

# Response

## Question 1: Ofcom’s general approach to information gathering (Section 3 of the draft guidance)

Do you have any comments on Ofcom’s proposed general approach to information gathering, as outlined in Section 3 of the draft guidance?

Response:

### Exercising powers in a reasonable and proportionate way

We note Ofcom’s comment at para. 3.11 that it *“will consider on a case-by-case basis **whether** exercising an information gathering power would be reasonable and proportionate, in line with our regulatory principles to seek the least intrusive regulatory methods of achieving our objectives”* (our emphasis), and the related footnote 6 referring to the proportionality requirements in ss.100(4) and 101(4) OSA and s.3(3)(a) of the Communications Act 2003. Similarly, its comment at para. 3.13 that *“In reaching our decision about **whether** to exercise an information gathering power, we will generally take account of a range of factors in the round”* (our emphasis).

In our view, and further to the OSA and Communications Act 2003 sections mentioned above, the principles of reasonableness and proportionality also apply to how Ofcom exercises the relevant power(s). We would therefore welcome explicit confirmation of the same in the guidance.

### Requirement to generate or obtain information

We note Ofcom’s comment at para. 3.17 of the guidance that, *“if we have been told informally that certain information is not available (or, where relevant, cannot be generated), we may also use our statutory powers to obtain formal confirmation of this **(or, where relevant, require stakeholders to generate or obtain the requested information)**”* (our emphasis).

This appears to suggest that, if a provider tells Ofcom (informally, and subsequently in response to a draft information notice) that it does not have and cannot generate certain information, Ofcom may nonetheless issue an information notice requiring the provider to generate or obtain that information (i.e., to do something that the provider has already told Ofcom it cannot do), thereby exposing the provider to potential regulatory and criminal liability when it is unable to comply with the notice.

In our view, this would not be a reasonable or proportionate use of Ofcom’s powers. If Ofcom believes (contrary to the provider’s statements) that there are viable routes for the provider to obtain or generate the relevant information, we consider that Ofcom should discuss this with the

provider, and seek to understand (whether through informal discussions or via an information notice) any obstacles and how these might be overcome.

We would therefore welcome a change to para 3.17 of the guidance to remove the bolded wording above.

#### **Change in purpose for which information is to be used**

We note Ofcom's comment at para. 3.18 of the guidance that, where Ofcom has obtained information for one purpose and wishes to use it for a different purpose, and the recipient has not consented to the information being so used, Ofcom may "*send the recipient another statutory information notice requiring the same information to be provided for the new purpose*".

We would welcome explicit confirmation in the guidance that Ofcom's decision as to whether to send another notice will be informed by the recipient's reasons for withholding consent, to ensure that where the recipient has, e.g., raised valid concerns about the relevance or appropriateness of the proposed new use of the information, these concerns are taken into account and that Ofcom seeks to address them by way of a constructive dialogue in the first instance. We note that paras. 3.28 to 3.30 of the guidance explicitly confirm that Ofcom will take an equivalent approach in relation to disclosures of information.

#### **Confidentiality**

We note Ofcom's comment at para. 3.21 of the guidance that "*blanket claims of confidentiality covering entire documents or types of information are unhelpful and unlikely to be accepted. Recipients should therefore identify specific words, numbers, phrases or pieces of information they consider to be confidential*".

We appreciate that certain documents or categories of information may contain a broad mixture of confidential and non-confidential information, and that claims of confidentiality relating to such documents / information should therefore be specific. However, we note that there will in some cases be documents or categories of information where all or almost all of the information therein is confidential (as defined in s.149 OSA), often for the same or similar reasons. In these cases, we do not think it is necessary or proportionate to require the recipient to provide a point-by-point explanation as to why, e.g., each paragraph in a document is confidential. In our view, the key issue is not how far a claim of confidentiality extends, but whether that claim is justified.

We would therefore welcome explicit confirmation in the guidance that recipients are entitled to: (i) claim that an entire document, or a particular category of information, is confidential, subject to the recipient explaining why confidentiality extends to the entire document / category; or (ii) specifically identify pieces of information that are not confidential, subject to the recipient

explaining why confidentiality extends to the rest of the document / category.

#### **Disclosure of information obtained informally**

We note Ofcom's comment at para. 3.22 of the guidance that "[w]e will not disclose information we have gathered from stakeholders" other than in the circumstances set out in sub-paragraphs (a) to (c).

We would welcome explicit confirmation in the guidance that this applies to information gathered from stakeholders on an informal / voluntary basis, as well as information gathered via Ofcom's statutory powers.

#### **Disclosure of information without consent**

We note Ofcom's comment at para. 3.23 of the guidance that information relating to a particular business, which has been gathered using Ofcom's information-gathering powers, can be disclosed without consent where Ofcom considers disclosure to be "*necessary for the purpose of facilitating the exercise of our online safety functions*", per s.393 of the Communications Act 2003.

Similarly, we note Ofcom's comment at para. 3.25 that the OSA "*enables Ofcom to disclose information to an overseas regulator listed in regulations made by the Secretary of State, to facilitate online safety functions of the overseas regulator which correspond to Ofcom's functions under the Act*".

We would welcome clarification on these points in the guidance, in the form of (i) examples as to when Ofcom may consider disclosure to be necessary to facilitate the exercise of its online safety functions and (ii) what factors Ofcom will take into account when considering whether to disclose information to an overseas regulator.

We also note Ofcom's comment at para. 3.31 that, "*Where in order to exercise our functions under the Act there is a need regularly to disclose information, a different process for disclosing information may be appropriate. Where we intend to take a different approach to that set out in this policy, we would expect to explain our approach to stakeholders in advance of disclosing any information*".

As a stakeholder, we would welcome the opportunity to be consulted and make representations in advance of any such future change in approach. In addition, we note that paras. 3.31 and 3.33 appear largely duplicative. We suggest that Ofcom de-duplicate these passages.

#### **Service of information notices**

We note Ofcom’s comment at para. 3.54 of the guidance that, where possible, information notices and other notices will be served electronically (by email) rather than by other means such as by post.

We would welcome explicit confirmation in the guidance that, where a recipient has previously requested that a particular form of service is used for some or all such notices (for example, by email to a specific email address), Ofcom will use this form of service in the first instance.

Confidential? - Y/N

Response: N

## Question 2: Information notices (Section 4 of the draft guidance)

a. Information notices : Do you have any comments on Ofcom’s proposed approach to the process for issuing and responding to information notices.

Response:

### **Proportionality of information notices**

We note Ofcom’s comment at para. 4.11 of the guidance that Ofcom “*may only issue an information notice where this is proportionate to the use of the information being gathered. We set out further detail about the principle of proportionality in [sic] paragraph A3.11 above*”.

Per our comment on paragraph A3.11 and s.100(4) OSA (“*the power conferred ... must be exercised **in a way** that is proportionate ...*”), proportionality should also apply to how Ofcom exercises this power.

We therefore suggest amending para. 4.11 to reflect that Ofcom “*may only issue an information notice where its issuance and the information sought is proportionate to the use of the information being gathered*”.

### **Information notice relating to use of a service by a named individual**

We note Ofcom’s references at paras. 4.3 and 4.13 of the guidance to the ability to use an information notice to require the recipient to “*provide information about the use of a service by a named individual*”, per s. 100(2)(b) OSA.

While s. 100(6) sets out numerous broad purposes in which Ofcom might seek to utilise its

s.100(1) power (which, as paragraph 4.12 of the guidance notes, are “non-exhaustive”), the guidance does not currently address when or why Ofcom might specifically seek to use an information notice to obtain information about the use of a service by a named individual further to s.100(2)(b). In our view, this could be a highly intrusive use of the information notice power - which, as addressed in our response to Question 1 above, is to be exercised in a reasonable and proportionate way, in line with the requirement for Ofcom to seek the least intrusive regulatory methods of achieving its objectives.

Given this, and the fact that Ofcom’s functions under the OSA focus on regulating providers’ systems and processes (rather than on requiring providers to remove particular content or accounts), we anticipate that there will be few situations in which seeking information about an individual’s use of a service is both (i) required for the purpose of exercising, or deciding whether to exercise, an online safety function, and (ii) the least intrusive way of doing so.

We would welcome confirmation of this in the guidance - guardrails that Ofcom will put in place and examples of when and why Ofcom may consider it appropriate to use an information notice to obtain such information.

We note that Ofcom’s power to require information about the use of a service by a named individual under s. 100(2)(b) OSA is distinct from Ofcom’s power to issue a Coroner Information Notice under s.101 OSA, which is only exercisable in the very limited circumstances set out in s.101(1) OSA, i.e., in the context of enabling Ofcom to respond to a notice or a request, or to prepare a report in the context of a coronial investigation into the death of a child.

#### **Production of documents held outside the UK**

We note the reference at para 4.14 of the guidance that an information notice issued under section 100 “*may require the production of documents wherever those documents are held, including outside the UK*”, per s. 204(2) OSA. Para 3.15 of the guidance states that Ofcom will, to the extent possible, “*take account of any legislative provisions which may restrict the ability of a stakeholder to provide any information [to Ofcom]*”, upon being made aware of any such provisions by the person subject to the information power. We would be grateful for confirmation that this would include any potential conflicts with any laws in other relevant jurisdictions.

#### **Information Registry oversight re multiple information notices**

We note Ofcom’s comment at para 3.13(b) of the guidance that, when considering whether to issue an information notice, Ofcom will take into account “*the feasibility and cost on the stakeholder involved in collating the information including for example, the size or capacity of that stakeholder and the resources required to provide the information*”. We also note Ofcom’s comment at para. 4.18 of the guidance that Ofcom’s Information Registry “*will record and have*

*oversight of the number of information notices which have been sent to a recipient at any one time. This allows for consideration to be given to other regulatory activity and will ensure Ofcom sets a reasonable deadline to respond”.*

In some cases, a provider will be able to respond to an information notice more quickly by devoting more resources to collating and verifying the requested information. However, this will not always be the case. Providers may have internal capacity limitations that restrict the resources that can be assigned to a particular information notice (e.g., a limited number of people who are familiar with the subject matter, multiple simultaneous notices targeting overlapping subject matter, or a situation that requires the diversion of resources to addressing a pressing issue). In addition, assigning more resources will not necessarily speed up the preparation of responses to certain types of questions.

We therefore suggest that Ofcom’s determination of what constitutes “*a reasonable deadline*” takes into account any overlaps in subject matter between information notices, and any representations from the provider (e.g., in response to a draft information notice) as to factors that may affect what a ‘reasonable’ deadline would be for a given notice.

#### **Sending of draft information notices**

We note and welcome paras. 4.22 to 4.24 of the guidance, which set out Ofcom’s commitment to, as a general rule, issuing information notices to the recipient in draft form, and clarify the circumstances in which Ofcom will issue draft notices (as we suggested in our response to Question 52 of the Illegal Harms Consultation).

However, we also have some concerns about the situations set out in para. 4.24 where Ofcom is unlikely to issue a draft notice, as follows:

- *“where it is a simple request or the request is for standard information known to be held by stakeholders, such as turnover numbers or basic customer information”*
  - We note that Ofcom’s view as to what constitutes a “*simple request*” or “*standard information*” may not always accurately reflect the recipient’s situation, particularly if the request relates to an area that Ofcom has not previously looked at in detail with reference to that recipient.
  - For example, some providers may hold certain types of information in a standard and easily accessible form (making it simple to provide that information to Ofcom), whereas other providers may - due to differences in internal organisation or operations - hold the same information spread across multiple different functions and locations, making it much more challenging to assemble and

provide that information to Ofcom. Indeed, the turnover numbers of a large provider with multiple services that operate across various markets may be an example of the latter. The same can be said about certain types of customer data.

- We therefore suggest amending this example to refer to situations *“where Ofcom is aware (e.g., further to previous interactions with the recipient) that the request relates to basic information held by the recipient that will be straightforward for the recipient to provide”*.
- *“where information has been provided to Ofcom previously on an informal/voluntary basis”*
  - In line with best practices, it is likely that a provider’s processes for identifying, collating, reviewing and verifying information will differ depending on whether the information is being provided informally / voluntarily or in response to a formal regulatory requirement.
  - As such, a provider may need to carry out substantial additional work, in line with its internal processes, if information previously provided on a voluntary basis is subject to a formal production requirement. In addition, depending on the time elapsed since the information was initially provided, the information may need to be checked, updated and supplemented to reflect any changes. These factors may, in particular, affect how long it takes the provider to respond. A final notice issued without prior consultation may therefore set out a disproportionately burdensome or unrealistic timescale for the provider’s response.
  - We therefore suggest removing this example.
- *“where we are asking for updates to information previously provided, where questions are the same as, or very similar to, questions previously asked”*
  - See our comments on the previous bullet regarding time elapsed, which apply similarly here.
  - In addition, while a question may be *“very similar”* to a previous question from Ofcom’s perspective, differences that appear to be minor may in some cases have a significant impact on the nature of the information to be provided and / or how burdensome it is for the recipient to collate and provide that information, for reasons that may not be immediately apparent to Ofcom.
  - We therefore suggest amending this example to refer to situations *“where we are*

*asking for updates to information provided before a significant period of time has elapsed, where questions are the same as questions previously asked”.*

In addition to the changes we propose above, we would welcome explicit confirmation in the guidance that:

- Where Ofcom issues a final notice without having previously issued a draft notice, Ofcom will consider any representations made by the recipient in response to the final notice; and
- Where it is appropriate to do so in light of those representations, Ofcom will cancel the notice pursuant to s.102(9) OSA, or agree amendments to the notice in correspondence with the recipient.

In addition, we note that precisely and practically what a final notice entails may only become apparent to a provider after it commences work on that notice, especially where it is of a complex nature. We would therefore encourage Ofcom to take a flexible approach in such circumstances - one that permits further representations from the provider on the scope, mode of delivery, and deadline of the final notice - and to reflect the same in the guidance.

#### **Explanation as to why information is needed**

We note Ofcom’s comment in para. 4.26(b) of the guidance that the information notice will “*specify or describe [...] why the information is needed by Ofcom*”, as required by s.102(3)(b) OSA. The guidance and the OSA do not further explain what this description should cover - for example, whether it could simply consist of a brief description of the relevant regulatory purpose (e.g., assessing compliance with a particular Part 3 duty) without explaining why the information is considered to be necessary, and how it will be used, in order to achieve that purpose.

If such limited information were to be provided, it would be difficult for recipients to respond to the notice in an informed way - for example, by making suggestions in response to a draft notice that enable Ofcom to target the final notice at information that is more relevant to the purpose in question.

We would therefore welcome explicit clarification in the guidance that this section of the notice will address:

- The regulatory purpose for which Ofcom needs the information (per para. 3.13(a) of the guidance) and the regulatory power it is relying on in its pursuit of that purpose;
- The use for which Ofcom intends to rely on the information (per para. 3.13(c) of the



guidance), to the extent that disclosing this would not undermine the purpose (e.g., in an enforcement context); and

- To the extent not covered above, why Ofcom considers this information to be needed in order to achieve the specified purpose and outcome.

This will help to ensure that recipients can respond to notices (draft and final) in an informed way.

### **Deadline extensions**

We note Ofcom’s comment in para. 4.31 that it will “*only agree to extend deadlines where there is good reason for doing so, like unexpected absence of a key employee responsible for obtaining the required information, technical difficulties, or other exceptional circumstances beyond the recipient’s control*”.

We note that in addition to the examples set out above, recipients may also need to seek an extension where - despite best efforts to estimate an achievable timescale - it becomes apparent after the issuance of the final notice that the recipient will need more time to collate, review and verify the necessary information. This may be a particular risk if, e.g., the request relates to a large amount of information covering multiple topics that are spread across a range of internal functions, and that have not previously been subject to information requests.

Currently, it is not clear from the guidance that a deadline extension would be granted in this situation. If recipients do not think that they will be granted an extension, there may be a risk that they seek to meet the initial deadline ‘at all costs’ and that this may result in potential oversights or shortfalls in the collation, review and verification of the required information.

In our view, such unforeseen difficulties would constitute a good reason for a deadline extension, and we would welcome inclusion of an example to this effect in the guidance.

d. Coroner Information Notices: 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?

Response:

### **Information required by Coroner Information Notices**

We note Ofcom’s reference in para. 4.66 of the guidance to the types of information that can be required pursuant to a Coroner Information Notice.

While we recognise that these types of information are set out at s.101(2) OSA, we note that they

include specific and time-bound information about discrete actions, experiences and events involving a user - for example, how a particular item of content came to be encountered by the child, or how the child interacted with a particular piece of content (including wide-ranging information about a user's viewing history - e.g., viewing a piece of content, that is potentially present on a page / surface with multiple other pieces of content, without ever interacting with that content).

For many services, such granular information may not be retained, tracked or recorded. As such, providers who receive a Coroner Information Notice may be unable to provide some of the information requested.

To the extent that a particular service provider cannot provide this information, we would welcome clarification in the guidance that this will be taken into account by Ofcom when considering whether a Coroner Information Notice is a feasible and proportionate way to obtain the information requested, per para. 4.71 of the guidance, and in line with our comments in response to Question 1 above regarding para. 3.17 of the guidance), and that Ofcom will convey this to coroners.

We also note the reference at para. 4.67 that "Coroner Information Notices may require the production of documents held outside the UK", per s. 204(2) OSA. Para 3.15 of the guidance states that Ofcom will, to the extent possible, "take account of any legislative provisions which may restrict the ability of a stakeholder to provide any information [to Ofcom]", upon being made aware of any such provisions by the person subject to the information power. We would be grateful for confirmation that this would include any potential conflicts with any laws in other relevant jurisdictions.

e. Naming a senior manager: 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?

Response:

**Threshold criteria for exercising the senior manager power**

In our response to Question 52 of the Illegal Harms Consultation, we proposed that "*the use of [the named senior manager] power should be limited to circumstances where Ofcom has evidence-based concerns that the service provider will not adequately comply with the information notice without such a requirement being imposed. This could be based, for instance, on past incidents of the service provider failing to provide adequate responses to information requirements. [Further guidance on this point] should include clarification that Ofcom will only use this power if it has concerns that the service provider will not adequately comply with the information notice without such a requirement being imposed, and examples of the types of the situations where this concern may arise*".

We therefore note and welcome Ofcom’s comment in para. 4.80 of the guidance that “[w]e will decide on a case-by-case basis whether to include this requirement, having considered whether it is necessary and proportionate to do so. We will take into consideration the entity’s history of compliance and co-operation with Ofcom, including its history of compliance with any previous requests for information, where appropriate, as well as the burden this requirement would place on the entity and the named senior manager”.

However, while this is a helpful indication that prior instances of non-compliance will factor into Ofcom’s decision as to whether to use this power, we would welcome additional clarity on when Ofcom expects the use of this power to be necessary and proportionate, taking into account the entity’s history of compliance and cooperation. This would help clarify that Ofcom expects to use this power as a last resort (as suggested in our response to the Illegal Harms Consultation).

For example, we would encourage Ofcom to consider clarifying:

- that the necessity / proportionality threshold would normally only be reached after multiple instances of non-compliance with OSA duties, lack of response to confirmation decisions or penalty notices, etc.;
- what other aspects of the entity’s history of compliance and cooperation with Ofcom (besides instances of actual non-compliance) might be taken into account; or
- that Ofcom does not envisage using this power in situations where there is no prior history of non-compliance or non-cooperation.

#### **Reference to ‘cooperation’ being taken into account**

In addition, while we understand “*compliance*” in para. 4.80 to refer to compliance with obligations under the OSA (e.g., to respond to information notices), it is unclear what is meant by “*co-operation*” or why this is relevant to the senior manager power.

In practice, Ofcom may seek a provider’s cooperation in numerous ways, including by informally requesting information (as addressed at various points in the guidance).

If Ofcom considers a provider’s cooperation to have fallen short in a particular instance that relates to something other than the provision of information, it is not clear what relevance this has to the question of whether the provider is likely to comply with an ‘ordinary’ information notice (i.e., a notice which does not include a senior manager requirement). We do not think it is proportionate for Ofcom to extrapolate from such instances to conclude that it is necessary and proportionate to require a senior manager to be named.

Where the perceived lack of cooperation does relate to the provision of informally requested information, the remedy for this is for Ofcom to issue an 'ordinary' information notice - which changes the request for information into a requirement to produce it, and which is supported by regulatory and criminal enforcement consequences for non-compliance - or to use another information-gathering power that requires compliance, such as by appointing a skilled person. In our view, the senior manager power is a remedy for a lack of compliance (whether with past information notices or with other OSA requirements), not for a perceived lack of cooperation.

As such, we suggest deleting the wording "*and co-operation*" from para. 4.80 of the guidance.

Confidential? - Y/N

Response: N

### Question 3: Skilled persons' reports (Section 5 of the draft guidance)

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, and the typical process that we propose to follow.

Response:

#### **Nomination and approval**

We note Ofcom's comment in para. 5.1 of the guidance that a skilled person "*will be appointed by Ofcom, or nominated and approved by Ofcom but appointed by the provider*".

We believe the reference to a skilled person being "*nominated **and** approved by Ofcom but appointed by the provider*" should instead refer to the skilled person being "*nominated **or** approved*" by Ofcom, in line with s.104(6)(b) OSA and para. 5.14 of the guidance. We suggest para. 5.1 is updated accordingly.

We further note Ofcom's comments in paras. 5.13 and 5.14 of the guidance that:

- Ofcom will decide whether the skilled person is to be appointed by the provider or by Ofcom "*on a case-by-case basis*" (other than in relation to s.121 OSA notices); and
- where the provider will appoint the skilled person, Ofcom will decide whether the person in question is to be: (i) nominated by the provider for Ofcom's approval; or (ii) nominated

by Ofcom.

As we noted in our response to Question 52 of the Illegal Harms Consultation, we consider that the provider will in most cases be best placed to identify the person with the requisite knowledge and expertise to carry out the skilled person role. Where the person is nominated and appointed by the provider, we consider that this would enable the provider to identify any potential lack of independence or conflict of interest before the person is nominated (as we discuss further below). It would not affect the risk of an unsuitable person being appointed, given the requirement for Ofcom's approval, and Ofcom would be able to take a different approach (by nominating or appointing the person itself) if it considered this to be necessary - e.g., if the provider's nominations are unsuitable, or if Ofcom is concerned that the provider will delay or obstruct the appointment process.

In our view, the default approach (other than in relation to s.121 OSA notices) should therefore be that the skilled person is nominated and appointed by the provider, and we would welcome explicit confirmation of this in the guidance.

#### **Independence of the skilled person**

We note Ofcom's comment in para. 5.5 of the guidance that "[w]e are only likely to consider that a person has the skills necessary to prepare a report about relevant matters where that person is independent from the service or service provider or can otherwise demonstrate that no potential conflict of interest could arise", and the related comment in para. 5.14(b) that Ofcom will only approve a person nominated by the provider where it considers that "there are no conflicts of interest that may affect their ability to give an objective opinion".

However, it is unclear what factors that will be taken into account by Ofcom when considering whether a person is "independent from the service" or whether there is a "potential conflict of interest [...] that may affect their ability to give an objective opinion".

For example:

- A person may have previously worked with a provider in an unpaid capacity, e.g., if the provider has surveyed external experts on particular risks or issues in order to inform the development of additional safety measures.
- A person may have previously worked with a provider in a paid capacity, e.g., as an employee or in a paid consulting role.

It is unclear when Ofcom may deem such work to affect the person's independence or lead to a conflict of interest, and what considerations would be taken into account (e.g., duration of the

work, amount of any remuneration, how long ago the work ceased, etc.).

Similarly, an individual person may have previously demonstrated (e.g., via their academic publications, interviews, public comments, etc.) that they have strong and settled views - whether positive or negative - about the service's approach to online safety in general or to the subject of the proposed report in particular. It is unclear at what point Ofcom would consider this to have a potential impact on the person's ability to give an objective opinion.

We would therefore welcome clarification in the guidance as to the factors that will be taken into account by Ofcom when considering whether a person is "*independent from the service*" or whether there is a "*potential conflict of interest [...] that may affect their ability to give an objective opinion*", as well as what evidence would amount to a "demonstration" of independence. In our view, this would help to ensure that there is clarity as to whether a particular person is appropriate for the role. This would be particularly helpful for informing providers' selection of candidates for Ofcom's approval.

#### **Provider's inability to provide information**

We note Ofcom's comments in para. 5.6(b) of the guidance that "*we may consider it necessary to exercise our power to obtain a skilled person's report [...] where we consider a service provider is unable to provide the information we require, for example due to [...] the specific or technical nature of the information needed*", and in para. 5.9 of the guidance that "*We would typically engage with the service before exercising our power to require a skilled person's report. This could be, for example, to help us decide whether to exercise this power, to understand what information the service may have, or to decide on how the appointment process should go ahead*".

Given that Ofcom is proposing that skilled person reports "*will typically be reserved for more serious or complex cases*", per para. 5.8 of the guidance, we anticipate that there will be relatively few cases where a skilled person's report is a proportionate response to a provider's difficulties in providing information. We would welcome explicit clarification in the guidance that Ofcom will only conclude that a provider is unable to provide the necessary information, per para. 5.6(b), where the provider has formally confirmed this to Ofcom, for example as part of the prior engagement referenced in para. 5.9.

#### **Provider selection of a skilled person for Ofcom's approval**

We note Ofcom's comment in para. 5.14 that, where a provider is required to appoint a skilled person, the provider may be requested to select "*a skilled person*" for Ofcom's approval, and that - if the person selected is not approved by Ofcom - Ofcom may then nominate a skilled person to be appointed by the provider. However, we note that para. 5.14(b) also states that "*[w]here we require a service provider to appoint a skilled person subject to our approval, we will explain what*

*information we expect the service provider to give Ofcom about its selected candidate(s)'.*

The reference to multiple selected candidates suggests that a provider can, if it wishes, provide Ofcom with more than one candidate (e.g., in the form of a shortlist of 2-3 candidates from which Ofcom can choose, or in the form of a preferred candidate and an alternate if Ofcom opts not to approve the preferred candidate). There is nothing in the OSA to prevent this, and we take the view that the additional flexibility would help to ensure that an appropriate skilled person can be appointed in a timely way. However, the guidance does not make it explicit that more than one candidate can be proposed by a provider.

We would welcome explicit confirmation of this in the guidance, subject to any restrictions (e.g., on the total number of candidates that can be proposed by a provider) that Ofcom considers appropriate.

#### **Ability of provider to comment on skilled person's report**

We note that the guidance regarding the process for preparation of the skilled person's report is primarily found in para 5.15, and is fairly brief.

We note, by way of comparison, that the Financial Conduct Authority ("FCA") has published detailed guidance on the use of skilled person's reports in a financial services context (see chapter 5 of the FCA's Supervision Manual ("SUP") and the Use of Skilled Persons part of the PRA Rulebook). By way of example, SUP 5.4.10G through to 5.5.12G provide guidance on process, with SUP 5.4.10 addressing the ability of the subject of a skilled person's report to comment on it prior to submission to the regulator.

We would welcome additional detail in the guidance on the process for preparing the skilled person's report, including explicit confirmation on the provider's right to comment on the draft skilled person's report prior to its submission to Ofcom and to discuss the report and its findings with Ofcom.

#### **Confidential and privileged information**

We would welcome explicit confirmation in this guidance that a service provider, and anyone subject to the obligation referred to in para 5.16, is not required to provide privileged information to a skilled person. In addition, we suggest that the guidance also makes clear that a skilled person may not pass on confidential information without lawful authority or with the consent of the person from whom that information was received and (if different) to whom the information relates.

Confidential? - Y/N

Response: N

#### Question 4: Interviews (Section 6 of the draft guidance)

Do you have any comments on the section of guidance dealing with the power to require an individual to attend an interview?

Response:

##### **Investigation of potential non-compliance**

We note Ofcom's comment at para. 6.1 of the guidance that "[w]here a service has failed, or is failing, to comply with a requirement imposed by any enforceable requirement as set out in section 131 of the Act, or to comply with a notice to deal with terrorism and CSEA content, we may decide to open an investigation".

While Ofcom may open an investigation where it is apparent that there has in fact been non-compliance by a service (in order to determine the nature and extent of that non-compliance), we note that an investigation may also be opened to determine whether there has been any non-compliance, per s.105(1) OSA. In our view, the guidance should not frame an investigation as something that only occurs where there has in fact been non-compliance. In the absence of Ofcom's consideration of any proportionate, equitable evidence-based analysis and defence, this risks giving the impression that Ofcom's investigation will treat this as a foregone conclusion, and that a decision by Ofcom to open an investigation is an indicator of actual non-compliance.

We therefore suggest updating para. 6.1 of the guidance to refer to situations where "*Ofcom has reasonable grounds to suspect that a service has failed, or is failing, to comply*".

##### **Other means of obtaining information**

We note Ofcom's comment at para. 6.4 of the guidance that attendance at an interview may be required where "*we believe, based on the evidence available at the time, that gathering information from an individual (including senior management) may help us identify the root cause of the compliance failure; [or] it would be beneficial to obtain first-hand accounts and individual experiences in relation to a potential failure*".

We note that attendance at an interview is likely to be burdensome and intrusive for the



interviewee.

We would welcome an update to the guidance to make clear that Ofcom will consider all available means of obtaining information, will only seek to exercise its interview power where it believes that it would not be able to effectively obtain the necessary information by other means, and will limit its exercise of that power to requiring interviews that are necessary to obtain the information only (e.g. by not interviewing multiple individuals where one would suffice).

Confidential? - Y/N

Response: N

#### Question 5: Entry with or without a warrant (Section 7 of the draft guidance)

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.

N/A.

Confidential? - Y/N

Response: N

#### Question 6: Audit (Section 7 of the draft guidance)

Do you have any comments on our proposed approach to the power for Ofcom to carry out an audit to assess compliance?

Response:

##### **Situations in which an audit may be carried out**

We note Ofcom's discussion at para. 7.40 of the guidance as to when Ofcom might exercise its audit power.

Para. 7.40 merely sets out the purpose(s) of an audit - i.e., to assess a provider's compliance or risks of non-compliance with OSA requirements. We note that Ofcom is able to assess these things outside the context of an audit, using other powers - e.g., by issuing information notices. Para. 7.40 does not give any indication as to when or why Ofcom may decide that an audit (as opposed to any other power) is the appropriate means of gathering information and assessing compliance.

While we recognise that this decision will be based on the circumstances of the case, we would welcome an update to the guidance to include clarification as to: (i) what may lead Ofcom to consider conducting an audit; (ii) how Ofcom will make that decision; and (iii) examples of circumstances in which an audit (as opposed to any other Ofcom power) would be considered to be the appropriate means of gathering information and assessing compliance.

We also note that 28 calendar days' notice may not be sufficient time for a provider to prepare for an audit depending on the topic. We would therefore welcome an update to the guidance to confirm that a provider may request additional time and to clarify factors that Ofcom will consider in determining such requests.

**Audit findings**

We note that the guidance does not address what will happen following an audit, and - in particular - what information Ofcom will share with the provider about its findings and any conclusions reached (e.g., as to non-compliance) and any proposed next steps.

We would welcome confirmation in the guidance that, following the conclusion of an audit, Ofcom will give the provider a timely update setting out the audit's findings, any conclusions reached, and any proposed next steps. We would also welcome confirmation in the guidance that the provider would have the opportunity to comment on the audit's findings.

Confidential? - Y/N

Response: N

**Question 7: Consequences of failure to comply with an information power (Section 8 of the draft guidance)**

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.

N/A.

Confidential? - Y/N

Response: N

**Question 8: Entry with or without a warrant (Section 7 of the draft guidance)**

Do you have any other comments on the draft guidance?  
Please provide any information or evidence in support of your views.

N/A.

Confidential? - Y/N

Response: N