



Department for Digital, Culture, Media & Sport

Ben Dean
Deputy Director
Head of Media Policy
DCMS
100 Parliament Street
London SW1A 2BQ

14 May 2019

Lord Burns GCB
Ofcom Chairman

Dear Lord Burns,

Thank you for your letter of 12 April to the Secretary of State on Ofcom's pre-disclosure duty. I am responding on behalf of the Secretary of State.

As you are aware, under section 24A of the Communications Act 2003 (as amended by the Digital Economy Act 2017), Ofcom is required to disclose information to government at least 24 hours in advance of publication. However, the duty to share will not apply to Ofcom until a statutory instrument is laid in Parliament specifying "descriptions of information" which will be exempt from these obligations. We are keen to deliver on this legislative requirement in the coming months. Before making that statutory instrument the Secretary of State is required to consult Ofcom. This process of consultation has consisted of extensive discussions between DCMS and Ofcom officials for over two years, and I write now to set out a final proposal for you to consider with the Ofcom Board.

The primary purposes of the duty on Ofcom to share information prior to publication is to aid ministers in the development of policy and to give them the opportunity to prepare accordingly for decisions or announcements that are made public by Ofcom, especially on policy areas for which ministers are held accountable. The government is fully committed to Ofcom's independence, and the legislation protects that independence by making clear that on receipt of the information representations cannot be made before publication, protecting the independence of Ofcom's decision making.

After extensive consideration of Ofcom's views, the Secretary of State proposes that the following information should specifically be excluded from the disclosure duty:

- **Broadcasting content standards enforcement** - *Any information published by Ofcom relating to the enforcement of content standards, including investigations and decisions around breaches of Ofcom's Broadcasting Code, and sanctions.*
- **Broadcasting licensing enforcement** - *Any information relating to Ofcom's decisions over TV and radio licences.*
- **Corporate functions** - *Any information relating to how Ofcom runs as an organisation, e.g. salaries, expenses, job advertisements, FOI responses etc.*

We believe it would be inappropriate for government to have advance sighting of Ofcom's broadcasting enforcement decisions against those TV channels or radio networks found in breach of Ofcom's Codes, as well as any decisions relating to awarding of, or changes to, radio or TV licenses. This is to safeguard the necessary separation between government and the media, to ensure there is no actual, or perceived, Government involvement with the editorial decisions of broadcasters.

We also agree with Ofcom officials that it is not necessary for Ofcom to pre-disclose corporate information as this administrative information would not aid policy development, and given Ofcom are operationally independent, the department would not expect advance sighting of information like salary scales or employee expenses.

All other types of information will fall outside of the exemption regulations, and thus will be required to be shared by Ofcom at least 24 hours before publication unless there are exceptional circumstances or prior agreement is reached between DCMS and Ofcom.

We have fully considered the points you have raised in your letter. As set out above, we agree that information relating to broadcast standards and broadcast licencing enforcement should be exempt from the duty. However, this is not the case for Ofcom's other sectors, where government has a clear guiding role.

The Statement of Strategic Priorities means that for telecoms, radio spectrum and postal services, Ofcom now has a statutory duty to have regard to policy priorities designated by the relevant Secretary of State when carrying out its regulatory functions in these areas. Therefore it is important Ministers have advance sighting of information and decisions in these fields, in order to assess the wider policy implications for government and prepare for Parliamentary, public and media scrutiny. For example, it would be important for Ministers to have advance sighting of information relating to future telecommunications regulation, in order for Ministers to understand and be able to respond to questions about how Ofcom's proposals fit with the Government's strategy, as set out in the Future Telecoms Infrastructure Review and given effect to in the Statement of Strategic Priorities. This is about ensuring that Ministers are as prepared as possible to respond to significant Ofcom announcements that affect key areas of public policy.

We do not agree that pre-disclosure of enforcement information in these areas would put companies at risk. There are already statutory limitations on what Ministers, and officials acting on behalf of Ministers, can do with information shared by Ofcom, which includes prohibiting them from making any representations to Ofcom on that information ahead of publication.

You mention our position on media and broadcast information. As you are aware, DCMS has had detailed discussions with Ofcom officials. DCMS officials set out the importance of distinguishing between media/broadcast "functions" and media/broadcast "enforcement", to appropriately capture the nuances in the types of information Ofcom publishes within this sector. Therefore, we would expect disclosure of media/broadcast information where we deem it to (i) not pertain strictly to Ofcom's enforcement functions but wider questions of public policy; (ii) where DCMS has a direct stake in the outcome, e.g. progressing future legislation; or (iii) where advanced sight of certain changes to the regulatory regime are necessary in order for government to be able to assess public policy implications, along with potential parliamentary and media interest. This would include publications like the Public Service Broadcasting Review and Ofcom's Annual Report on the BBC.

You also raise concerns about similar sharing arrangements not being in place for other regulators such as the Competition and Markets Authority, Ofgem and Ofwat and that as a result some companies will be treated differently from those in other sectors. Notwithstanding this, it is clear that in enacting section 24A of the Communications Act 2003, Parliament intended sharing arrangements to be in place for Ofcom. To be clear, this duty does not affect how Ofcom undertakes its regulatory functions; neither does it affect the companies it regulates. It is designed specifically to aid the formulation of policy within DCMS and BEIS and to assist Ministers in assessing the wider implications Ofcom's decisions can have on policy. As discussed with your officials, our proposed Memorandum of Understanding, in particular the timing arrangements on sensitive information, should reassure you that this will not negatively impact on the sectors you regulate.

Memorandum of Understanding (MoU)

We are in positive discussions with Ofcom on the MoU and have shared a draft with colleagues at Ofcom which sets out the processes to be followed for the disclosure of information, including proposed sharing arrangements according to Ofcom's classification system and necessary assurances around the treatment of sensitive information.

To confirm, we have already proposed with Ofcom officials that "Highly Sensitive" information, i.e. containing significant market sensitive material, will only be shared with DCMS and BEIS once UK markets have closed, to provide reassurance for stakeholders. We have also proposed that DCMS will maintain a Named Official List of who will have authorisation to access information shared by Ofcom across DCMS and BEIS. This list will limit the number of individuals who will have access to only those deemed necessary for achieving the purpose of the duty. Named recipients on this list will be responsible for making sure any sensitive information shared with them before publication will be handled according to existing internal departmental procedures and the arrangements set out clearly in the MoU.

All government departments handle large quantities of sensitive information on a daily basis and have strong procedures in place to prevent and deal with the unlikely event of a security breach. We have added to our own internal procedures specific processes around Ofcom's pre-disclosure information in the MoU. Action in the event of any breach could include removing access, disciplinary action in accordance with the department's internal conduct and discipline procedures; or, if appropriate, criminal proceedings.

Written Ministerial Statement

On the request for Ofcom to contact companies whose information will be included under the duty, we defer to Ofcom's knowledge of the sectors it regulates and what Ofcom considers appropriate. However, in due course and for transparency, the Secretary of State will table a Written Ministerial Statement to both Houses before laying legislation and the commencement of the duty.

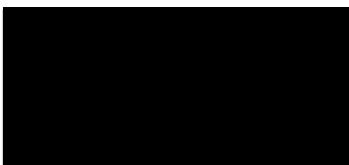
Next steps

We now invite you and the Ofcom Board to consider the proposals set out in this letter and raise any additional issues you would like the Secretary of State to consider in making a final decision on what should fall within the scope of the exemption regulations. We ask that you do so by 5 June 2019. The Secretary of State will then make a final decision, and legal instructions will be issued to draft the necessary regulations.

Please do not hesitate to contact either me or my team if anything is unclear or if you have any further questions.

I have copied this letter to relevant BEIS officials.

Yours sincerely,



Ben Dean
Deputy Director - Head of Media Policy

