

Reference: 1723211

Information Rights
Information.requests@ofcom.org.uk

6 February 2024

Freedom of Information: Right to know request

Thank you for your request for information as detailed below, initially received on 23 November 2023, and clarified by you on 7 December 2023. We have considered your clarified request under the Freedom of Information Act 2000 ('the FOI Act'). We wrote to you on 9 January 2024 to say we needed more time to consider the public interest in disclosing or withholding the information – we have now concluded our consideration.

Your request and our response

23 November 2023

"I request all information held by Ofcom relating to the website [REDACTED]."

You clarified this on 7th December 2023

"I request all information held by Ofcom relating to the website [REDACTED] in connection with Ofcom's duties under the Online Safety Act (formerly Online Safety Bill)."

We have searched for the information requested and while we do hold information that is in scope of your request, this information is being withheld.

We can however confirm that, following reports of alleged illegal and harmful suicide content on this site, Ofcom made contact with the service and is continuing to monitor the situation. You may find it helpful to have sight of Ofcom's planned approach to online safety regulation which is set out in Ofcom's regulatory roadmap (which is available on our website [here](#)). In November, Ofcom consulted on its proposed guidance and codes of practice which set out steps in scope services can take to comply with the duties in the Online Safety Act relating to illegal content and activity, including illegal suicide and self-harm content. In spring we plan to consult on our guidance and codes of practice which will set out steps that in scope services can take to comply with the duties in

the Act relating to protecting children from content that is legal but harmful to them, including content that promotes, encourages or provides instructions for suicide and deliberate self-harm. Whilst the regime is at an early stage, Ofcom wishes to support all in scope services to be compliant with the provisions of the Act and intends to seek to engage constructively in the first instance.

The information is being withheld as it is exempt from disclosure under sections 21(1), 36(2)(b)(ii) and (c), 42(1) and 44(1)(a) of the FOI Act – we set out these provisions below.

Section 21(1) of the FOI Act provides that information which is otherwise reasonably accessible to the applicant is exempt information. Some of the information we hold which is in the scope of your request is publicly available, and therefore is withheld on that basis. Section 21 is an absolute exemption and therefore not subject to the public interest test.

Much of the information in the scope of your request contains working-level documents or discussions including exchanges of views between Ofcom colleagues. Section 36(2)(b)(ii) and (c) of the FOI Act this provide that information held by a public authority is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure of the information:

- would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation; and/or
- would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36 is a qualified exemption, which means that Ofcom is required to consider whether or not the public interest in disclosing the information you have requested outweighs the public interest in withholding the information. In this case, we consider that the public interest favours withholding the information for the reasons set out in **Annex B** to this letter. In **Annex A** of this letter, the qualified person, the Corporation Secretary for Ofcom, has confirmed that the exemption applies.

In addition, some of the information is exempt from disclosure under section 44(1) of the FOI Act. Section 44(1) of the FOI Act provides that information is exempt from disclosure if its disclosure is prohibited by or under any enactment. The enactment that prohibits the disclosure of this information is section 393(1) of the Communications Act 2003 (“the Communications Act”). Under this section, we are prohibited from disclosing information with respect to a particular business that has been obtained in the exercise of our regulatory functions, unless that business consents or one of the statutory gateways under section 393(2) of the Communications Act is met, neither of which apply here. Section 44 of the FOI Act is an absolute exemption and therefore is not subject to the public interest test.

We further consider that some of the information is exempt from disclosure under section 42(1) of the FOI Act. This deals with the exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. In applying this exemption we have had to balance the public interest in withholding the information against the public interest in disclosing the information. The attached **Annex C** to this letter sets out the exemption in full, as well as the factors Ofcom considered when deciding where the public interest lay.

If you have any further queries, then please send them to information.requests@ofcom.org.uk quoting the reference number above in any future communications.

Yours sincerely

Information Requests

Annex A

Freedom of Information: Right to know request

Section 36 exemption

I am a "qualified person" as referred to section 36(2) of the Act and duly authorised by a Minister of the Crown for the purposes of that section. In my reasonable opinion, disclosure of the relevant information requested would prejudice the effective conduct of public affairs.

In applying this exemption, I have had to balance the public interest in withholding the information against the public interest in disclosing the information.

I have set out in **Annex B** the exemption in full, as well as the factors I considered when deciding where the public interest lay in relation to the information concerned. If you have any queries about this letter, please contact information.requests@ofcom.org.uk.

Corporation Secretary

Date: 6 February 2024

Annex B

Section 36: Prejudice to effective conduct of public affairs

Section 36 exempts information whose disclosure would, or would be likely to, have any of the following effects:

- inhibit the free and frank exchange of views for the purposes of deliberation, or
- otherwise prejudice the effective conduct of public affairs.

Key points:

- Section 36 can only be used if, in the reasonable view of a "qualified person", disclosure of the requested information would have one of the specified effects.
- In this case it is considered that disclosure would prejudice the effective conduct of public affairs
- The application of section 36 is subject to a public interest balance.

Factors for disclosure	Factors for withholding
<ul style="list-style-type: none"> • Ofcom recognises that its approach to its duties under the Online Safety Act 2023, relating to specific services or more generally, is a matter of interest to the wider public. Releasing such information could be said to increase transparency in our work and allow for discussion in a public forum. 	<ul style="list-style-type: none"> • The documentation in relation to which the exemption is claimed is documentation reflecting internal discussion/deliberation relating to the site in question. The disclosure of these documents could affect Ofcom’s ability to effectively deliberate on and discuss such matters and to engage with the site in question, and similar sites, going forward. • In order to fulfil its regulatory functions effectively, colleagues need to be able to engage internally in frank discussions and exchange advice/opinions/recommendations, in order for robust decisions to be made. The disclosure of information about such discussions would , or would be likely to, inhibit free and frank discussions in the future and this in turn would likely damage the quality of deliberation and lead to less robust decision making. • Given the above and the fact that colleagues need to be able to give their opinions to other staff members or decision makers, disclosing such communications would also likely prejudice the effective conduct of public affairs.

Reasons why public interest favours withholding information

- At this time, Ofcom is withholding the requested information. The public interest test has been applied on the basis of disclosing information which would reveal internal discussions and deliberations in relation to the site in question. We consider that the public interest in withholding outweighs the public interest in disclosure.
- This is because the disclosure of this information is likely to prejudice the effective conduct of public affairs, as it would affect Ofcom’s employees’ ability to freely and effectively deliberate on and discuss such matters.
- Whilst there may be some weight attached to the public interest in disclosing to enable the public to understand how Ofcom is facilitating its role as online safety regulator, we consider that significant prejudice would be caused by such a disclosure.

Annex C

Section 42 – Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

Factors for disclosure	Factors for withholding
<ul style="list-style-type: none"> • Open policy making and public confidence in regulated activities. 	<ul style="list-style-type: none"> • Ofcom considers that the request includes information of which a claim to legal professional privilege could be maintained in legal proceedings. It is advice given by Ofcom’s own salaried in-house legal advisers and is connected with the giving or obtaining of legal advice.

Reasons why public interest favours withholding information

- It is in the public interest that work undertaken by Ofcom in the context of regulated activities is undertaken in a fully informed legal context, where relevant. Ofcom therefore needs high quality legal advice for the effective conduct of its business. That advice needs to be given in context, and with a full appreciation of the facts. It needs to be sought and given in a timely fashion.
- Legal advice cannot be effectively obtained unless Ofcom is able to put all the facts before its in-house legal advisers without fear that they may afterwards be disclosed. Without such effectively obtained advice, the quality of Ofcom’s work would be much reduced because it would not be fully informed and this would be contrary to the public interest.

If you are unhappy with the response you have received in relation to your request for information and/or consider that your request was refused without a reason valid under the law, you may ask for an internal review. If you ask us for an internal review of our decision, it will be subject to an independent review within Ofcom.

The following outcomes are possible:

- the original decision is upheld; or
- the original decision is reversed or modified.

Timing

If you wish to exercise your right to an internal review **you should contact us within two months of the date of this letter**. There is no statutory deadline for responding to internal reviews and it will depend upon the complexity of the case. However, we aim to conclude all such reviews within 20 working days, and up to 40 working days in exceptional cases. We will keep you informed of the progress of any such review. If you wish to request an internal review, you should contact information.requests@ofcom.org.uk

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. Further information about this, and the internal review process can be found on the Information Commissioner's Office [here](#). Alternatively, the Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF