

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2025

Public Authority: Ofcom

Address: Riverside House, Southwark Bridge Road
London SE1 9HA

Decision (including any steps ordered)

1. The Commissioner's decision is that Ofcom was entitled to withhold some of the information about online safety matters that the complainant has requested under section 44(1) of FOIA and was entitled to neither confirm nor deny it holds other information under 44(2). These exemptions concern prohibitions on disclosure.
2. The Commissioner does not require further steps.

Request and response

3. The complainant submitted the following information request to Ofcom on 17 January 2025:

"[1] Dates, agendas, and attendees at meetings since November 2023, between Ofcom senior leadership or online safety group staff representatives of any of the following companies:

- Meta or its subsidiaries (including WhatsApp, Facebook, Instagram);
- X/Twitter;
- Google/YouTube;
- Bytedance/Tik Tok

[2] Dates, agendas, and attendees at meetings since November 2023, between Ofcom senior leadership or online safety group staff

representatives of trade or lobbying bodies of which any of the following companies are a member:

- Meta or its subsidiaries (including WhatsApp, Facebook, Instagram);
- X/Twitter;
- Google/YouTube;
- Bytedance/Tik Tok

- [3] Confirmation of, and dates for, internal approvals, including Chief Executive, Legal Director, Online Safety Policy Director, for the decision to defer consideration of an optional identity verification measure until “phase 3”, as set out in Annex 1, page 138 A1.16.34, of the Illegal Harms Statement published on 16 December 2024
- [4] Electronic copies of evidence or correspondence submitted to Ofcom between November 2023-February 2024 from Meta/WhatsApp in relation to the measure ICU C2 in the Online Safety Illegal Harms Code of Practice published 16 December 2024, and previously referred to a “4A. Having a content moderation function that allows for the swift take down of illegal content” in the 9 November 2023 consultation version
- [5] Copy of the letter from WhatsApp dated 22 November 2024 referred to in Illegal Harms Statement published on 16 December 2024, Volume 2 (service design and user choice), page 12, footnote 40
- [6] Details of, and supporting evidence from, all of the “small number” of stakeholders that Ofcom refers to in its Illegal Harms Statement published on 16 December 2024, at Volume 2, p12, para 2.40”
4. Ofcom responded on 14 February 2025. It confirmed that it was withholding information within scope of parts 1, 2, 4, 5 and 6 of the request under section 44(1) of FOIA. It also confirmed that it neither confirmed nor denied it holds some information within scope of parts 1 and 2, which is a provision under section 44(2). Ofcom disclosed some information within scope of parts 3, 4 and 5 of the request.
5. The complainant requested an internal review on 1 April 2025. This focussed on Ofcom’s reliance on section 44.
6. Ofcom provided an internal review on 9 April 2025; it upheld its application of section 44 to parts of the complainant’s request.

Reasons for decision

7. This reasoning covers whether Ofcom correctly applied sections 44(1) and 44(2) of FOIA to parts of the complainant's request.
8. Section 44(1)(a) of FOIA allows a public authority to withhold information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment.
9. Section 44(2) allows a public authority to neither confirm nor deny it holds information if confirmation or denial is prohibited by or under any enactment.
10. Section 44 is an absolute exemption which means it's not subject to the public interest test.
11. In its correspondence to the complainant, in relation to section 44(1) Ofcom had advised that the legislation that prohibited disclosure in this instance was section 393(1) of the Communication Act 2003 ('the Act'). It said that section 393(1) prevented Ofcom from disclosing information about a business which has been obtained in the course of exercising a power conferred by other legislation, including the Act, unless it had the consent of the business, or one of the statutory gateways under section 393(2) had been met. Ofcom confirmed that none of those gateways was applicable in this case.
12. Ofcom also advised that under section 393(1) of the Act it may disclose information in order to facilitate the carrying out of its functions. For that reason, Ofcom had disclosed previously that it had met with Meta and TikTok and so to that extent it could confirm that it holds some information within scope of the request.
13. But Ofcom also said it could neither confirm nor deny that it holds information relating to X formerly Twitter or Google and YouTube under section 44(2) of FOIA.
14. In their complaint to the Commissioner, the complainant said:

"[a] Ofcom has applied the s44 exemption offered by The Communications Act 2003 ("CA"), s.393(1) in a way which would appears to place all information about its dealings with companies regulated by the Online Safety Act outside the FOIA. There is no justification for such an interpretation. The provision is plainly intended to protect the commercial operation of "particular businesses" subject to regulatory engagement - hence the qualification for businesses which are no longer being carried on and the definition of "business" in s.405(1) - and not their efforts to influence regulatory policy.

[b] There can have been no reason for Parliament to confer greater confidentiality on businesses seeking to lobby Ofcom or engage with its consultation exercises than on non-commercial / non-profit organisations doing the same.

[c] Furthermore, the stakeholder engagement and consultation exercises of other government and regulatory bodies are routinely conducted perfectly well without any comparable blanket of confidentiality.”

15. The Commissioner asked Ofcom to address these arguments in its submission to him.
16. In its submission, Ofcom first provided some general context. It noted that, as it had explained in its internal review, in this circumstance the meaning of “obtained” isn’t limited to information obtained by use of Ofcom’s formal powers to require the provision of information. It also has a natural, broad meaning that applies to information gathered by Ofcom pursuant to the exercise of its statutory functions¹.
17. This therefore includes information which is provided by the relevant business, or by another party, voluntarily, including in response to consultations.
18. Under section 393 of the Act, Ofcom confirmed, it’s only permitted to disclose information caught by section 393(1) if it has the consent of the business or one of disclosure gateways in section 393(2) applies. In that context it notes businesses often do consent to the disclosure of responses made to Ofcom consultations (discussed further below). Providing information in response to requests under FOIA is, however, not one of the disclosure gateways in section 393(2)³.
19. Ofcom advised that criminal sanctions apply to any breach of section 393. This reflects the importance placed on Ofcom’s careful stewardship of information it obtains whilst carrying out its regulatory functions.
20. An important aspect of this, it said, is that businesses falling within its regulatory remit must have the confidence that sensitive commercial information passed to Ofcom will be carefully protected. Without such trust, Ofcom’s ability to carry out its regulatory functions would be seriously inhibited.

¹ [Mander Faw v Information Commissioner \(EA/2012/0034\)](#)

21. Ofcom continued that in the circumstances of this request it's important to note the gateway for disclosure of information under section 393(2)(a), which provides that Ofcom may disclose information for the purpose of facilitating the carrying out by Ofcom of any of its functions.
22. It noted that Ofcom has a statutory duty to have regard in performing its duties to the principle that its regulatory activities should be transparent.
23. It's the principal duty of Ofcom to carry out its functions to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate, by promoting competition. Ofcom said it's also conscious of its public law duties in relation to transparency.
24. Ofcom says that in instances where it has carried out regulatory work which has involved gathering information subject to section 393(1), it considers what it would be appropriate to disclose pursuant to section 393(2)(a) as part of providing transparency over its work. For example, where Ofcom conducts a consultation, it asks respondents to identify what information from their responses can be published. If a respondent identifies information, which is subject to section 393(1) and which it does not consent to disclose, Ofcom then goes through a process to consider whether it would nonetheless be appropriate to disclose that information pursuant to section 393(2)(a), taking into account all of its statutory duties and the relevant factual circumstances.
25. Ofcom considers that the statutory scheme therefore provides a clear mechanism for it to be able to determine what information subject to section 393(1) should be disclosed. The playing out of this process can be seen, as an example, in the Illegal Harms statement to which the complainant refers. In that case, stakeholder responses were disclosed alongside the relevant statement: [Statement: Protecting people from illegal harms online - Ofcom](#). This reflects Ofcom's consultation principles: [Ofcom's consultation principles - Ofcom](#).
26. Ofcom has then addressed the complainant's points. Regarding point [a], it has confirmed that the position on section 393(1) is explained above, along with the position under FOIA of what "obtained by" means. Ofcom says it has proceeded in a way that complies with the statute. No distinction is made in section 393(1) between a business's "commercial operation" and efforts to "influence regulatory policy". This is not surprising, it says, as where businesses engage with Ofcom on matters of regulatory policy it's ordinarily because they have a commercial interest to protect.

27. Regarding point [b], Ofcom says that there's no ambiguity in the language of section 393(1) that requires any exercise of interpretation along these lines.
28. And finally, regarding point (c) Ofcom says it has explained above its approach to complying with its duties around transparency, which ordinarily involves publishing responses from stakeholders to its consultations. Ofcom considers it's straightforwardly incorrect to suggest that it maintains a "blanket of confidentiality."

The Commissioner's conclusion

29. First, the Commissioner considers that Ofcom has addressed the complainant's specific concerns satisfactorily.
30. However, in order to demonstrate that section 44 is engaged, the Commissioner must carry out a three step test:
 - a) Does the Communications Act 2003 prevent disclosure of any particular category(ies) of information, including through confirming or denying information is held? If so,
 - b) On the facts of the case, if held, does the information fall within one or more of those categories? If and to the extent that it does,
 - c) Is he satisfied that none of the lawful gateways for disclosure, set out in the Communications Act, would permit disclosure under FOIA?
31. Considering the first of these, section 393(1) of the Communications Act 2003 states that:

"Information with respect to a particular business which has been obtained in exercise of a power conferred by—

(a) this Act...

...is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business."
32. And as Ofcom has noted, criminal sanctions apply to any breach of section 393 – under section 393(10) of the Act.
33. The Commissioner is satisfied that section 393 of the Communications Act 2003 makes it a criminal offence to disclose certain information outside of prescribed circumstances. It's therefore capable of acting as a statutory prohibition on disclosure.

34. The Commissioner has gone on to consider the second test. In order to be covered by this statutory prohibition, if held, the withheld information must be or must reflect information that Ofcom has obtained in the exercise of its functions. This would include information it had formally obtained directly from an organisation, and he agrees that it would also include information parties had provided to it voluntarily, including through consultations. The Commissioner accepts that, to the extent that it's held, the withheld information was obtained by Ofcom in the course of carrying out the regulatory functions conferred on it by the Communications Act 2003.
35. Finally, the Commissioner has considered the various lawful gateways to disclosure that are contained within section 393(2) of the Communications Act 2003. Disclosure of the information (if held) isn't required to fulfil Ofcom's functions or those of any person listed in section 393(3) of that Act. The remaining gateways relate to court orders or Ofcom's obligations under other pieces of legislation – none of which apply to FOIA.
36. Therefore, if held, the withheld information is covered by section 393, there is no lawful gateway which would allow its disclosure and so any disclosure of this information would breach the Communications Act 2003.
37. Where relevant information is held, it's subject to a statutory prohibition. It therefore follows that section 44(1) of FOIA is engaged in respect of that information.
38. The Commissioner finds that section 44(2) of FOIA is also engaged. If Ofcom were to confirm or deny it holds information about X and Google/YouTube it would, in effect, be disclosing whether or not these organisations had been subject to Ofcom's regulatory functions. The Commissioner understands that this information isn't in the public domain and, as such, disclosing it would be prohibited for the reasons explained above.
39. As section 44 is an absolute exemption there's no need for Ofcom to demonstrate that disclosure would be harmful and no requirement for the Commissioner to consider the balance of the public interest.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
General Regulatory Chamber
PO Box 11230
Leicester
LE1 8FQ

Tel: 0203 936 8963
Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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