

## Your response

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<p><b>Question 1: Ofcom’s general approach to information gathering (Section 3 of the draft guidance)</b></p> <p><b>Do you have any comments on Ofcom’s proposed general approach to information gathering, as outlined in Section 3 of the draft guidance?</b></p>	<p>Confidential? – N</p> <p><b>Information-gathering powers</b></p> <p>We are supportive of Ofcom’s indication that it will exercise its information-gathering powers in a way that is proportionate to the use to which the information is to be put, as required by the Act. While we appreciate that Ofcom will require certain information from regulated services, that must be balanced against the need to ensure that the regulatory burden in responding to information requests is not disproportionate or excessive. We note that the guidance indicates that Ofcom will “typically” exercise the power that imposes the least burden on stakeholders (para 3.11). However, in our view, the guidance should go further and clarify that Ofcom <u>must</u> exercise the power that imposes the least burden to achieve its aim, in order to comply with its statutory obligations under s100 and s101 Communications Act. Furthermore, Ofcom should exercise these powers only where there are reasonable grounds to believe that the relevant service is in breach of its obligations under the Online Safety Act 2023 (“OSA”), or where required by the OSA for a specific purpose, to ensure that requests are proportionate to the issue that they are seeking to address.</p> <p>Ofcom has provided helpful guidance as to the factors it will consider in deciding whether or not to exercise its information-gathering powers (para 3.13). In that regard, we note that “the feasibility and cost on the stakeholder” is one of the relevant factors, and would ask Ofcom to clarify that, when it refers to a “stakeholder” in the guidance, it means the specific regulated service in question. In other words, where an organisation has multiple regulated services, with differing degrees of resource and capacity, the information request must be focussed on the specific regulated services to which the objective of the request is relevant, and addressed to that service only. For example, if the information request relates to specific harms or functionalities, only the services on which the relevant harms are likely to arise, or on which the relevant functionalities are present, should fall within scope. Ofcom should not seek to obtain information blanketly about all and any regulated service operated by any entity within the corporate group and, instead, should expressly narrow the scope of requests to the service or services that are relevant to the request’s objective. Indeed, such an approach is required by the Act given the information gathering powers must be used in a way that is proportionate to the use to which the information is to be put. Further, where a company is responding to an information request</p>

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	<p>on behalf of multiple services, additional time may be required to coordinate with multiple teams and collate information before responding, as compared with a request that relates to a single service.</p> <p><u>Proposed amendments:</u></p> <ul style="list-style-type: none"> <li>• Amend para 3.11 to confirm that Ofcom <u>must</u> exercise the power that imposes the least burden on the relevant service to achieve its aim, and generally only where there are reasonable grounds to believe that the service is in breach of an obligation under the OSA.</li> <li>• Use the phrase “regulated service” rather than stakeholder where relevant, including in para 3.13.</li> <li>• Amend paragraph 3.13 to recognise that, in considering the feasibility of, and time and cost involved in, collating requested information, Ofcom should factor in the size and capacity of each service within the scope of the request, rather than simply the company receiving the request. Paragraph 3.13 should also recognise that additional time may be required to respond on behalf of multiple services.</li> </ul> <p><b>Confidential information / Disclosure of information</b></p> <p>At paragraph 3.19 of the guidance, Ofcom states that confidential information means “<i>information that relates to the affairs of a body or private affairs of an individual, the publication of which would or might seriously and prejudicially affect the interests of that body or individual.</i>” However, we note that confidentiality is treated differently under the Freedom of Information Act 2000 (FOIA). In those circumstances, Ofcom should treat as confidential information that is subject to an actionable breach of confidence (s41), that is a trade secret or would prejudice or be likely to prejudice someone’s commercial interests (s43). Ofcom’s approach appears to apply a higher bar to commercial prejudice than s.43 FOIA and does not reflect s.41 by failing to account for the protection of information provided to Ofcom in confidence. We do not see any justification for the different approach, given the FOIA regime sets out well-established principles regarding the disclosure of information held by public authorities such as Ofcom. It would be helpful if the guidance could clarify that Ofcom will also assess publication of information provided to it under its OSA information gathering powers against the requirements of FOIA, even where the information has not been requested under FOIA (since it would be unlawful and/or contrary to principles of natural justice for Ofcom to disclose or publish information under the Act if it would be prohibited from disclosure under FOIA.) If any publication is</p>

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	<p>envisaged in connection with material provided in response to a request for information, Ofcom should explain this in the Request. It may also be helpful if the guidance could specify the circumstances in which Ofcom might need to publish information in connection with Requests for Information.</p> <p>Ofcom has confirmed at para 3.29 of the guidance that it will give services the opportunity to make representations about confidentiality prior to any disclosure of information. We would like to make the following additional comments:</p> <ul style="list-style-type: none"> <li>● In those circumstances (and also a FOIA context, as in para 3.38), Ofcom should give services a minimum of 5 business days in which to make confidentiality representations, in order to allow sufficient time for an assessment of the confidentiality risk or to prepare a challenge to the publication decision. Services may require at least this amount of time to determine the confidentiality of the information, particularly where it may contain user information or personal data, or be subject to contractual confidentiality obligations.</li> <li>● Where publication or disclosure of information is required, Ofcom should be required to publish or share the minimum level of information so as to meet its proportionality requirements and the reasons for disclosure. Where possible, it should aggregate or summarise data or other information so as to alleviate any sensitivities.</li> <li>● We would ask Ofcom to notify services at least 5 business days in advance prior to the disclosure or publication of any information, even where it is permitted to share such information under s393 of the Communications Act or s114 of the OSA. This is in order to ensure that Ofcom uses its regulatory powers in a manner that is consistent with transparency and proportionality principles and service providers are given an appropriate amount of time to prepare for the publication.</li> </ul> <p>Ofcom notes that, while it will consider representations, it will ultimately decide what information is and is not confidential, and blanket claims to confidentiality covering entire documents are <i>“unhelpful and unlikely to be accepted”</i> (Annex 1, para 3.21). We accept that, where possible, assertions of confidentiality should only be made by service providers in respect of genuinely confidential parts of documents and, as such, it may be possible for Ofcom to publish redacted versions of those documents or extracts of the non-confidential parts. However, in some cases, it may be necessary for service providers to assert confidentiality over the entirety of a</p>

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	<p>document they disclose to Ofcom because the entire document is genuinely confidential. This is a common approach under FOIA and, as Ofcom will know, there are certain cases in which an authority will not be required even to confirm or deny that it holds a document because that fact itself is confidential. The guidance should therefore be amended to recognise that, where services are able to provide satisfactory reasons for an entire document being confidential, this will be accepted.</p> <p>The guidance notes at paragraph 3.25 that Ofcom has powers under the Act to disclose information to certain overseas regulators listed in regulations. We also note that Ofcom has powers to share information via certain information sharing gateways with other persons, including other UK regulators and public authorities. We think it would only be proportionate to use these powers to share information obtained about regulated services with another regulator, whether that regulator is based overseas or in the UK, in exceptional circumstances and when doing so, where possible, Ofcom should notify the relevant service provider at least 5 business days in advance, to allow the relevant service the opportunity to make any representation. This sort of information sharing could undermine due process, and have unintended consequences, because information provided to Ofcom in the context of the UK online safety regime may be irrelevant or even misleading when reviewed by overseas regulators, or other UK regulators, for the purposes of a different regulatory regime. The other regulators in question will almost always have their own information gathering powers, which could, if necessary, be relied upon to obtain information from Google. This would usually be the more appropriate route for the other regulators to obtain information about Google's services as we would then have the opportunity to provide the most relevant information in the context of the specific regime.</p> <p>To the extent that sharing between regulators is necessary and appropriate, Ofcom should be required to seek confirmation from the receiving regulator that equivalent statutory protections are in place, including that (i) there will be no further sharing of the information with other third parties without prior consent of the service provider, whether under FOIA or otherwise; (ii) that equivalent security controls will be applied to the information; and (iii) that the information can only be used the purpose for which it was shared. Furthermore, there must be full transparency with the service provider over the scope and basis for sharing, including who within the regulator has access to the relevant information.</p>

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	<p data-bbox="544 271 836 300"><u>Proposed amendments:</u></p> <ul data-bbox="592 331 1369 1816" style="list-style-type: none"> <li data-bbox="592 331 1302 398">● Clarify at paragraph 3.19 that confidentiality will also be assessed against FOIA requirements.</li> <li data-bbox="592 409 1369 517">● Amend paragraphs 3.29 and 3.38 to state that services will be given at least 5 business days to make representations on confidentiality.</li> <li data-bbox="592 528 1350 595">● Amend paragraph 3.29 to ensure that Ofcom publishes the minimum level of information necessary.</li> <li data-bbox="592 607 1366 748">● Clarify in paragraph 3.29 that Ofcom will, save in exceptional circumstances, always give services 5 business days' prior notice of disclosure or publication of information to a third party.</li> <li data-bbox="592 759 1353 972">● Amend paragraph 3.21 to remove the statement that claims of confidentiality over entire documents are unlikely to be accepted and instead clarify that such claims will only be accepted where satisfactory reasons are provided for the entire document, as opposed to just parts of it, being confidential.</li> <li data-bbox="592 983 1342 1240">● Amend paragraph 3.25 to clarify that Ofcom will only disclose information about regulated services, obtained using its information gathering powers under the Online Safety Act, to an overseas or domestic regulator in exceptional circumstances and, if it considers it necessary to do so, will give a minimum of 5 business days' advance notice to the relevant service provider.</li> <li data-bbox="592 1252 1350 1816">● Amend paragraph 3.25 to clarify that, in the event that it is necessary and proportionate for Ofcom to share information with another regulator, there must be full transparency over the process. Ofcom will inform the service provider of the scope of disclosure and basis for sharing in advance and, where appropriate, provide details of who within the regulator will have access to the information. The receiving regulator must also provide written confirmation that equivalent statutory protections are in place, including that (i) there will be no sharing of the information with other third parties without the prior consent of the service provider, whether under FOIA or otherwise; (ii) that appropriate security controls will be applied to the information; and (iii) that the information can only be used the purpose for which it was shared.</li> </ul> <p data-bbox="544 1845 719 1874"><b>Personal data</b></p> <p data-bbox="544 1904 1361 2011">Para 3.43 of the guidance notes that services will be responsible for complying with their own obligations under relevant data protection legislation, and that Ofcom's powers are not capable of requiring a</p>

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	<p>person to process personal data in a way that contravenes UK data protection legislation. We would also note that, where data protection laws in other jurisdictions are applicable to a service provider, such laws may also prevent a service from lawfully providing personal data to Ofcom.</p> <p><u>Proposed amendment</u></p> <ul style="list-style-type: none"> <li>Amend paragraph 3.43 to refer to UK data protection legislation “and any other applicable data protection law”.</li> </ul>
<p><b>Question 2: Information notices (Section 4 of the draft guidance)</b></p> <p><b>a) Information notices</b></p> <p><b>Do you have any comments on Ofcom’s proposed approach to the process for issuing and responding to information notices.</b></p> <p><b>b) Requiring a test</b></p> <p><b>Do you have any comments on our proposed approach to information notices that require recipients to perform a test?</b></p> <p><b>c) Remote viewing</b></p> <p><b>Do you have any comments on our proposed approach to Remote Viewing Information Notices? For example, to the factors that we may take into account when considering whether to issue a Remote Viewing Information Notice.</b></p>	<p>Confidential? – N</p> <p><b>Information Notice Process</b></p> <p>We are grateful for the indication from Ofcom that it will generally provide information notices in draft form prior to issuing the final version. This will allow services to input on the scope of the request and ensure that the response will align with Ofcom’s expectations, as well as the opportunity to indicate any concerns with the deadline for response. While that phase should not be unduly protracted, we would also welcome Ofcom indicating early on if it has any clarification questions or whether a live discussion would be helpful, in order to expedite the final notice.</p> <p>We also consider that the circumstances in which Ofcom <i>won’t</i> provide prior notice of a draft RFI are unduly broad (see para 4.24), since it would be rare that allowing a short window for comment would be disproportionate or lead to excessive delay. Furthermore, Ofcom may consider that a request is “simple” or “standard information”, but in practice the information may be voluminous or require customisation to meet the scope of the request, or be subject to regulatory restrictions or internal approval requirements prior to disclosure, which Ofcom would not be aware of. Even where information is similar to that which has previously been provided, it may not necessarily be a simple or proportionate exercise if the request is broadly drafted or covers irrelevant services. Indeed, it may be useful for Ofcom to give advance notice of a request for information, in order to allow a service the ability to locate the source of data and, if applicable, implement data holds to prevent destruction, pending the issuing of the final notice. It may also allow the request to be appropriately narrowed such that Ofcom receives the most relevant data, in a more digestible format, as opposed to the service provider being compelled to disclose a vast amount of data due to the request inadvertently being framed by Ofcom in an excessively broad manner, and there being no opportunity to clarify or narrow it through prior engagement.</p>

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<p><b>d) Coroner Information Notices</b></p> <p><b>Do you have any comments on our proposed approach to issuing Coroner Information Notices for the purpose of responding to requests for information by investigating authorities in connection with an investigation or inquest into the death of a child?</b></p> <p><b>e) Naming a senior manager</b></p> <p><b>Do you have any comments on the section relating to naming a senior manager who is in a position to ensure compliance with an information notice?</b></p>	<p>As noted in paragraph 4.13, Ofcom has the power to require both information that is already held by the recipient of an information notice but also to require a recipient to obtain or generate information. However, we would welcome some assurance from Ofcom that it will not typically require recipients to seek to obtain information from third parties, as this would be disproportionate (and not practicable) in most cases. It may be unfeasible to access information from third parties, even where the recipient has a legal right to do so, and may require the recipient to incur significant additional cost and time in attempting to obtain the information.</p> <p>In terms of the contents of the notice (as set out in para 4.26 of the guidance), it should expressly require Ofcom to make clear which regulated service the notice relates to. This is to ensure regulated services have clarity over the scope of the request (particularly where a senior manager has been appointed, since a service will need to ensure that the manager has the requisite knowledge and responsibility), and to avoid blanket Notices being sent to service providers in respect of any regulated service (regardless of whether there is a concern with that particular service), as also explained in more detail above in response to Question 1. Failing to do so would, by its nature, result in requests being too broad, arbitrary and disproportionate.</p> <p><u>Proposed amendments:</u></p> <ul style="list-style-type: none"> <li>• We suggest that the guidance clarifies that recipients of an information notice will be required to obtain information from third parties in exceptional circumstances only, and only where practicable to do so.</li> <li>• We would suggest that the guidance limits paragraph 4.24 to exceptional circumstances only.</li> <li>• Paragraph 4.26 should require any Notice to specify the regulated service(s) to which it relates.</li> </ul> <p><b>Requiring a test and remote viewing</b></p> <p>Ofcom has powers to issue information notices in order to require a service to conduct a test and/or to remotely view information demonstrating in real time the operation of systems, processes and features used by a service. This power was introduced at a late stage of the Bill's passage, during the House of Lords Report stage, and extensive reassurances were given at the time by DSIT in relation to the need for adequate safeguards for the use of this power. This included the following protections:</p> <ul style="list-style-type: none"> <li>• The express confirmation that Ofcom has a legal duty to exercise these powers in a way that is proportionate, ensuring that undue burdens are not placed on businesses</li> </ul>

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	<p>(clause 101(4)), and the fact that service providers will have a right to bring a legal challenge if the power is exercised in a disproportionate manner.</p> <ul style="list-style-type: none"> <li>● Clarification that the power is limited to ‘viewing’ only and that Ofcom has no ability to interfere with or access the service when exercising the powers. Further the tests should involve the use of a <u>test dataset</u>, rather than observing the live provision of the service or live user data.</li> <li>● Confirmation that Ofcom is under a legal obligation to ensure the information gathered from services is protected from disclosure and cannot be disclosed without the provider’s prior consent (subject to statutory exceptions).</li> <li>● Assurances that Ofcom must comply with UK data protection laws and act in a way that is compatible with privacy rights.</li> </ul> <p>It is essential that these safeguards are reinforced in the guidance in order to meet the policy intent of this provision and ensure that Ofcom’s powers are exercised in a reasonable and proportionate manner.</p> <p>As recognised by Ministers in the debate stage of this provision, this is one of the most intrusive information gathering powers available to Ofcom, particularly as access to live user information could interfere with users’ rights of privacy and raise security issues where it is accessing commercially sensitive information or information that could be used by bad actors to game our systems. The guidance (at para 4.51) itself acknowledges that Ofcom has equivalent powers in Schedule 12, but which are limited in scope to UK premises. We therefore recommend that appropriate safeguards (such as those incorporated into Schedule 12) are built into Ofcom’s guidance to ensure that these powers can only be used in specific circumstances, and only in a manner that respects our users’ rights of privacy, complies with applicable data protection laws and safeguards commercially sensitive information.</p> <p>Even with these protections, the exercise of this power is likely to place a significant burden on services, in order to generate an appropriate testing environment and reliable data, and should therefore only be used where no other means of obtaining this information is possible.</p> <p><u>Proposed amendments</u></p> <ul style="list-style-type: none"> <li>● The guidance should clarify that requiring the performance of a test and/or remote viewing should be a measure of last resort, used only where it is the least onerous way of obtaining information (i.e. where other information gathering powers cannot satisfy Ofcom’s objective) and only where it will not adversely impact the users of the</li> </ul>

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	<p>service (e.g. where a breach of duty is suspected or situations where Ofcom has been unable to obtain the information by alternative means). Further, when exercising the power, Ofcom should be required to conduct an impact assessment to determine the impact on user privacy and any adverse impacts on the use of the service by users, to ensure that the exercise of the power is proportionate.</p> <ul style="list-style-type: none"> <li>• It would be helpful if paragraphs 4.41 and 4.57-4.60 could clarify that, if a service is required to use its own dataset, services may require more than seven calendar days in order to be able to generate the relevant information and to do so in a way that complies with data protection obligations (e.g. anonymised data).</li> <li>• Similarly, paragraph 4.56 should make clear that nothing in the notice can require services to breach any applicable international data protection laws.</li> <li>• Paragraph 4.42 should be amended to ensure that testing cannot be carried out on live users, due to privacy and security reasons.</li> <li>• Open-ended tests could amount to surveillance, so we would recommend that the guidance clarifies the limits of how long Ofcom could view the data for.</li> </ul> <p><b>Coroner Information Notices</b></p> <p>Ensuring that coroners have access to the information they need to conduct an inquest or investigation into the death of a child is essential. Moreover, where a service is identified in a Prevention of Future Deaths report, it is extremely important for services to engage directly with the coroner, in order to be able to fully investigate the matter and provide accountability, as well as remediating any issues on the service. We continue to support a direct dialogue between impacted services and coroners in those circumstances, which may obviate the need for regulatory involvement.</p> <p>We do, however, note that preservation and disclosure of user data needs to be feasible and lawful. For example, the preservation of a user's data could impact the rights of other users (who would no longer be able to delete their own data or move off a service, and would be unaware that the services are combing through their information). The disclosure of this information could also pose security risks (by violating data minimisation and hygiene efforts). International privacy regulations (and in the UK <a href="#">ICO guidance</a>) recognise that children have a right to privacy, including from their parents, except where it is in the best interests of the child for a parent to exercise the right (and it is unlikely to be in the child's best interests to take a maximalist approach to preservation and disclosure). We would suggest that the guidance expressly requires</p>

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	<p>Ofcom to conduct a privacy impact assessment when exercising this power and acknowledges that services may be prevented from complying due to applicable data protection obligations.</p> <p><u>Proposed amendment</u></p> <ul style="list-style-type: none"> <li>At paragraph 4.74, it would be useful to note that there may be international data protection laws that need to be complied with when responding to a notice.</li> </ul> <p><b>Senior managers</b></p> <p>The guidance should recognise the complexity of large platforms and ensure that service providers have discretion to nominate the most appropriate individual in respect of the notice. Furthermore, given the potential criminal exposure for the named individual, it is important that the requirement to name an accountable senior manager is limited to investigation or enforcement contexts, for example where Ofcom has reasonable grounds to believe that a service’s previous response was inadequate or where there are reasonable grounds to believe that a service is non-compliant with the core duties in the Act.</p> <p><u>Proposed amendments:</u></p> <ul style="list-style-type: none"> <li>The guidance should clarify that any request for information must specify the relevant regulated service, to ensure that any person held accountable is employed by the applicable service provider and holds the relevant knowledge.</li> <li>The guidance should make clear that a service has the discretion to appoint the most appropriate individual, depending on the subject matter.</li> <li>This requirement should be limited to enforcement contexts, rather than information-gathering more broadly, and typically be used only where Ofcom has first issued an information notice that does not require the naming of a senior manager, and received an inadequate response.</li> </ul>
<p><b>Question 3: Skilled persons’ reports (Section 5 of the draft guidance)</b></p> <p><b>Do you have any comments on our approach to skilled persons’ reports? This might include when we might decide to require a skilled person’s report,</b></p>	<p>Confidential? – N</p> <p>With regards to the skilled person’s reports, we are concerned that the guidance offers insufficient safeguards against bias and lack of transparency over the process for impacted services. In order to introduce sufficient protections over the process for appointment, we would recommend minor amendments to paragraphs 5.5 and 5.10 of the guidance.</p> <p><u>Proposed amendments:</u></p> <ul style="list-style-type: none"> <li>Where Ofcom proposes to appoint a skilled person itself, Ofcom must ensure the person is impartial and must</li> </ul>

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<p>and the typical process that we propose to follow.</p>	<p>confirm to the service provider that it has conducted preliminary conflicts clearance, before any skilled person is appointed.</p> <ul style="list-style-type: none"> <li>● There should be agreed criteria for the appointment of a 'skilled person', for example, that the relevant person must have the necessary expertise and demonstrated experience to understand and investigate the service under investigation. Ofcom should provide the service provider with these details in advance, including the skills and qualifications of that person, as well as cost information like hourly rates.</li> <li>● The skilled person must provide legally binding written confirmation that they will handle sensitive user data or confidential information in line with an agreed procedure aimed at maximising preservation of confidentiality in the material and appropriate handling of sensitive user data or confidential information.</li> <li>● A service should have a right to comment on the appropriateness and/or the adequacy of the skills, cost and experience of a skilled person nominated by Ofcom, reasonably object to the nomination, or suggest alternative skilled persons if these criteria are not met.</li> <li>● There should also be transparency over the appointment process, including disclosure of all communications between Ofcom and the skilled person (including any instructions or briefings) to the relevant service provider. This will give the service provider sufficient understanding of the parameters of the report and ensure transparency and independence in the process.</li> <li>● It may be helpful to clarify in paragraph 5.16 that the requirement relating to former employees only applies where the relevant employee has left the company <u>during the process</u>. Otherwise services may not be able to comply or enforce this obligation against former employees.</li> <li>● We recommend Ofcom set out how safeguards will be incorporated into the process, for example by recognising that this is a power that will only be used where Ofcom has first asked for information in a written request and not been satisfied with the response.</li> </ul> <p>Finally, it might also be useful for Ofcom to engage with services in advance of needing to exercise this power, to ensure that appropriate safeguards are in place and avoid any delay in any future appointment of a skilled person. This could include the publication of a list of skilled persons for industry to consider.</p>

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<p><b>Question 4: Interviews (Section 6 of the draft guidance)</b></p> <p><b>Do you have any comments on the section of guidance dealing with the power to require an individual to attend an interview?</b></p>	<p>Confidential? – N</p> <p>We have minor comments on the process for conducting enforcement interviews, as follows:</p> <ul style="list-style-type: none"> <li>● Prior to an interview, Ofcom should be required to provide the interviewee with an indicative list of questions or topics for discussion, to ensure that the interviewee can adequately prepare.</li> <li>● Reasonable accommodations to the interview may include ensuring interviews are arranged at a time that is reasonable, based on normal working hours, particularly where it is conducted remotely and the individual is located in a different time zone.</li> <li>● Interviewees should be given an opportunity to read through and check any transcript or note of the interview. Ofcom should seek comments on its accuracy and representations as to confidentiality.</li> <li>● Where an individual has requested a legal advisor, the questioning should be delayed for a reasonable time to allow the legal advisor to attend.</li> </ul>
<p><b>Question 5: Entry with or without a warrant (Section 7 of the draft guidance)</b></p> <p><b>Do you have any comments on our proposed approach to entry either with or without a warrant? This might include the typical process and our interpretation of the requirement to have regard to the Home Office’s code of practice on powers of entry.</b></p>	<p>Confidential? – N</p> <p>We have minor comments on the guidance relating to Ofcom’s powers of entry, and would request these are clarified, as follows:</p> <ul style="list-style-type: none"> <li>● Any “authorised person” for the purposes of the guidance must be employed by Ofcom and subject to appropriate confidentiality and information security restrictions.</li> <li>● Any documents obtained by Ofcom must be relevant to the investigation only, and (if under warrant) documents covered by the scope of the warrant only. Anything seized by Ofcom that is determined to be irrelevant or out of scope should be returned as soon as possible.</li> <li>● Privileged information should not be disclosed or produced to Ofcom. If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, the documents should be kept in safe-keeping pending the resolution of the dispute.</li> <li>● Ofcom also cannot force a business to provide answers that would require an admission that it has infringed the law.</li> <li>● All information seized should be treated as confidential, until the service has had the opportunity to make representations on confidentiality.</li> </ul>

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<p><b>Question 6: Audit (Section 7 of the draft guidance)</b></p> <p>Do you have any comments on our proposed approach to the power for Ofcom to carry out an audit to assess compliance?</p>	<p>N/A</p>
<p><b>Question 7: Consequences of failure to comply with an information power (Section 8 of the draft guidance)</b></p> <p>Do you have any comments on the potential consequences of a failure to comply with any of the information gathering powers covered in the draft guidance? This might be either on breaches that may be subject to enforcement action by Ofcom, or those that may constitute criminal offences.</p>	<p>N/A</p>
<p><b>Question 8: Additional comments</b></p> <p>Do you have any other comments on the draft guidance?</p> <p>Please provide any information or evidence in support of your views.</p>	<p>Confidential? – N</p> <p><b>Corporate structures</b></p> <p>We note that the guidance refers to Ofcom holding “<i>another company within the same corporate group as a service provider liable for a contravention of the service provider’s duties under the Act</i>”(A2.4, Annex 11).</p> <p>We recognise that Ofcom has powers under Schedule 15 of the Act to issue an enforcement decision or notice to both the service provider and related companies. However, we are concerned that the guidance does not reflect the constraints on those powers built into the statute. For example, in respect of subsidiaries of a service provider, the Act makes clear that a relevant decision or notice may only be given to the subsidiary where it “<i>contributed to the failure in</i></p>

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	<p><i>respect of which the decision or notice is given". Whereas, paragraphs A7.15-A7.20 of the enforcement guidance go further than this and suggest that Ofcom may consider it appropriate to pursue a Related Company, including subsidiaries, not only in situations where the company has some responsibility for the failure under investigation, but also where enforcement action would be more effective if taken against the related company as well as the service provider. In particular, at A7.19 Ofcom states that action may be taken due to "concerns about the resource required to ensure [a service's] compliance with any confirmation decision that we impose via the mechanisms of another jurisdiction." We note that under the Act, and under English law more generally, subsidiaries are not held liable for the actions of parent companies, unless they have been materially culpable in the infringing conduct, particularly where the basis is primarily due to perceived inefficiencies with enforcing overseas.</i></p> <p><u>Clarification amendment</u></p> <p>To clarify this, we would suggest that A7.18 is also amended to state <i>"In the case of other Related Companies, we would expect to have some evidence that the other company <b>materially</b> contributed to the failure under investigation..."</i></p>

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