

# Online Safety Information Gathering Guidance

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Guidance for regulated services and other stakeholders on information gathering powers under the Online Safety Act 2023.

## Statement

Published 26 February 2025

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# 1. Overview

- 1.1 Ofcom is the online safety regulator in the UK. The Online Safety Act 2023<sup>1</sup> ('the Act') gives Ofcom powers to require and obtain information we need for the purposes of exercising, or deciding whether to exercise, our online safety duties and functions. We are issuing guidance to help service providers and other stakeholders understand when and how we might use these powers.

## What we have decided – in brief

We have decided to introduce guidance for service providers and other stakeholders about the use of our information gathering powers under the Act<sup>2</sup>. [Our Guidance](#) explains when and how we might exercise our powers. It is intended to be flexible to allow us to consider the individual circumstances in which we might use our powers, and to inform all stakeholders about the factors we may take into account when deciding whether to exercise them or not. It also explains the legal duties imposed on regulated services and other third parties in relation to information gathering and sets out our expectations on how services or other third parties should respond when we exercise our information gathering powers.

There was broad support for our draft Guidance. However, many respondents raised concerns or requested clarification in relation to our information gathering activities. For the reasons explained more fully in this document, we have decided to make some changes to our Guidance to address some of these comments. The key changes are:

- We provide more information about the protections the Act provides in relation to Ofcom's disclosure to overseas regulators.
- We provide further detail about when and how we will use our powers to require tests or demonstrations, including the use of datasets for this purpose, and other general mechanics of some of the powers, such as Remote Viewing. We also provide further detail about our approach to user privacy and the security of stakeholders' systems in connection with these powers.

We have also:

- Made some minor changes to our Guidance on the Coroner's Information Notice Power based on our recent experience of exercising this power.
- Made certain changes to mirror the approach taken in our General Policy on Information Gathering, which we published in December 2024.<sup>3</sup>

This Overview section is a simplified high-level summary only. The decisions we have taken, and our reasoning, are set out in the full document and in our Guidance.

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<sup>1</sup> [The Online Safety Act 2023](#)

<sup>2</sup> Ofcom has information gathering powers under other legislation also: Section 145 of the Communications Act, section 34 of the Wireless Telegraphy Act and Schedule 8, paragraph 14 of the Postal Services Act. 2

<sup>3</sup> [General Policy on Information Gathering](#)

## 2. Introduction and background

- 2.1 It is important that the information that Ofcom relies on to carry out our functions under the Act is robust, so that we can carry out our regulatory functions effectively and proportionately. The range of statutory information gathering powers conferred on Ofcom by the Act give us the legal tools to obtain information in support of our online safety functions.
- 2.2 Although we are not obliged to publish guidance on our online safety information gathering powers, we consider that such guidance may be helpful to stakeholders. Statutory information gathering powers are a well-established regulatory tool – Ofcom has for many years had information gathering powers under other legislation besides the Act which are available where we are carrying out our other regulatory functions. However, many stakeholders affected by the Act, including services regulated by the Act and other stakeholders such as coroners and bereaved families, may not have experience of statutory information requests.
- 2.3 In addition to statutory information requests, the Act also confers on Ofcom a variety of other information gathering powers which are not available in those other areas of Ofcom’s remit, and we consider that guidance on these may also be beneficial for all stakeholders. For example, Ofcom’s powers under the Act include powers to require providers of regulated services (and, in some cases, certain others) to:
- generate information by performing tests;
  - take steps to enable a person authorised by Ofcom to remotely view certain information in real-time;
  - provide information about the use of a regulated service by a child whose death is under investigation, to enable Ofcom to respond to a request for information from a coroner or Procurator Fiscal; or
  - appoint a skilled person to prepare a report, for example to assist Ofcom to identify a failure to comply with regulatory requirements.
- 2.4 The Guidance will also enable us to be transparent about our approach to these powers and our consultation process has given stakeholders the opportunity to comment on our approach.
- 2.5 The Guidance is intended to help stakeholders understand:
- the extent of our information gathering powers under the Act;
  - how and when we might use them; and
  - the legal duties on stakeholders to comply with our information gathering powers and the potential consequences of failing to comply when we exercise these powers.
- 2.6 It also provides an overview of the persons who may be legally bound by each of Ofcom’s information gathering powers (see Table 2.2 in the Guidance).

- 2.7 Our consultation<sup>4</sup> document provided an overview of our Guidance and invited comments from stakeholders. It also set out how we have taken account of the comments that we received in response to our November 2023 consultation ‘Protecting people from illegal harms online’ (‘Illegal Harms Consultation’)<sup>5</sup>, which contained a summary of our information gathering powers and some brief comments on our approach to exercising them.<sup>6</sup>
- 2.8 We received 17 responses to our consultation, 15 of which have been published (in whole or in part) on our website.<sup>7</sup>
- 2.9 The remainder of this document:
- i) summarises each section of the Guidance; and
  - ii) sets out how we have taken into account any relevant responses to the Guidance consultation.
- 2.10 The table below sets out our information gathering powers and where they are addressed in the Guidance. This statement follows the same structure.

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<sup>4</sup> [Consultation on Online Safety Information Gathering](#)

<sup>5</sup> [Statement: Protecting people from illegal harms online - Ofcom](#)

<sup>6</sup> [General Policy on Information Gathering](#)

<sup>7</sup> [Consultation stakeholder responses.](#)

Section in the Guidance	Section / Schedule in the Act	What the section covers (relevant powers)	Location in the Guidance (paragraph)
Section 2	N/A	Introduction, covering the scope and status of the Guidance	2.1 – 2.13
Section 3	N/A	Ofcom’s general approach to information gathering, including how we typically decide how to use our powers, how we will treat confidential information, how we will handle personal data and how we will disclose information	3.1 – 3.66
Section 4	s100 - s103	The power to issue information notices, including:	4.1 – 4.97
		• specific considerations for section 100 notices requiring the performance of a test	4.37 – 4.50
		• specific considerations for section 100 notices requiring the remote viewing of certain information under section 100(3) (‘Remote Viewing Information Notice’)	4.51 – 4.70
		• specific considerations for section 101(1) notices requiring the provision of information relating to the use of a service by a child who has died (‘Coroner Information Notice’ <sup>4</sup> )	4.71 – 4.87
		• requirement to name a senior manager under section 103	4.88 – 4.97
Section 5	s104	Skilled persons’ reports	5.1 – 5.18
Section 6	s106	Interviews	6.1 – 6.19
Section 7	Sch12	Entry, inspection and audit	7.1 – 7.44
Section 8	N/A	The duties imposed on services and other persons and the consequences of non-compliance with any of these information gathering powers	8.1 – 8.12

## Changes we are making to the Online Safety Information Gathering Guidance to align with our General Policy of Information Gathering

2.11 Before addressing stakeholder comments to our consultation, we summarise below the key changes that we made to our General Policy on Information Gathering<sup>8</sup> which we have decided to mirror in our Online Safety Information Gathering Guidance (the Guidance). The reasons for these changes are set out in our Statement on our General Policy on Information Gathering.

- When deciding whether to exercise an information gathering power, we will consider (among other things) whether it may be appropriate to

<sup>8</sup> We consulted on our draft General Policy on Information Gathering on 18 July 2024, shortly before consulting on our draft Online Safety Information Gathering Guidance. We issued our final General Policy on Information Gathering on 18 December 2024: [General Policy on Information Gathering](#)

send the same notice to all stakeholders of a particular type, only send a notice to a sub-set of those stakeholders, and/or send a smaller or updated set of questions to some stakeholders (Paragraph 1.13(g) of the General Policy on Information Gathering).

- We have set up a new cross-organisation forum to improve senior oversight of information gathering across Ofcom and provide a mechanism to better manage and prioritise requests and ensure our information gathering activities are proportionate (Paragraph 1.22 of the General Policy on Information Gathering).
- Where appropriate, an information notice may explain to stakeholders the criteria we used to determine the type or sub-set of stakeholders that have been sent a statutory information notice (Paragraph 1.17 of the General Policy on Information Gathering).
- Wherever possible, we will draw from existing internal and external information sources to avoid unnecessary duplication of effort and to minimise the burden on those from whom information is requested (Paragraph 1.10 of the General Policy on Information Gathering).
- We have explained that Ofcom will not accept unjustified or unsubstantiated claims of confidentiality, and that blanket claims of confidentiality covering entire documents or types of information are also unhelpful and will rarely be accepted (Paragraph 1.56 of the General Policy on Information Gathering).
- When we consider whether information is available from other sources or could be provided voluntarily (as part of our decision about whether to exercise an information gathering power), this includes whether the information may already be held by Ofcom (Paragraph 1.13(e) of the General Policy on Information Gathering).
- Where information that we intend to rely on as part of our decision making has been provided on a voluntary basis, we generally expect to use our statutory powers to confirm the information is accurate and complete. Further, we may also issue a statutory information notice when requesting customer or other information that may be commercially sensitive, including where a stakeholder asks us to request the information formally (Paragraph 1.15-1.16 of the General Policy on Information Gathering).
- Where we ask questions clarifying a stakeholder's response to a statutory information request, the response to those clarificatory questions is treated as a response to the relevant question in the associated statutory information notice, meaning we can take enforcement action for failing to comply with a request for clarification (Paragraph 1.31 of the General Policy on Information Gathering).
- We have clarified the circumstances in which it is likely to be appropriate to issue a statutory information notice without issuing a draft first, including but not limited to where we are asking for updates to information previously provided, where questions are the same as, or very similar to, questions previously asked, and where we are issuing a

similar statutory information notice to a large number of stakeholders, such that issuing a draft request is not practicable (Paragraph 1.34 of the General Policy on Information Gathering).

- We have made minor changes to provide further detail on how we will handle statutory information notices including:
  - the role of the Information Registry and how it coordinates information gathering for Ofcom;
  - where we may make use of information provided voluntarily;
  - typical processes including the issuing of draft statutory information notices;
  - use of information including disclosure and confidentiality;
  - record retention and personal data; and
  - information security.



# 3. Ofcom's general approach to online safety information gathering

## Summary of Section 3 of the Guidance

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- 3.1 Section 3 of the Guidance explains Ofcom's general approach to information gathering and addresses issues that are common to the exercise of all our information gathering powers under the Act. It covers:
- the purpose of our information gathering powers;
  - Ofcom's general duties;
  - how we will use these powers; and
  - how Ofcom will deal with confidential information, disclosure of information, personal data, information security and service of notices.

## General comments

### Stakeholder comments

- 3.2 Many of our stakeholder responses, including NSPCC, stated Ofcom must consider how we can create a culture that ensures we consistently use these powers to strengthen the regime<sup>9</sup>. OpenMined Foundation<sup>10</sup> told us it sees the Guidance as supportive to service providers and agreed that regulatory decisions need to be founded on a robust evidence base.
- 3.3 NSCPCC<sup>11</sup> supported our approach and the need for flexibility. Another stakeholder [redacted]<sup>12</sup> stated that information gathering must not be “tokenistic”, i.e. using our powers in a way to seem effective, without making lasting changes, and that our rationale should be explained. It acknowledged that some submissions to the Illegal Harms consultation criticised potential over-intrusion, but it expressed concerns that if information gathering powers were reduced or without substance there would be a lack of fulsome scrutiny on service providers.

### Our response

- 3.4 Applying the information gathering powers set out in the Act in an effective way is important for our regulatory functions under the Act. We are pleased this has been

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<sup>9</sup> [NSPCC](#) response to July 2024 consultation, page 1.

<sup>10</sup> [OpenMined Foundation](#) response to July 2024 consultation, page 1.

<sup>11</sup> [NSPCC](#) response to July 2024 consultation, page 1.

<sup>12</sup> [redacted]

acknowledged by some stakeholders, and we consider our Guidance will help stakeholders understand how we intend to use our powers.

- 3.5 We view our information gathering powers as a serious tool to investigate potential non-compliance and to help keep the public safe. We will determine on a case-by-case basis how best to apply our powers, and likewise how we explain our rationale for doing so.
- 3.6 The Guidance provides more detail on how we plan to use these powers and any impact this may have on services.

## Proportionality

### Stakeholder comments

- 3.7 One stakeholder [redacted]<sup>13</sup> said it is particularly encouraged by Ofcom's repeated commitment to proportionality, recognising the diverse operational scales of regulated service providers. Ofcom's willingness to consider the size and capacity of different services, along with its flexible approach to timelines for more complex requests, reflects an understanding of the challenges faced by medium-sized companies, where resources are limited (more context to this point can be found in the proportionality section).
- 3.8 Many stakeholders<sup>14</sup> raised points related to proportionality, calling for Ofcom to ensure that it adopts a proportionate and measured approach when exercising our powers to gather information. For example, there were calls to assess the impact our powers may have on smaller services and for confirmation that our powers will be used in a reasonable way.
- 3.9 The Federation of Small Businesses stated its understanding for a balance to be struck between the burden that is imposed on small businesses and Ofcom's ability to achieve its objectives.<sup>15</sup>
- 3.10 Google<sup>16</sup> requested clarification as to the meaning of 'stakeholder' within the Guidance. It queried whether this means the specific regulated service in question. Google also noted that where a company is responding to a request on behalf of multiple services, additional time may be required to respond to the request.
- 3.11 TechUK<sup>17</sup> also commented that Ofcom should not fish for information.
- 3.12 Ukie<sup>18</sup> which represents more than 700 game businesses, echoed these sentiments, suggesting that Ofcom should ensure the process is not overly intrusive or burdensome for small and medium sized services. Additionally, Ukie members argued that the most intrusive enforcement powers should be reserved for the most serious cases. It said that the potential for disproportionate demands that may overwhelm service providers, risk user privacy and data security was concerning. Another stakeholder [redacted] suggested that Ofcom could use informal information requests in the first instance, while assuring

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<sup>13</sup>[redacted]

<sup>14</sup> [UK Finance](#), [TechUK](#), [Meta Platforms Inc](#), [Google](#), [Ukie](#), [Children's Commissioner's Office](#), [Apple](#), each raised points regarding the proportionate use of the new powers in response to question 1 in our consultation, July 2024.

<sup>15</sup> [Federation of Small Businesses](#) response to July 2024 consultation, page 1.

<sup>16</sup> [Google](#) response to July 2024 consultation, page 1.

<sup>17</sup> [TechUK](#) response to July 2024 consultation, page 2.

<sup>18</sup> [Ukie](#) response to July 2024 consultation, page 1.

safeguards around data protection and confidentiality by using a mediation process for disputes.

- 3.13 The Children's Commissioner's Office<sup>19</sup> and UK Finance<sup>20</sup> had different feedback about the proportionality of our powers. They said that they view information gathering as a method of taking proactive steps to prevent harms, as opposed to being used retrospectively. They state they do not recognise inconvenience to businesses as a valid factor in deciding whether to use information gathering powers to ensure compliance. UK Finance suggested there is a risk of too much emphasis on service capacity, calling for the level of risk of harm to be the focus point when considering the proportionate use of our powers, in line with a risk-based approach method.
- 3.14 Similarly, The Children's Commissioner's Office<sup>21</sup> said Ofcom should not give undue weight to the costs to corporations of providing information for a regulatory purpose when determining whether it is appropriate or proportionate to exercise an information gathering power. It also said Ofcom should remove "reassurances made regarding the burdensomeness of regulatory regimes which are given at the expense of the intention of their regulatory purpose under the Act".

## Our response

- 3.15 We have considered the points raised by stakeholders. We have decided not to make material changes to the Guidance. We explain below how we think the Guidance addresses the comments made and set out some minor changes that we have made.
- 3.16 We have given careful consideration to how we will exercise our information gathering powers in a proportionate way. This is a key focus of the Guidance, as well as our General Information Gathering Policy.<sup>22</sup> We acknowledge the points stakeholders have raised about the impact that our powers may have on any service provider.
- 3.17 The starting point, as noted in paragraph 3.10 of our guidance, is that:
- "We 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. When faced with a choice of which of our information gathering powers to use, we will typically exercise the power that imposes the least burden on stakeholders without compromising our ability to fulfil our objectives."
- 3.18 The principle of proportionality is of central importance when exercising our information gathering powers. The underlying legislation reflects this. Ofcom may only issue information notices under sections 100(1) or 101(1) in a way that is proportionate to the use to which the information is to be used in the exercise of Ofcom's functions: see sections 100(4) and 101(4). Furthermore, in performing its principal duties under section 3(1) of the Communications Act, Ofcom is required to have regard to the principles under which regulatory activities should be (amongst other things) proportionate: see section 3(3)(a).<sup>23</sup>

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<sup>19</sup> [Children's Commissioner's Office](#) response to July 2024 consultation, page 1.

<sup>20</sup> [UK Finance](#) response to July 2024 consultation, page 2.

<sup>21</sup> [Children's Commissioner's Office](#) response to July 2024 consultation, page 1.

<sup>22</sup> [General Policy on Information Gathering](#)

<sup>23</sup> [Communications Act 2003, section 3](#)

- 3.19 We note that some stakeholders expressed concern about the use of our information gathering powers for ‘fishing’. We consider that the principle of proportionality ensures that the information we seek is proportionate to the way in which the information will be used in the exercise of our functions. Furthermore, as noted in Section 4 of the Guidance, when we issue an information notice under sections 100(1) or 101(1) we must set out why we require the information.<sup>24</sup> At 3.19 of the Guidance we have included information about how a stakeholder may raise concerns about the proportionality of the exercise of our information gathering powers.
- 3.20 We acknowledge stakeholders’ comments regarding the potential burden for small or medium sized stakeholders, as well as other comments suggesting there is a risk of too much emphasis on service capacity and inconvenience. The Guidance states 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. These include the feasibility and cost on the stakeholder involved in collating the information including the size or capacity of that stakeholder and the resources required to provide the information (see paragraph 3.12 of the Guidance). We do not think it is appropriate to ignore service provider size and capacity, but this is only one factor to be balanced against others including the regulatory purpose for which we need the information.
- 3.21 We acknowledge that it may not be proportionate to issue the same notice to the largest services and small services alike. As noted in the previous section, we have amended the Guidance to state that when deciding whether to exercise an information gathering power, we will consider (among other things) whether it may be appropriate to send the same notice to all stakeholders of a particular type; only send a notice to a sub-set of those stakeholders; and/or send a smaller or updated set of questions to some stakeholders.
- 3.22 We recognise the note of caution from the Children’s Commissioner’s Office. We do not believe the Guidance would compromise our ability to perform our functions. Where we carry out our functions, we will ensure that we take the necessary steps, including gathering the information that we need to take robust decisions.
- 3.23 We respond to other comments made by stakeholders below:
- i) The Guidance uses the term ‘stakeholder’ to refer to anyone who may be the subject of our information powers, such as information requests. This includes people other than regulated services in some circumstances (see Table 2.2 in the Guidance).
  - ii) There may be circumstances where we require a parent company to respond to requests on behalf of multiple subsidiaries. However, we will always use a proportionate approach, setting out the purpose of the request. We have not amended this in the Guidance so as to maintain a transparent and flexible process.
  - iii) Where a company is responding to a request on behalf of multiple services, we will set a deadline that is proportionate to the circumstances. We note in Section 4 of the Guidance that as a general rule we will issue statutory information notices in draft, and where we do so the recipient may provide comments on the practicability of providing the information in the proposed timescales.

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<sup>24</sup> Section 102(3)(b) of the Act.

iv) We do not think that it would be appropriate to use informal requests in the first instance in all cases. Our guidance sets out the circumstances in which we will generally obtain information using our statutory powers (paragraph 3.13). However, it also acknowledges that we often benefit from the provision of information on an informal or voluntary basis and sets out examples of when we may consider this appropriate (paragraph 3.20).

3.24 Lastly, we have made some changes to other chapters of our guidance to include cross references to make clear our commitment to use our powers proportionately, for example in the Audit, Entry and Inspection chapter of our guidance, chapter 7, paragraph 7.4.

## Confidentiality

### Stakeholder comments

3.25 The Federation of Small Businesses<sup>25</sup>, Apple<sup>26</sup> and another stakeholder [§<]<sup>27</sup> have told us that confidentiality should be considered on a case-by-case basis. Apple argued that in many cases, “entire documents are genuinely confidential and/or commercially sensitive”. It went on to say that the Guidance should recognise it will not always be appropriate or possible for services to identify specific text or parts of the document that are confidential; and where services are able to provide justifications for why the document is confidential this should not be refused.

3.26 The Federation of Small Businesses expressed concern about the detrimental impact on a service’s relationship with their suppliers and customers should confidentiality not be assured. This especially impacts upon small or medium sized business.

3.27 Google<sup>28</sup> highlighted that confidentiality is treated differently under the Freedom of Information Act 2000 (FOIA)<sup>29</sup> and Ofcom's approach appears to apply a higher bar to commercial prejudice than under that regime. Google asked for the Guidance to clarify that Ofcom will assess publication of information provided to it in connection with its online safety function against the requirements of the FOIA.

### Our response

3.28 We recognise information provided to Ofcom may be highly sensitive and why confidentiality is important to stakeholders. We also acknowledge stakeholders’ comments about reputational or market impact if confidential information is disclosed.

3.29 The Guidance states that recipients must provide the information that Ofcom requests, even if they consider that the information, or any part of it, is confidential (paragraph 3.28 of the Guidance). While stakeholders may withhold information that Ofcom has requested on the basis that it is legally privileged, they may not withhold information on the basis that it is confidential. Any confidential information provided to Ofcom is subject to restrictions on its further disclosure, as set out elsewhere in Section 3 of the

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<sup>25</sup> [Federation of small businesses](#) response to July 2024 consultation, page 2.

<sup>26</sup> [Apple](#) response to July 2024 consultation, page 1.

<sup>27</sup> [§<]

<sup>28</sup> [Google](#) response to July 2024 consultation, page 2.

<sup>29</sup> [FOIA The Information Commissioner’s Office provides guidance on the exemptions that may apply.](#)

Guidance. The Guidance also states that Ofcom will take into account representations made by recipients that certain information should be considered confidential (paragraph 3.29 of the Guidance). If stakeholders wish to make representations at the time they provide the information about the reputational or market impact that the disclosure of the information would have on them, they may do so. This is likely to help Ofcom determine whether or not information is confidential.

- 3.30 The Guidance also addresses the process we will generally follow when disclosing information (including confidential information) (from paragraph 3.41 of the Guidance). We will normally explain our intention to disclose the information (including the context in which we intend to disclose it) and give the relevant stakeholder an opportunity to make representations about the proposed disclosure. Therefore, stakeholders may also make representations about the reputational or market impact that the disclosure of the information would have on them at this stage. We address the disclosure of information further below.
- 3.31 In relation to Apple’s point about the confidentiality of entire documents, our draft Guidance stated that “blanket claims of confidentiality covering entire documents or types of information are unhelpful and unlikely to be accepted”. We have clarified that we do not accept unjustified or unsubstantiated claims of confidentiality – in other words, claims should be accompanied by an explanation of why the information is confidential. As noted in our Statement on our General Information Gathering Policy, we acknowledge some stakeholders may claim entire documents are confidential and have clarified that claims of confidentiality over whole documents will rarely be accepted. For example, we would expect stakeholders to consider whether the fact of the document’s existence or particular elements of the document (e.g. its title or metadata such as to/from/date/subject or other specific content) are not confidential. This reiterates the importance of identifying specific words, numbers, phrases or pieces of information considered to be confidential. We have amended our Guidance to make this clear. We note that we intend to introduce new templates for statutory information requests, which will include a summary of the confidentiality and disclosure process, to provide even greater clarity for stakeholders.
- 3.32 In relation to Google’s comment about how we have defined ‘confidential information’ for the purpose of the Guidance, we have adopted the definition used in section 149 of the Act. This section restricts Ofcom’s ability to publish confidential information when publishing details of enforcement action. The definition is 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. We consider this definition to be appropriate when considering more generally whether information obtained in connection with our online safety functions is confidential (even outside the context of enforcement action).
- 3.33 We accept FOIA contains a number of exemptions that, if satisfied, allow a public authority to withhold information from a requester. These include information provided in confidence (i.e. the disclosure of the information by the public authority would constitute a breach of confidence)<sup>30</sup> and information that is a trade secret or where its disclosure would, or would be likely to, prejudice the commercial interests of any

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<sup>30</sup> FOIA 2000, s 41(1).

person.<sup>31</sup> However, these provisions apply in a different circumstances, namely where Ofcom has received a request under FOIA for information and is considering whether the information is exempt from disclosure (and our Guidance notes the existence of FOIA exceptions at paragraphs 3.47 and 3.48 of the Guidance). But these definitions do not apply where Ofcom is considering whether to disclose information for other purposes. In any event, we think there is substantial overlap between the definition we have adopted and the FOIA exemption concerning information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person.

## Disclosure of information

### Stakeholder comments

- 3.34 Apple<sup>32</sup> and another stakeholder [redacted]<sup>33</sup> considered that Ofcom should not typically disclose confidential information to overseas regulators because it could be misinterpreted if reviewed out of context in a different jurisdiction with different regulations. They said that the Guidance should note that Ofcom will ordinarily engage with the service provider prior to sharing information with an overseas regulator.
- 3.35 One stakeholder [redacted] said the treatment of commercial and confidential data in highly sensitive areas, such as account holder privacy, is a significant concern. The stakeholder said that the Guidance should include a clear and transparent mediation process to resolve disputes about what constitutes confidential information. It said it has concerns that the decision rests with Ofcom and advocated for an independent review mechanism to ensure a balanced approach.
- 3.36 Meta Platforms Inc (Meta)<sup>34</sup> requested clarification on our Guidance regarding the disclosure of information without consent, in the form of examples of when Ofcom may consider disclosure to be necessary to facilitate the exercise of its online safety functions, and what factors Ofcom will consider when deciding whether to disclose information to an overseas regulator. Meta pointed to para 3.31 of the Guidance, and said it welcomes the opportunity to be consulted and make representations in advance of changing any approach to disclosing information. Meta also said that paras. 3.31 and 3.33 of the draft version of the Guidance appear duplicative.
- 3.37 One stakeholder [redacted] said that some parties will be concerned with sharing information with overseas regulators where there are different regulatory standards. It recommended Ofcom limit the sharing of information to countries with commensurate privacy laws to protect the integrity of service providers' operations across different markets, asking Ofcom to make clear any plans to interact with the CLOUD Act.<sup>35</sup>

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<sup>31</sup> FOIA 200, s 43(1)-(2).

<sup>32</sup> [Apple](#) response to July 2024 consultation. page 1 consultation July 2024 page 1.

<sup>33</sup> [redacted]

<sup>34</sup> [Meta Platforms Inc](#) consultation July 2024, page 2.

<sup>35</sup> "Clarifying Lawful Overseas Use of Data Act – [The CLOUD Act](#), authorises the United States to enter into agreements with other countries that remove restrictions under each country's laws as to ensure a covered service provider can also comply with qualifying and lawful orders seeking electronic data issued by the other country.

- 3.38 Google<sup>36</sup> made several comments in response to our text within the Guidance which stated Ofcom will normally give stakeholders the opportunity to make representations prior to any disclosure of information. Google said that where we do decide to publish or disclose confidential information, we should:
- a) give stakeholders a minimum of five business days to make confidentiality representations, to allow sufficient time for them to assess confidentiality risk, prepare for publication or to prepare a challenge to the publication decision,
  - b) only publish or disclose the minimum confidential information necessary.

## Our response

- 3.39 In this section we have separately addressed comments about: i) disclosing information to an overseas regulator, and ii) disclosing information generally.

### Disclosing information to an overseas regulator

- 3.40 We acknowledge the concerns raised regarding disclosing information overseas, and the complex nature of this topic. We have updated the Guidance to provide more information about protections that the Act provides in relation to disclosure to overseas regulators.<sup>37</sup> The Guidance goes on to state that Ofcom can only disclose information to overseas regulators which are specified in the regulations made by the Secretary of State (SoS). Furthermore, under the Act where we disclose information to an overseas regulator, they must not use that information for a purpose other than the purpose for which it was disclosed, or further disclose that information, except with Ofcom's consent or in accordance with an order of a court or tribunal.<sup>38</sup>
- 3.41 We do not consider it appropriate for Ofcom to assess the domestic privacy laws which would apply to any overseas regulator that Ofcom proposed to disclose information to. We note that one of the purposes of this framework is to ensure that Ofcom is able to share information in an efficient manner.<sup>39</sup> Furthermore, in making the order specifying the overseas regulators to which Ofcom can disclose information, the Government jurisdiction that empowers them, upholds international human rights".<sup>40</sup>

### Disclosing information generally

- 3.42 Having considered stakeholders' comments, we do not think it is necessary to make significant changes to the Guidance regarding the disclosure of information. We consider that many of the points made by stakeholders are already addressed in the Guidance. For example, we state that:
- i) an example of a situation in which disclosure may facilitate the carrying out of our functions is where disclosure will ensure stakeholders can properly understand the basis for our reasoning (paragraph 3.34 of the Guidance);
  - ii) before disclosing information, we will normally explain our intention to disclose and give the person who provided the information an opportunity to make representations. We will carefully balance the need to disclose the relevant

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<sup>36</sup> [Google](#) response to July 2024 consultation, page 2.

<sup>37</sup> see 3.36 of the Guidance.

<sup>38</sup> The Online Safety Act 2023, s114(3)

<sup>39</sup> [Online Safety \(List of Overseas Regulators\) Regulation - Hansard - UK Parliament](#).

<sup>40</sup> [The Online Safety \(List of Overseas Regulators\) Regulations 2024](#), Explanatory Memorandum, paragraph 7.5.



- information against any concerns or objections raised by the person who provided the information in relation to its disclosure (paragraphs 3.41-3.42 of the Guidance);
- iii) where we decide the information does not need to be disclosed in full but consider it appropriate to include some information in a proposed disclosure, we may ask the person who provided the information to provide a summary of the information or range of numbers (paragraph 3.44 of the Guidance);
  - iv) we do not expect to disclose any personal data unless we are satisfied that we have a legal basis to do so, for example because one of the statutory gateways for disclosure applies (paragraph 3.56 of the Guidance).
- 3.43 We have decided not to update the Guidance with specific time frames for representations on disclosure. However, we will allow a reasonable time determined on a case-by-case basis. As noted in the Guidance, where we propose to disclose information over an objection, we will give the person advance warning prior to making the disclosure. This will give them an opportunity to challenge our decision or raise the issue with the Procedural Officer, where relevant.<sup>41</sup> We do not consider it proportionate to have any additional mediation or dispute resolution mechanism beyond the circumstances in which the Procedural Officer has a role.
- 3.44 We have amended paragraph 3.42 of the Guidance to set out an example of a circumstance in which it may not be appropriate to give prior notice of our intention to disclose information. This is where we are disclosing information to an overseas regulator for the purpose of an overseas criminal investigation relating the overseas regulator’s online regulatory functions and giving notice of our intention to disclose the information to the overseas regulator could prejudice their investigation.
- 3.45 As noted at paragraph 3.55 below, we have included links to ICO guidance on lawful basis for processing of information at paragraph 3.55 of the Guidance.

## Other comments regarding our general approach to exercising our information gathering powers

### Stakeholder comments

- 3.46 Meta<sup>42</sup> highlighted paragraph 3.17 of the Guidance, which said: “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)”. Meta stated this paragraph suggests that Ofcom will issue an information notice requiring the provider to generate or obtain information where Ofcom were already aware this would be unavailable, thereby exposing the provider to potential regulatory and criminal liability.
- 3.47 Meta also said it would welcome explicit confirmation that, where a recipient has previously requested that a particular form of service is used for some or all such notices (for example, to a specific email address), Ofcom will use this form of service in the first instance.

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<sup>41</sup> Section 10 of our [Online Safety Enforcement Guidance](#) explains when a procedural complaint can be referred to Ofcom’s Procedural Officer and the process for doing so.

<sup>42</sup> [Meta Platforms Inc](#) response to July 2024 consultation, page 2.

- 3.48 In relation to the section of the Guidance where we refer to any change in purpose for which information is to be used, Meta requested explicit confirmation that Ofcom’s decision as to whether to send another notice will be informed by the recipient’s reasons for withholding consent. This is to ensure that where the recipient has, for example, 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.
- 3.49 NSPCC acknowledged our reasons for not publishing information notices, but raised the point that those outside Ofcom need to be able to understand the way tech companies are complying with regulation. It also urged Ofcom to consider how it will take a transparent approach to how information powers are used and what decision or decisions exercising the powers has informed. Similarly, another stakeholder [redacted]<sup>43</sup> said it believes Ofcom should publish each information notice (including the nature and status of the process) because this will aid transparency and accountability, suggesting this could be done through the Information Registry.

### Our response

- 3.50 In relation to Meta’s comment about the use of formal powers where a stakeholder has voluntarily told us it cannot generate information or does not have certain information, we accept that stakeholders will not always have or be able to generate information that we have asked for. We may nevertheless use our formal powers to obtain confirmation of this. It can be important to obtain this confirmation in response to a formal notice, given that respondents are under a legal duty to ensure responses are accurate and there are serious consequences of failing to comply with an information notice. Further, paragraph 4.32 of the Guidance acknowledges that if a recipient does not have some or all of the information requested then they should explain why and describe what searches have been carried out to check whether the information is available to them. A stakeholder that provides accurate information about why they cannot provide information requested will not be exposed to penalties.
- 3.51 We will seek to have constructive dialogue with stakeholders whenever we use our information gathering powers. Where a stakeholder has not consented to the use of information for a different purpose, and we are considering whether to exercise our formal powers to obtain the same information, we will take into account all relevant factors including (as noted at paragraph 3.12) the purpose for which we need the information; the use for which we intend to rely on the information; and whether the information is available from other sources or could be provided voluntarily. We do not think the Guidance should be updated with specific examples beyond this to allow for a flexible approach.
- 3.52 There were a variety of views expressed on how we should publish each notice. We acknowledge that some stakeholders would like us to publish every notice, but we do not think this would not be appropriate or proportionate and this is not our practice in other sectors. We will use information obtained under these powers to support our regulatory functions and drive compliance where appropriate and necessary. We will provide clarity as to the performance of our functions by publishing our regulatory

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<sup>43</sup> [redacted]

consultations and statements and our enforcement decisions. In accordance with the principle of transparency, and to ensure fairness to our stakeholders, these documents set out the evidence upon which we have based our decisions or proposals.<sup>44</sup>

- 3.53 We confirm that where a stakeholder has requested that a particular form of service is used (for example, to a specific email address), Ofcom will use this form of service, provided the legislative provisions on service permit this. As noted at paragraph 4.19 of the Guidance, the Information Registry maintains up-to-date stakeholder information, including contact details.

## User privacy

### Stakeholder comments

- 3.54 Five stakeholders<sup>45</sup> [redacted] expressed concerns about the potential impact on user privacy arising from Ofcom issuing an information notice under section 100(1) (an information notice requiring a test or demonstration) or section 100(3) (a Remote Viewing Information Notice) of the Act.
- 3.55 Google and TechUK said that clear criteria and safeguards should be in place to protect user privacy. Another respondent [redacted] encouraged Ofcom to work with recipients to minimise risks to personal user data.<sup>46</sup>
- 3.56 The ICO noted that an Information Notice may require services to disclose personal data to Ofcom and welcomed Ofcom's inclusion of references to data protection law compliance throughout the Guidance. It encouraged Ofcom to continue to refer stakeholders to relevant ICO guidance resources where appropriate and stated that it is happy to work with Ofcom to identify appropriate ICO resources. The ICO noted that recipients are required, under Article 6 of the UK General Data Protection Regulation (UK GDPR),<sup>47</sup> to determine the lawful basis for processing personal data. It requested that Ofcom updates the Guidance to include a reference to the Guidance<sup>48</sup> to ensure recipients are signposted.

### Our response

- 3.57 We acknowledge the points raised regarding the impact on user privacy. As noted at paragraph 3.54 of the Guidance, in all cases we will seek to limit the personal data we require to that which is necessary for the performance under the Act. This is consistent with the 'data minimisation' principle in the UK GDPR, to which we are subject. Furthermore, paragraph 3.12 sets out a number of factors that we will generally take

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<sup>44</sup> Unless disclosure of this evidence is prohibited, for example by section 393 of the Communications Act.

<sup>45</sup> The five stakeholder responses included [The Information Commissioner's Office](#) response to July 2024 consultation, page 3

[redacted]

[redacted]

and [Google](#), response to July 2024 consultation, page 7.

<sup>46</sup> [Google](#), response to July 2024 consultation, page 7. [TechUK](#) response to July 2024 consultation, page 3

<sup>47</sup> The 'UK GDPR' is defined in section 3(1) of the Data Protection Act 2018 as 'Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4))'.

<sup>48</sup> [ICO Lawful Basis Guidance](#).

into account when exercising our information gathering powers, including impacts on a person's right to privacy in relation to the information we are seeking. In relation to Remote Viewing Information Notices, the Guidance acknowledges at paragraph 4.64 that it is possible that the information we seek to remotely view may include personal data; and that we will discuss with the recipient of our information notice what personal data (if any) we consider relevant for the purpose of our functions, and practical arrangements to ensure that, to the extent possible, we are not viewing personal data that is unlikely to be relevant. We provide further details about our approach to Remove Viewing Information Notices, which touches on data protection considerations, in the next section.

- 3.58 In line with the ICO's suggestion, we have updated the Guidance to include a reference to the ICO's Lawful Basis Guidance, see paragraph 4.64.

# 4. Information notices

## Summary of Section 4 of the Guidance

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- 4.1 An information notice is a means through which we formally gather the specific information we need to carry out our functions.
- 4.2 Section 100(1) of the Act grants Ofcom the power to issue a notice requiring any person to provide information that we require to exercise, or to decide whether to exercise, any of our online safety functions. This may include a requirement to:
- i) obtain or generate information;
  - ii) provide information about the use of a service by a named individual.
- 4.3 Section 100(3) of the Act provides that, as part of our power to issue an information notice under sub-section (1), we may require a recipient to take steps to allow a person authorised by Ofcom to remotely view certain information in real time, for example tests and demonstrations. We refer to this type of information notice as a Remote Viewing Information Notice.
- 4.4 Section 101(1) of the Act grants us a power to request information from providers of regulated services, and certain others, for the purpose of responding to a request for information from certain authorities in connection with an investigation into the death of a child. Those authorities are a senior coroner (in England and Wales), a procurator fiscal (in Scotland) or a coroner (in Northern Ireland). We refer to these authorities as ‘Coroners’ and refer to this type of notice as a Coroner Information Notice.
- 4.5 Section 103 of the Act grants us a power to include a requirement in an information notice issued to a provider of a regulated service under sections 100 or 101 of the Act to name a senior manager who may reasonably be expected to ensure compliance with the requirements of the notice.
- 4.6 Section 4 of the Guidance provides further detail about the different types of information notices including when and how we may exercise these powers.

## Draft information notices

### Stakeholder comments

- 4.7 TechUK suggested that Ofcom should commit to always sending draft information notices, so that providers can comment and engage with Ofcom before a final notice is issued.<sup>49</sup> One other stakeholder [redacted]<sup>50</sup> also stressed the importance of sending draft requests.

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<sup>49</sup> [TechUK](#) response to July 2024 consultation, page 3.

<sup>50</sup> [redacted]

- 4.8 Google<sup>51</sup> and Meta<sup>52</sup> suggested that the circumstances listed within the Guidance where we have indicated that a draft information notice may not be issued are unduly broad.
- 4.9 One stakeholder [S<]<sup>53</sup>, disagreed that services should be sent a draft information notice, and expressed concerns that this could offer providers an undue advantage by providing advance notice that they are under scrutiny. It suggested that draft information notices may lead to the suppression of information or concealment of relevant information, which could undermine the power of the information notice issued.

## Our response

- 4.10 As a general rule, we will send a draft information notice to stakeholders to ensure our requests are targeted and sufficiently clear for the recipient to respond within the proposed timeframe. This helps to ensure we receive the information we need to carry out our functions, as explained in the Guidance from paragraph 4.24. However, there are times where it may not be appropriate for Ofcom to send a draft information notice.
- 4.11 We understand the need to be as transparent as possible with stakeholders about when this might happen. We have made some changes to the examples of where it may be appropriate to issue a statutory information notice without first issuing a draft notice listed at paragraph 4.26 of the Guidance. These changes have been made to mirror our General Policy on Information Gathering.<sup>54</sup>
- 4.12 The examples are intended to be flexible to allow us to consider the individual circumstances in which we might use our powers and so narrowing these examples, as proposed by Google<sup>55</sup> and Meta,<sup>56</sup> is not appropriate.
- 4.13 We understand the concerns by one stakeholder [S<] that sending a draft information notice could lead to the suppression of information. However, as set out in this section of the Guidance, one of the circumstances in which we are unlikely to issue an information notice in draft is when prior notice of an information notice may not be appropriate due to concerns relating to the destruction of documents. We also note for completeness that, after we have issued a final notice, there are significant consequences for non-compliance with a statutory information notice. It is also a criminal offence for the provider of a regulated service to intentionally prevent information from being provided by suppressing, destroying or altering the information or document (or causing or permitting this to happen). These consequences and offences are explained within every draft information notice issued to services to encourage full compliance. We set out further details in Section 8 of the Guidance.

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<sup>51</sup> [Google](#), response to July 2024 consultation, page 7.

<sup>52</sup> [Meta Platforms Inc](#), response to July 2024 consultation, page 6.

<sup>53</sup> [S<]

<sup>54</sup> [Ofcom's general policy on information gathering](#).

<sup>55</sup> [Google](#), response to July 2024 consultation, page 7.

<sup>56</sup> [Meta Platforms Inc](#), response to July 2024 consultation, page 3.

## Test and demonstrations

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- 4.14 Section 4 of the Guidance covers the considerations for section 100(1) notices requiring the performance of a test. The Guidance covers:
- i) the parameters of the test;
  - ii) test datasets;
  - iii) test environments; and
  - iv) information generated by the test.

### Test datasets

#### Stakeholder comments

- 4.15 Several respondents suggested that a recipient of an information notice requiring a test or demonstration (including as part of a Remote Viewing Information Notice) may encounter difficulties generating a suitable test dataset for the performance of a test or demonstration of systems, processes or features including functionalities and algorithms.
- 4.16 Google<sup>57</sup> stated that if a service provider is required to conduct a test using a dataset derived from its service, it would require more than seven calendar days to generate the required information and to do so in a way that complies with relevant data protection obligations.
- 4.17 One respondent [redacted]<sup>58</sup> noted that recipients may find it difficult to generate a test dataset that meets the criteria specified by Ofcom. This could be due to the technical complexity of systems, recipients having no means of identifying relevant demographic characteristics of users and/or data protection considerations. It [redacted] also requested that Ofcom update the Guidance to clarify that it will discuss the proposed criteria for test datasets with recipients.

#### Our response

- 4.18 We recognise that service providers will require sufficient time to generate a test dataset that is appropriate, suitable and relevant for the specific issues we are considering. This is the case whenever we have required a test or demonstration, whether or not we also include a remote viewing requirement under section 100(3).
- 4.19 We note that the Act requires Ofcom to provide recipients of a Remote Viewing Information Notice with at least seven calendar days' notice before requiring the test or demonstration to take place. This is the minimum statutory notice, but we recognise that recipients may require longer to comply with such a request depending on the circumstances. In contrast there is no equivalent notice period where we require a test or demonstration without a remote viewing requirement under section 100(3). However, in all circumstances we will exercise our powers in a proportionate manner, including as to the deadline to comply. Further, as noted at paragraph 4.24, we will generally issue an information notice in draft and give recipients an opportunity to

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<sup>57</sup> [Google](#) response to July 2024 consultation, page 10.

<sup>58</sup> [redacted]

comment on the practicability of providing the information within the proposed timescales.

- 4.20 In response to the feedback we received, we have decided to update the Guidance to clarify that, in most cases, we will discuss the criteria for datasets to ensure these are clear in advance of requiring a test or demonstration to take place (see paragraph 4.43).
- 4.21 We note one stakeholder's view around the potential difficulty in generating datasets for the purposes of a test or demonstration. As noted above, we generally expect to discuss aspects of the test with recipients in advance to ensure they are able to comply with their legal requirements.
- 4.22 We have also updated the Guidance to simplify the example of a circumstance in which we may ask a recipient to conduct a test using a test dataset provided by Ofcom (see paragraph 4.44).

## Parameters of the test

### Stakeholder comments

- 4.23 Paragraph 4.41 of the Guidance notes that Ofcom will generally discuss the proposed parameters of a test or demonstration with recipients, by for example, issuing an information notice in draft form. One respondent [redacted]<sup>59</sup> requested that Ofcom explicitly confirm that it will discuss all parameters in advance. The Federation of Small Businesses<sup>60</sup> similarly requested that Ofcom set out the parameters of any test or demonstration in a draft notice.

### Our response

- 4.24 Paragraph 4.41 of the Guidance states that we will typically outline, in the information notice, the parameters of the test or demonstration that we are requiring the recipient to perform. It also states that we will generally discuss the proposed parameters with the recipients (by, for example, issuing the notice in a draft) to ensure they are clear. We have decided it is not necessary to update the Guidance in response to the comments raised by stakeholders.

## Testing on live user data

### Stakeholder comments

- 4.25 Two respondents expressed concern about Ofcom requiring stakeholders to conduct tests or demonstrations on live user data. Google suggested that, for privacy and security reasons, any test or demonstration should only involve the use of test datasets rather than the live provision of the service or live user data. It requested that Ofcom amend paragraph 4.46 of the Guidance to state that testing cannot be carried out on live users.<sup>61</sup> Another respondent [redacted]<sup>62</sup> noted the potential negative impact on users' trust should Ofcom be able to require tests or demonstrations on live user data.

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<sup>59</sup> [redacted]

<sup>60</sup> [Federation of Small Businesses](#) response to July 2024 consultation, page 3.

<sup>61</sup> [Google](#) response to July 2024 consultation, page 10.

<sup>62</sup> [redacted]



- 4.26 Another respondent [redacted]<sup>63</sup> encouraged Ofcom to retain the ability to perform tests and demonstrations on live user data.

### Our response

- 4.27 We acknowledge stakeholders' concerns that such a test or demonstration could impact the live service being delivered to users. In recognition of the feedback we have received, we have decided to amend paragraph 4.46 of the Guidance to clarify that:

Where a test environment is available, we expect to request that a test or demonstration is undertaken in this environment unless there are specific reasons why this would not be feasible or appropriate in a given case. We expect such cases to be exceptional.

However, if a test environment is unavailable or unsuitable, we may request the performance of a test using the server that is used to deliver the 'live' service. This could involve using either a test dataset which is derived from the service or one that is not. A test using the server used to deliver the 'live' service might impact the 'live' service being delivered to users. For example, a test or demonstration conducted on the server used to deliver the live service may have limited impacts on user experience, such as increased latency. We will only take this approach where we are satisfied that it is proportionate (in accordance with the principles set out from 3.10 of the Guidance) taking account of the potential impact on users.

- 4.28 We also recognise that, where we request the performance of a test using the server that is used to deliver the live service, any data processing by the recipient of the information notice would need to comply with data protection law.

## International data protection law

### Stakeholder comments

- 4.29 Google requested that Ofcom update paragraph 4.56 of the Guidance to make clear that an information notice (including a Remote Viewing Information Notice) requiring a test or demonstration cannot require a recipient to breach any applicable international data protection laws.<sup>64</sup>
- 4.30 Another respondent [redacted] noted that the Act has wider application beyond the UK and that Ofcom needs to be able to perform its regulatory functions "regardless of jurisdiction".

### Our response

- 4.31 We recognise that recipients of an information notice requiring the performance of a test or demonstration may operate services internationally and need to comply with relevant data protection legislation in multiple jurisdictions. Paragraph 3.17 of the Guidance states that, to the extent possible, Ofcom will take account of any legislation which may restrict the ability of a stakeholder to provide certain information to us. However, it will be the responsibility of the person subject to the information power to

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<sup>63</sup> [redacted]

<sup>64</sup> [Google](#) response to July 2024 Consultation, page 10.

draw any such legislation to our attention and to explain how it restricts the recipient's ability to respond.

## Impact on small businesses

### Stakeholder comments

- 4.32 The Federation of Small Businesses welcomed Ofcom's consideration of the resources and ability of a recipient to perform a test or demonstration. It encouraged Ofcom to take into account the software and technology a recipient may be using to deliver services.<sup>65</sup>

### Our response

- 4.33 We acknowledge the Federation of Small Businesses' concerns about the ability of smaller businesses to perform a test or demonstration of the kind required under section 100(1) (including as part of a Remote Viewing Information Notice under section 100(3)) of the Act. We will consider on a case-by-case basis whether exercising these powers would be proportionate and, in line with our regulatory principles, seek to use the least intrusive methods of obtaining the information we require for the performance of our regulatory objectives. The factors that we will generally take into account are explained at paragraph 3.12 of the Guidance.

## Remote Viewing Information Notices

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- 4.34 Section 4 of the Guidance covers specific considerations for Remote Viewing Information Notices under section 100(3).

## Proportionality and limits on exercising the power

### Stakeholder comments

- 4.35 Two respondents [redacted]<sup>66</sup> [redacted]<sup>67</sup> expressed concerns about the potentially intrusive nature of a Remote Viewing Information Notice. Google<sup>68</sup>, TechUK<sup>69</sup> and other stakeholders emphasised that the use of this power should be sparing and proportionate, only used when necessary and in a targeted way to avoid a burdensome process. Google also suggested that when exercising this power Ofcom undertakes an impact assessment to determine the impact on user privacy and any adverse effects on the use of the service by users.<sup>70</sup> Google also asked Ofcom to confirm that it has no ability to interfere with or access the service when exercising this power.<sup>71</sup>
- 4.36 Several stakeholders said that a Remote Viewing Information Notice should only be used in a limited set of circumstances.

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<sup>65</sup> [Federation of Small Businesses](#) response to July 2024 consultation, page 3.

<sup>66</sup> [redacted]

<sup>67</sup> [redacted]

<sup>68</sup> [Google](#) response to July 2024 consultation. page 6.

<sup>69</sup> [TechUK](#) response to July 2024 consultation, page 2.

<sup>70</sup> [Google](#) response to July 2024 consultation, page 9.

<sup>71</sup> [Google](#) response to July 2024 consultation, page 8.

- 4.37 Google requested that Ofcom clarifies that a Remote Viewing Information Notice will only be used as a last resort and when no other means of obtaining the relevant information exist.<sup>72</sup> Two respondents [redacted]<sup>73</sup> suggested that the power should only be used when Ofcom has serious concerns that a service is not complying with specific requirements of the Act or when Ofcom has not been able to obtain the relevant information via other means, such as a performance of a test or demonstration under section 100(1) of the Act.<sup>74</sup> TechUK said that Ofcom should ensure that a Remote Viewing Information Notice should only be used when absolutely necessary.<sup>75</sup>
- 4.38 One stakeholder [redacted] welcomed Ofcom’s clarification that a Remote Viewing Information Notice would typically be reserved for more serious or complex cases.<sup>76</sup> Another stakeholder [redacted]<sup>77</sup> suggested that Ofcom should retain the discretion to use the power in a wider set of circumstances.

## Our response

- 4.39 We acknowledge that a Remote Viewing Information Notice is a novel power and understand stakeholders’ concerns about it. However, as per paragraph 4.62 of the Guidance, this power (as it applies in connection with tests or demonstrations) is limited to remotely viewing information generated by the performance of a test or demonstration and in no circumstances would Ofcom be able to directly control the service, even where we are requiring the performance of a test using the ‘live’ service environment.
- 4.40 In response to Google’s suggestion that when exercising this power we should conduct an impact assessment to determine the impact on user privacy and any adverse effects on the use of the service by users, we set out in Section 3 of the Guidance our approach to exercising our information gathering powers. This includes that we will generally take account of a range of factors including the impact on the person who would be subject to the power and other relevant persons e.g. impact on a person’s right to privacy in relation to the information we are seeking. We also set out our approach to personal data, including that we will seek to limit the personal data which we require to that which is necessary for the performance of our functions under the Act. Section 4 of the Guidance also sets out additional factors which are specific to Remote Viewing Information Notices, to ensure that the use of this power is proportionate. This is in line with our regulatory principles which seek the least intrusive regulatory methods of achieving our objectives. Finally, we have considered the way in which our information gathering powers could impact human rights in the impact assessment in Section 9 of this Statement.
- 4.41 Furthermore, in response to stakeholders’ comments about the potential intrusiveness of the power, we note that paragraph 4.59 of the Guidance states that we do not expect

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<sup>72</sup> [Google](#) response to July 2024 consultation, page 9; [redacted]

<sup>73</sup> [redacted]

<sup>73</sup> [redacted]

<sup>74</sup> [redacted]

<sup>75</sup> [Tech UK](#), response to July 2024 consultation, page 3.

<sup>76</sup> [redacted]

<sup>77</sup> [redacted]

to issue a Remote Viewing Information Notice as often as we expect to exercise our more general information notice powers, and the use of this power will typically be reserved for more serious or complex cases, and do not consider it necessary or appropriate to elaborate on this further.

## Resource implications

### Stakeholder comments

- 4.42 Two stakeholders [redacted]<sup>78</sup> expressed concerns about the resources required to comply with a Remote Viewing Information Notice, highlighting the burden it could place on recipients.<sup>79</sup>
- 4.43 The Federation of Small Businesses<sup>80</sup> welcomed Ofcom’s consideration of using a Remote Viewing Information Notice to obtain the information it requires, rather than exercising its formal audit and inspection powers under Schedule 12 of the Act.
- 4.44 As referenced previously, in paragraph 4.16 of this chapter, Google<sup>81</sup> requested that Ofcom updates paragraphs 4.41 and 4.57-4.60 of the Guidance to clarify that, if a service is required to conduct a test using a dataset derived from its service, it would require more than seven calendar days to generate the required information and to do so in a way that complies with relevant data protection obligations.

### Our response

- 4.45 We acknowledge stakeholders’ concerns about the resources required to perform a test or demonstration required by a Remote Viewing Information Notice. We will consider proportionality on a case-by-case basis when exercising this power and ensure, in line with our regulatory principles, that we will seek to use the least intrusive method of obtaining the information we require.
- 4.46 The factors that we will generally take into account are explained at paragraph 3.12 and 4.58 of the Guidance. These include the cost to the stakeholder and the complexity of the systems, processes or features that Ofcom is considering, or of the test or demonstration that Ofcom requires to be performed.
- 4.47 Further, in our view, a demonstration or test with a remote viewing requirement is not necessarily likely to be more resource intensive for the recipient than simply performing a demonstration or test without a remote viewing notice. This is because when remotely viewing a demonstration or test, Ofcom can address queries raised by the recipient in real time. This may reduce the need for further correspondence or meetings which delay the performance of the demonstration or test.
- 4.48 We note that the Act requires Ofcom to provide recipients of a Remote Viewing Information Notice with at least seven calendar days’ notice before requiring the test or demonstration to take place. This is the minimum statutory notice, but we recognise that recipients may require longer to comply with such a request depending on the nature of the issues we are assessing. Further, as noted at paragraph 4.19 above, we will

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<sup>78</sup> [redacted]

<sup>79</sup> [Google](#) response to July 2024 consultation, page 9; [redacted]

<sup>80</sup> [Federation of Small Businesses](#) response to July 2024 consultation, page 3.

<sup>81</sup> [Google](#) response to July 2024 consultation, page 10.

generally first provide an information notice (including a Remote Viewing Information Notice) in draft and give recipients an opportunity to comment on the practicability of providing the information within the proposed timescale, before issuing the final notice.

## Privacy, data security and integrity of systems

### Stakeholder comments

- 4.49 Three stakeholders [redacted], Google and ICO, highlighted potential negative impacts on data security arising from the use of a Remote Viewing Information Notice and the associated need to maintain the integrity of recipients' systems.
- 4.50 One of these stakeholders [redacted]<sup>82</sup> suggested that Ofcom should put in place robust protections to guard against unauthorised access and the misuse of sensitive information.
- 4.51 Google highlighted potential security issues arising from the use of a Remote Viewing Information Notice, particularly in circumstances where Ofcom is accessing commercially sensitive information or information that could be used by bad actors to game its systems.<sup>83</sup>
- 4.52 The ICO highlighted the risks a Remote Viewing Information Notice could pose to the integrity, availability and resilience of a recipient's systems and processes.<sup>84</sup> It suggested that Ofcom updates the Guidance to recommend that services consult the ICO's "A Guide to Data Security" guidance when complying with a Remote Viewing Information Notice.
- 4.53 TechUK<sup>85</sup> also told us it thinks remote viewing has risks to user privacy and security threats to the functionality of the site. It requested clarification about how this power will be used and suggested implementing guardrails to prevent misuse. It added that addressing these concerns is essential to strike a balance between effective regulatory oversight and protecting user privacy and the functionality of online services.

### Our response

- 4.54 We acknowledge stakeholders' concerns about the potential risks to data security. Ensuring information is appropriately protected is central to Ofcom's work and our reputation as the UK's communications regulator. The security of commercially confidential and sensitive personal information provided to Ofcom is something we take extremely seriously.
- 4.55 We refer stakeholders to paragraph 3.31 of the Guidance which explains the limited circumstances in which Ofcom may disclose information we have obtained via use of our online safety information gathering powers. We will also seek consent, or re-request information, if we want to use information gathered for a different purpose than that originally specified. We also note that it is a criminal offence for a person to disclose information in contravention of section 393 of the Communications Act.

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<sup>82</sup> [redacted]

<sup>83</sup> [Google](#) response to July 2024 consultation, page 9.

<sup>84</sup> [ICO](#) response to July 2024 consultation, page 3.

<sup>85</sup> [TechUK](#) response to July 2024 consultation, page 2.

- 4.56 Paragraph of 4.62 of the Guidance makes clear that Ofcom will not be able to directly control the service, even where we are requiring the performance of a test using the ‘live’ service environment. Nor could we require companies providing infrastructure services to create the means to weaken or circumvent cybersecurity measures such as encryption. Furthermore, we will not be able to directly alter any aspect of the service or testing infrastructure, as any test required by Ofcom would be performed by the employees of the service itself.
- 4.57 Regarding TechUK’s points about our remote viewing power causing risks to user privacy and security threats to the functionality of the site, we appreciate the importance of security and privacy for stakeholders and users and understand stakeholders’ request for reassurance on this point. We recognise that several stakeholders have sought clarity on the practical process for exercising our Remote Viewing Information Notice power. We have therefore decided to update the Guidance to explain that we generally envisage that it will be sufficient for us to conduct remote viewing via a simple ‘screen-sharing’ mechanism, by for example using a video calling application. This can be found at paragraph 4.60 of the Guidance. The Guidance also includes a number of paragraphs regarding our approach to data protection considerations, including that: we will seek to limit the personal data which we remotely view to that which is necessary for the performance of our functions; we will discuss with the recipient what personal data (if any) we consider relevant for the purpose of our functions; and we will discuss practical arrangements to ensure that, to the extent possible, we are not viewing personal data that is unlikely to be relevant. Further, in most cases, we expect to require recipients to provide information generated by a test or demonstration in a high-level, aggregate form, as specified in the notice. We have amended the Guidance to refer stakeholders to the ICO’s “[A Guide to Lawful Basis](#)” and “[A Guide to Data Security](#)”, which they may find helpful.

### Stakeholder comments

- 4.58 One stakeholder [redacted]<sup>86</sup> requested that Ofcom clarify what ‘viewing information in real time’ entails. It also requested that Ofcom confirm whether it principally intends to use Remote Viewing Information Notices to view the operation of algorithms and algorithmic systems.
- 4.59 OpenMined said that the mechanisms used to view information will have a significant impact on the effectiveness of Ofcom’s online safety information gathering powers.<sup>87</sup> It provided details of an alternative means of viewing information generated by a test or demonstration via a method known as ‘remote execution’.

### Our response

- 4.60 We recognise that several stakeholders have sought clarity on the practical process for exercising our Remote Viewing Information Notice power. We have therefore decided to update the Guidance to explain that we generally envisage that it will be sufficient to

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<sup>86</sup> [redacted]

<sup>87</sup> [OpenMined](#) response to July 2024 consultation, page 4.

conduct remote viewing via a simple ‘screen-sharing’ mechanism, by for example using a video calling application.<sup>88</sup>

- 4.61 We note that one stakeholder asked Ofcom to clarify whether it primarily intends to use a Remote Viewing Information Notice to view the operation of algorithms and algorithmic systems. We refer to section 100 of the Act which clarifies that this power can be used to remotely view a demonstration (and information generated) in real time of the operation of systems, processes, or features, including functionalities and algorithms used by the service.<sup>89</sup>

## Data retention

### Stakeholder comments

- 4.62 Google suggested that open-ended tests could amount to a form of surveillance on users and requested that the Guidance clarifies how long Ofcom could view the data obtained via a test or demonstration. It also requested that Ofcom confirms it is under a legal obligation to ensure the information obtained via a Remote Viewing Information Notice is protected from disclosure and cannot be disclosed without the recipient’s prior consent.<sup>90</sup>
- 4.63 One respondent [redacted]<sup>91</sup> suggested that Ofcom’s Information Registry maintains a record of when we have exercised our Remote Viewing Information Notice powers.

### Our response

- 4.64 There are a number of elements to Google’s comment. In relation to the duration of a particular test or demonstration and (if relevant) the remote viewing of that test or demonstration, this will depend on the circumstances and therefore we have not amended the Guidance to address this point. We do not expect to require providers to conduct open-ended or continuous tests or demonstrations. We will limit the duration of tests or demonstrations to that which is necessary and proportionate. However, in some circumstances it may be necessary to re-run a test or demonstration at a later date. For example, we may wish to assess the effectiveness of any remedial action taken in response to a specific compliance concern.
- 4.65 In relation to Ofcom’s retention of information obtained via a test or demonstration, the Guidance notes at paragraph 4.49 (in the context of a test or demonstration without a remote viewing element) that the recipient must provide to Ofcom the information generated in accordance with the parameters set out by Ofcom in the notice. Paragraph 4.50 also notes that, in most cases, we expect to require recipients to provide information generated by a test or demonstration in a high-level, aggregate form. In relation to a Remote Viewing Information Notice requiring a test or demonstration, the Guidance states at paragraph 4.70 that it is likely that the information notice will require the recipient to provide the results or output of that test or demonstration in writing to ensure that Ofcom has a proper record.

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<sup>88</sup> See A4.49 of the guidance.

<sup>89</sup> The Online Safety Act 2023, s100(3)

<sup>90</sup> [Google](#) response to July 2024 consultation, page 10.

<sup>91</sup> [redacted]

- 4.66 In some cases, we may decide to make a recording of a test or demonstration that we remotely view, but we would only do this where it is necessary and proportionate to do so and in line with data protection requirements. We have clarified this in the Guidance (para 4.63).
- 4.67 In all circumstances where we retain information, our [Records and Information Management Policy](#) notes that information will be held only as long as required and disposed of in accordance with the record retention policy and retention schedules. It also notes that information will be held only as long as required and disposed of in accordance with the record retention policy and retention schedules.
- 4.68 In relation to Google’s comments about disclosure of information we gather using this power, we address disclosure in Section 3 of the Guidance and in Section 3 of this statement. For the avoidance of doubt, Ofcom may disclose information even without consent where it has another legal basis to do so. However, as noted at 3.43 of the Guidance, we will normally first explain our intention to disclose information and give the provider of the information the opportunity to make representations about the proposed disclosure.
- 4.69 In response to one stakeholder’s [redacted]<sup>92</sup> comment about maintaining a record of when we have exercised our Remote Viewing Information Notice powers, the Information Registry maintains records of the statutory information notices we have issued.

## Accuracy of information

### Stakeholder comments

- 4.70 The Children’s Commissioner’s Office expressed concerns about the quality of information Ofcom will be able to obtain via a Remote Viewing Information Notice.<sup>93</sup> It suggested that the information generated would be both “two-dimensional and time-limited”. It also said that the software used to facilitate remote viewing processes are not subject to any accuracy checks and are vulnerable to corruption. To mitigate these issues, it recommended that Ofcom appoints an independent viewer from a relevant government agency to jointly view these tests or demonstrations.

### Our response

- 4.71 We note that Section 8 of the Guidance sets out details of the consequences of failure to comply with our online safety information gathering powers. A recipient commits an offence by knowingly or recklessly providing false information. Ofcom can take enforcement action where there is a failure to act in accordance with the requirements of a notice or a failure to ensure information provided is accurate in all material respects. Therefore, to the extent that there may be concern about the risks involved with the outputs of the test or demonstration potentially being falsified, we therefore do not consider it necessary (or within the scope of the legislation) to require an independent viewer to observe a test or demonstration required via a Remote Viewing

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<sup>92</sup> [redacted]

<sup>93</sup> [Children’s Commissioner](#) response to July 2024 consultation, page 5.



Information Notice in order to ensure that Ofcom can have assurances that the outputs are not being falsified.

- 4.72 In relation to the Childrens' Commissioner's Office's comment that the information, obtained via a Remote Viewing Information Notice would be "two-dimensional and time-limited", we believe this power will enable Ofcom to gain valuable insights into the operation of services' features, functionalities and algorithms that we would otherwise not have. Given that we only expect to use this power in more serious or complex cases, it is unlikely to be used for more routine monitoring purposes.

## Tackling fraudulent activity

### Stakeholder comments

- 4.73 UK Finance said that Ofcom's ability to remotely view a test or demonstration of systems are necessary to tackle the presence of illegal content on services. It recommends that Ofcom continues to promote best practice in this field to help raise the level of proactive mitigations by services.<sup>94</sup>

### Our response

- 4.74 Reducing online fraud is an important online safety objective for Ofcom. We expect services to have implemented systems and processes to address illegal fraud content. The Guidance already notes that a Remote Viewing Information Notice can be used to gather information relating to the algorithms and functionalities services use to comply with their online safety duties, which may include duties relating to fraudulent content.

## Coroner Information Notices

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- 4.75 Coroners have existing powers to require information for the purpose of their functions. Under those powers, a coroner may request information from Ofcom for the purposes of an investigation or inquest into the death of a child.<sup>95</sup>
- 4.76 In that event, we have discretion to issue a Coroner Information Notice under section 101(1) of the Act for the purpose of responding to the coroner's request. Ofcom may also issue a Coroner Information Notice for the purpose of preparing a report under section 163 in connection with an investigation or inquest into the death of a child.
- 4.77 The Guidance sets out:
- a) to whom such a notice may be issued;
  - b) how we expect to exercise this discretion;
  - c) data protection considerations; and
  - d) disclosure of information obtained under a Coroner Information Notice.

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<sup>94</sup> [UK Finance](#) response to July 2024 consultation, page 3.

<sup>95</sup> Paragraph 1(2) of Schedule 5, Coroners and Justice Act 2009; section 17A(2) of the Coroners Act (Northern Ireland) 1959 (c. 15 (N.I.)).

## Raising awareness of the coroners' process

### Stakeholder comments

- 4.78 NSPCC, while supportive of Ofcom's proactive approach, raised concerns on behalf of bereaved families that Ofcom's powers to issue a Coroner Information Notice might not work effectively due to "a lack of awareness about the system. Whilst [it] recognise[d] it is not Ofcom's responsibility to promote this, making the process clear and accessible, and engaging with relevant bodies, will support effective use".<sup>96</sup>

### Our response

- 4.79 Working within the legal framework set by the Act, we want to ensure that there are appropriate processes in place to support a coroner's investigation or inquest into the death of a child where the child's use of online services may have been a factor or where the coroner considers that online services may have information relevant to an inquest or investigation. We therefore agree with the NSPCC's comment that constructive engagement to support effective use is important.
- 4.80 As we note at paragraph 4.78 of the Guidance, the Chief Coroner in England and Wales has issued guidance to coroners in those jurisdictions on obtaining of information regarding a child's social media use in connection with Ofcom's powers under section 101. We worked closely with the Chief Coroner's Office during its preparation of this Guidance. We have also engaged with relevant authorities in Scotland and Northern Ireland. In addition, we have engaged with coroners on individual cases. Through this, we have built awareness through interaction with individual coroners which complements our engagement with relevant authorities.
- 4.81 We also know this is an important area for bereaved families and the organisations that represent them. We therefore agree with the NSPCC's comment that it is important for Ofcom's processes around the use of Coroner Information Notices to be as clear and accessible as possible. Therefore, we have decided to add some additional points to the Guidance which are based on our experience of exercising this power. These are:
- 4.82 When identifying the child whose death is the subject of the investigation or inquest, we would expect coroners to provide Ofcom with any usernames and/or contact details known by the coroner to have been used by the child.
- 4.83 When describing the timeframe within which the information is sought, we would encourage coroners to consider how to narrow the timeframe to that which is necessary and relevant in the context of the investigation or inquest. This is more likely to ensure that it is feasible for recipients to respond by the proposed deadline and will reduce the risk that coroners have to deal with voluminous irrelevant information.
- 4.84 As part of our early discussions with a coroner we may also support the coroner to explore potential alternative ways of obtaining the information sought; for example, where services may have a policy of disclosing information directly to parents of deceased children.
- 4.85 We expect that close engagement and communication between Ofcom and the coroner will continue over the lifecycle of a case.

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<sup>96</sup> [NSPCC](#) response to July 2024 consultation, page 2.

# Privacy and data concerns

## Stakeholder comments

- 4.86 TechUK supports the use of these notices in a manner that respects privacy and legal requirements and processes while aiding in investigations.<sup>97</sup> Another stakeholder [redacted]<sup>98</sup> suggested that Ofcom should provide clear guidelines on data security, retention and disposal to safeguard sensitive information. It also suggested that Ofcom should anonymise data where possible and limit the information sought to what is strictly needed for an investigation.
- 4.87 Both Google and Meta made comments about data privacy, including that “services may be prevented from complying due to applicable data protection obligations”<sup>99</sup> and that there may be “conflicts with any laws in other relevant jurisdictions”.<sup>100</sup> Google asked Ofcom to consider amending certain paragraphs of the Guidance<sup>101</sup> to confirm that international data laws will be taken into consideration.<sup>102</sup>

## Our response

- 4.88 We acknowledge that there may be important data protection considerations when responding to a Coroner Information Notice. For this reason, the Guidance includes a paragraph on this topic (paragraph 4.84, which was also in the draft guidance). It notes, for example, that although information relating to a deceased person does not constitute personal data and is therefore not subject to the UK GDPR, the information sought may, depending on the case, include the personal data of other users. The Guidance says we will endeavour to engage with coroners to understand the extent to which they require personal data for the purpose of their functions and ensure that any Coroner Information Notice is not likely to require the disclosure of more personal data than needed to fulfil the purposes of the request.
- 4.89 In response to Google and Meta’s comments about obligations in other jurisdictions, the Guidance notes that we will, to the extent possible, take account of any legislation which may restrict the ability of a stakeholder to provide certain information to us (paragraph 3.17). However, it will be the responsibility of the person subject to the information power to draw any such legislation to our attention and to explain how it restricts the recipient’s ability to respond. We have amended the Guidance to reiterate this point again in connection with Coroner Information Notices (paragraph 4.85).
- 4.90 More broadly, Section 3 of the Guidance sets out our position on a number of relevant issues which applies to the exercise of all our information gathering powers under the Act. Full details on our approach to the issues raised by stakeholders can be found in the Guidance as follows:
- Confidential information: paras 3.27 - 3.30
  - Disclosure of information: paras 3.31 - 3.50

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<sup>97</sup> [TechUK](#) response to July 2024 consultation, page 4.

<sup>98</sup>

[redacted]

<sup>99</sup> [Google](#) response to July 2024 consultation, page 10.

<sup>100</sup> [Meta Platforms Inc](#) response to July 2024 consultation, page 10.

<sup>101</sup> Paragraphs 4.74-4.67 of the Guidance.

<sup>102</sup> [Google](#) response to July 2024 consultation, page 10.

- Record retention and personal data: paras 3.52 - 3.69
- Information security: paras 3.60 - 3.62

## Timing of requests

### Stakeholder comments

- 4.91 5Rights Foundation suggested that Ofcom should support services in their understanding of the requests made by the coroner, so that services understand how to comply with the notice. They say that *'information must [also] be provided in good time to the coroner and tech companies must not seek to obstruct or delay the legal process.'*<sup>103</sup>

### Our response

- 4.92 In relation to the time for providing information, in the first instance it is for the coroner to decide if and when to approach Ofcom and, if necessary, issue a request for information to Ofcom. As noted previously, we expect to engage with the coroner as to the deadline by which Ofcom must respond, taking into account the time it will take Ofcom to issue any Coroner Information Notice and obtain the relevant information, and the date of the inquest or investigation. As noted in paragraphs 4.80 - 4.81 of the Guidance, we will carefully consider whether to issue a Coroner Information Notice, including whether such a notice will be a feasible and proportionate way to obtain the information requested by the deadline set by the coroner.
- 4.93 As explained at paragraphs 4.76 of the Guidance, our typical process from paragraphs 4.24 will apply when we issue a Coroners Information Notice under section 101(1), including that these will typically be sent in draft in the first instance. This will enable the potential recipient to comment on the practicability of providing the information in the proposed timescales.
- 4.94 We agree that recipients should not seek to delay or obstruct the legal process. As noted in Section 8, Ofcom can take enforcement action in respect of a failure to act in accordance with the requirements of an information notice, and it is also an offence for a provider of a regulated service to fail to comply with a requirement of an information notice that relates to that service.

## Naming a senior manager

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- 4.95 Where Ofcom sends an information notice under section 100 or 101 to a regulated service provider, and that provider is an entity, we may require it to name a relevant senior manager who may reasonably be expected to be in a position to ensure compliance with the notice. Section 4 of the Guidance provides an overview of this power and how we typically expect to use it.

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<sup>103</sup> [5Rights Foundation](#) response to July 2024 consultation, page 1.

## Naming different senior managers, including teams/groups

### Stakeholder comments

- 4.96 Google<sup>104</sup> and TechUK<sup>105</sup> suggested that the Guidance should recognise the complexity of large platforms and services and ensure that they have discretion to nominate the most appropriate individuals or team who holds the most relevant knowledge depending on the subject matter of the information notice.

### Our response

- 4.97 This power enables Ofcom to require the recipient to name a senior manager, but the onus is on the recipient to choose the applicable individual senior manager to be named. The Act specifies that a senior manager is an individual who plays a significant role in making decisions about or managing and organising the service's activities that relate to the subject matter of the information notice.<sup>106</sup> Under the Act, the senior manager named must be an individual and so cannot be a nominated team. We have amended the Guidance at paragraph 4.89 to make this clear.
- 4.98 Ofcom recognises the complexity of larger services means there may be different appropriate senior managers, depending on the subject matter of the information notice. Where the recipient feels that more than one individual should be named as the senior manager responsible for different parts of an information notice response given the scope of the information notice, they should inform Ofcom of this in response to any draft information notices issued. As explained in the Guidance at 4.25, we will consider any comments on the draft statutory information notice and take them into consideration before issuing it as a final version.

## Publication of senior managers' names

### Stakeholder comments

- 4.99 TechUK raised concerns that if the senior manager named within the statutory information notice is made public, there may be concerns of significant abuse for that person.<sup>107</sup>

### Our response

- 4.100 Where we have required a senior manager to be named within a statutory information notice, section 393 of the Communications Act will apply, which means Ofcom cannot disclose the name of the senior manager without the consent of the person carrying on that business, unless this is permitted for specific, defined purposes (and in many cases only to specific persons), as set out in sub-sections (2) to (7). The name of a senior manager will also constitute personal data. The Guidance explains our general approach to personal data, confidentiality and disclosure at Section 3.
- 4.101 We note that we may take enforcement action against a regulated service provider in respect of a failure to:
- i) act in accordance with the requirements of the notice; or

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<sup>104</sup> [Google](#) response to July 2024 consultation, page 11.

<sup>105</sup> [TechUK](#) response to July 2024 consultation, page 4 & 5.

<sup>106</sup> Sections 103(4) and (5) of the Act.

<sup>107</sup> [TechUK](#) response to July 2024 consultation, page 4.

ii) ensure information provided is accurate in all material respects (as set out in section 8 of the Guidance).

4.102 If we decided to take such enforcement action in circumstances where the information notice included a requirement to name a senior manager, in most cases we do not expect to publish the name of the senior manager as part of that enforcement action. However, we may bring criminal proceedings against a named senior manager in certain limited circumstances (also set out in Section 8 of the Guidance, specifically Table 8.2 which sets out information offences). If we decided to bring such criminal proceedings against the named senior manager their name would normally be a matter of public record. We have amended the Guidance to include these points at paragraphs 4.92 and 4.96.

## When should Ofcom use this power?

### Stakeholder comments

- 4.103 Meta sought further clarification as to when it might be necessary and proportionate for Ofcom to require a service to name a senior manager. It also suggested it is unclear what is meant by ‘cooperation’ at paragraph 4.81 of the Guidance, where we explained that one of the factors that we would take into account in deciding whether to include the requirement to name a senior manager was the entity’s history of compliance and co-operation with Ofcom. It suggested that reference to co-operation be removed from this section.<sup>108</sup>
- 4.104 Google and one other stakeholder [redacted]<sup>109</sup> suggested that Ofcom commit to this power only being used in a specified set of circumstances, for instance during an enforcement investigation, due to the serious potential consequences for the named senior manager.<sup>110</sup>
- 4.105 NSPCC and 5Rights Foundation queried why this power is not being used all the time and recommend that at a minimum it should be used in any compliance issue related request or enforcement action, as well as when a Coroners Information Notice is issued.<sup>111</sup>

### Our response

- 4.106 We will consider on a case-by-case basis whether to include the requirement to name a senior manager within a statutory information notice. Paragraph 4.91 explains by way of example that Ofcom may consider the entity’s history of compliance and co-operation with Ofcom, including compliance with any previous information requests when deciding to include the requirement to name a senior manager. The Guidance is intended to be flexible to allow us to consider the individual circumstances in which we might use this power. We note that the concept of co-operation is referred (in the context of investigations) in the Act,<sup>112</sup> our Online Safety Enforcement Guidance<sup>113</sup> and

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<sup>108</sup> [Meta Platforms Inc](#) response to July 2024 consultation, page 10.

<sup>109</sup> [redacted]

<sup>110</sup> [Google](#) response to July 2024 consultation, page 11.

<sup>111</sup> [NSPCC](#) response to July 2024 consultation, page 3. [5Rights Foundation](#) response to July 2024 consultation, page 6.

<sup>112</sup> Section 105.

<sup>113</sup> [Online Safety Enforcement Guidance, \(consultation period\)](#)

our Penalties Guidance.<sup>114</sup> Outside the context of investigations, an example of a failure to co-operate may be refusing to respond to inquiries, withholding relevant information or otherwise obstructing Ofcom in the performance of its functions. We do not consider it appropriate to limit our use of this power to investigations and note there is no such restriction in the Act. Naming a senior manager to ensure compliance with a notice may be appropriate in connection with important policy development work, to ensure we have a robust and reliable evidence base. On the other hand, we also do not consider it appropriate to require the naming of a senior manager in all circumstances where there may be a compliance issue or potential enforcement.

- 4.107 Where Ofcom decides not to include a requirement to name a senior manager, it should be noted that all statutory information notices, including Coroners Information Notices, must be complied with and there are serious enforcement consequences (and potentially criminal liability) for non-compliance. See Section 8 of the Guidance, which sets these out in more detail.

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<sup>114</sup> [Penalties Guidance](#)

# 5. Reports by a skilled person under section 104

## Summary of Section 5 of the Guidance

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- 5.1 Section 104 of the Act grants us the power to appoint a skilled person, or to require the provider of a service to appoint a skilled person, to provide a report ('a skilled person's report') in certain circumstances. This section of the Guidance sets out:
- what a 'skilled person' is;
  - when we might require a skilled person's report, with some examples; and
  - the typical process we expect to follow.

## Publication of reports

### Stakeholder comments

- 5.2 NSPCC asked for clarification as to whether Ofcom intends to publish any skilled person's reports obtained.<sup>115</sup> Meta compared Ofcom's draft guidance to the Financial Conduct Authority (FCA)'s guidance on the use of a skilled person's report and requested additional detail including explicit confirmation on the provider's right to comment on the draft skilled person's report prior to its submission to Ofcom; and UK Finance suggested Ofcom could follow the same process as the FCA.<sup>116</sup>

### Our response

- 5.3 We acknowledge some stakeholders have suggested that Ofcom should mirror the FCA's approach to skilled person's reports. Ofcom has considered the FCA's process but we do not consider that it is necessary to align with it where there may be relevant differences in the two regimes. In general we do not consider it appropriate to give providers of services an opportunity to comment on draft skilled person's reports. This is because to the extent that we propose to take further action because of a skilled person's report we would give stakeholders an opportunity to comment as part of that further process. For example, if we intend to give a technology notice under section 121 of the Act as after obtaining a skilled person's report, we would first give that stakeholder a warning notice under section 123 of the Act which must include a summary of the skilled person report and invites their representations. We also generally do not consider it appropriate to publish a skilled person's report. However, we want to assure stakeholders that if a skilled person's report leads to an enforcement case or other regulatory decisions, we will publish relevant information as part of our decision following our usual processes. For example, if we issue a confirmation decision in an enforcement case, we will publish

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<sup>115</sup> [NSPCC](#) response to July 2024 consultation, page 4.

<sup>116</sup> [Meta Platform Inc](#) response to July 2024 consultation, page 15. [UK Finance](#) response to July 2024 consultation, page 3.



a non-confidential version of the confirmation decision on our website.<sup>117</sup> We may therefore include public comments on the relevant findings in the skilled person’s report in that context.

## Confidentiality

### Stakeholder comments

- 5.4 Several stakeholders have raised concerns about how confidentiality will be ensured where a skilled person is appointed.
- 5.5 TechUK proposed that Ofcom’s Guidance should contain additional details about a skilled person’s confidentiality obligations or that there should be a requirement for the skilled person to enter a contract with the subject of the report before the report is produced.<sup>118</sup>
- 5.6 Google suggested the skilled person must provide legally binding written confirmation that they will handle sensitivities, such as data or confidential information, in line with agreed procedures.<sup>119</sup>
- 5.7 Meta would like Ofcom to confirm that there is no obligation to provide privileged information to a skilled person.<sup>120</sup>

### Our response

- 5.8 We acknowledge confidentiality is important to service providers and understand their concerns around confidentiality where a third party is appointed as a skilled person.
- 5.9 Therefore, along with the changes we have explained from paragraphs 3.27 in this statement, we have also added that we are only likely to appoint a skilled person where we are satisfied that that person has appropriate safeguards in place to ensure confidential information is not disclosed to anyone other than Ofcom (see paragraph 5.5 of the Guidance).
- 5.10 In response to Meta’s query regarding privileged information, we note that section 104(7) of the Act imposes a duty on:
  - a. the provider of the service (“P”),
  - b. any person who works for (or used to work for) P, or is providing (or used to provide) services to P related to the relevant matters, and
  - c. other providers of internet services,

to give the skilled person all such assistance as the skilled person may reasonably require to prepare the report. We do not consider that this duty requires those subject to it to provide information subject to legal professional privilege to the skilled person. We have amended Section 5 of the Guidance to make this clear.

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<sup>117</sup> Section 6 of our [Online Safety Enforcement Guidance](#) sets out more information about publishing the details of the confirmation decision.

<sup>118</sup> [TechUK](#) response to July 2024 consultation, page 5.

<sup>119</sup> [Google](#) response to July 2024 consultation, page 12.

<sup>120</sup> [Meta Platforms Inc](#) response to July 2024 consultation, page 12.

## Independence and cost of skilled person

### Stakeholder comments

- 5.11 Many stakeholders raised points about how skilled persons should be selected, including concerns over how the independence of the skilled person will be assured and how the costs will be set.
- 5.12 One stakeholder [redacted]<sup>121</sup> suggested that to reduce any potential bias or undue influence by the provider, the appointment of the skilled person should ultimately be Ofcom's decision.
- 5.13 The NSPCC said that there may be times where it is inappropriate for the service to select the skilled person, for instance where there are compliance concerns.<sup>122</sup>
- 5.14 The Children's Commissioner's Office suggested Ofcom should put resource into recruiting independent skilled persons with the subject knowledge and independence that a skilled person report warrants.<sup>123</sup>
- 5.15 Google has told us that it thinks the skilled person must be impartial and a conflict clearance must be conducted before a skilled person is appointed.<sup>124</sup>
- 5.16 Meta told us that it is unclear what factors will be taken into account when considering whether someone is independent from the service or if there is a conflict of interest.
- 5.17 TechUK suggests the appointment of an expert should be a collaborative process between Ofcom and the service. This is because the services are close to the issues and have developed appropriate networks to identify the required expertise.<sup>125</sup>
- 5.18 One stakeholder [redacted]<sup>126</sup> said it was concerned about possible open-ended costs for service providers if Ofcom were to commission a skilled person, as there appears to be no incentive for Ofcom or the contractor to limit costs or do the work at a reasonable rate. It suggested setting a cap on pricing for small and mid-size services which is proportionate and reasonable.
- 5.19 Google also suggested that Ofcom should provide the service with agreed criteria for the appointment of a skilled person in advance, including their qualifications and hourly rate.<sup>127</sup>

### Our response

- 5.20 As indicated at paragraph 5.15 of the Guidance, where Ofcom gives a service provider a notice requiring it to appoint a skilled person, Ofcom will either nominate a skilled person for the service provider to appoint, or request that the service provider select a skilled person, which will need to be approved by Ofcom. We acknowledge the concerns about ensuring the independence of a skilled person by the NSPCC, Google and one other stakeholder [redacted] and confirm that in circumstances where Ofcom requires a

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<sup>121</sup> [redacted]

<sup>122</sup> [NSPCC](#) response to July 2024 consultation, page 4.

<sup>123</sup> [Children's Commissioner's Office](#) response to consultation July 2024, page 6.

<sup>124</sup> [Google](#) response to July 2024 consultation, page 12.

<sup>125</sup> [TechUK](#) response to July 2024 consultation, page 5.

<sup>126</sup> [redacted]

<sup>127</sup> [Google](#) response to July 2024 consultation, page 12.

service to select a skilled person, Ofcom must ultimately approve the skilled person and will only do so once we are satisfied as to their independence (amongst other things) as highlighted at paragraph 5.15 of the Guidance.

- 5.21 In response to Meta's comment that it is unclear what factors will be considered when determining whether a skilled person is independent from a service, this will be considered on a case-by-case basis and a skilled person will only be approved where Ofcom is satisfied that there is no conflict of interest that affects the skilled person's ability to give an objective opinion, as indicated at paragraph 5.15 of the Guidance.
- 5.22 We recognise costs may be a concern for services where a skilled person's report is required and understand stakeholders' [§<] call for setting a price cap for small and mid-sized services which is proportionate and reasonable. In relation to costs generally, we have amended the Guidance at paragraph 5.6 to clarify that, in line with the approach set out in Section 3 of the Guidance, we will exercise our power to appoint a skilled person, or to require the provider of a service to appoint a skilled person, in a proportionate manner. Section 3 of the Guidance sets out factors we will generally take into account when making this assessment, including the cost or impact to the person who would be subject to the power, such as the cost of appointing a skilled person.
- 5.23 We have also amended paragraph 5.15 of the Guidance to state that, where we request that a service provider select a skilled person for our approval, the service provider may take the cost associated with the skilled person report into account when deciding what skilled person to select.
- 5.24 In relation to the suggestion of a price cap, the Act does not empower us to set a price cap for the charges that could be levied by skilled persons generally, but we assure stakeholders that we would typically engage with a service before exercising this power to require a skilled person's report. This could be, for example, to help us decide whether to exercise this power and to decide on how the appointment process should proceed. We would encourage services to raise concerns with Ofcom during any prior engagement.

# 6. Interviews under section 106

## Summary of Section 6 of the Guidance

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- 6.1 Ofcom may open an investigation into whether the provider of a regulated 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. Once we have opened an investigation, we may require an individual to attend an interview to answer questions and provide explanations on any matter relevant to the investigation by issuing a notice under section 106 of the Act.
- 6.2 Section 6 of the Guidance sets out:
- when we might use this power, including the individuals whom we can require to attend an interview; and
  - the typical process we expect to follow.

## Proportionality

### Stakeholder comments

- 6.3 Several stakeholders, including Ukie, TechUK and Meta, [redacted]<sup>128</sup> commented that the power to require individuals to attend an interview should be used in a proportionate way.<sup>129</sup> One stakeholder [redacted] stated there could be a negative impact and consequences on those who we require to be interviewed, such as the stress an individual may experience during the process of being interviewed, or causing a burden to smaller businesses should individuals need to take time to prepare or be away from their work commitments for any period of time.
- 6.4 One stakeholder, [redacted] agreed with our proposals and referred to paragraph 6.5 of the Guidance, which sets out a suitable range of personnel to whom the interview requirement applies, including those who may have left their role with the provider. It said the process has been appropriately laid out in the Guidance and the application of the interview duty to parties outside the UK is welcome and important.<sup>130</sup>

### Our response

- 6.5 We have carefully considered proportionality throughout the development of this Guidance as well as our General Information Gathering Policy.<sup>131</sup> We only expect to use this power where it is reasonable and proportionate to do so in the exercise of our functions, and in some cases it may be necessary for us to interview individuals for this purpose. The fact that we will carry out a case-by-case assessment, taking

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<sup>128</sup> [redacted]

<sup>129</sup> [TechUK](#) response to July 2024 consultation, page 4 response to July 2024 consultation, page 4.  
[Ukie](#) response to July 2024 consultation, page 2. response to July 2024 consultation  
[Meta platforms Inc](#) response to July 2024 consultation, page 14.

<sup>130</sup> [redacted]

<sup>131</sup> [General Information Gathering Policy](#).

proportionality into account, is reflected in paragraphs 3.10 to 3.19 of the Guidance. In each case, our priority will be to carry out an effective investigation, and in line with the approach set out in Section 3, we will only exercise the interview power where we are satisfied that it imposes the least burden on stakeholders without compromising our ability to fulfil our objectives.

- 6.6 In addition, in Section 6 of the Guidance we outline the process we will typically follow and make clear that as part of this process we will typically aim to arrange the interview and a time and place, and via a method, which limits the burden on the individual concerned. We therefore do not intend to make further changes to Section 6 of the Guidance.

## Interview arrangements

### Stakeholder comments

- 6.7 Some stakeholders, including Federation of Small Businesses<sup>132</sup>, [redacted]<sup>133</sup> suggested the Guidance for interview arrangements required further consideration. It expressed concerns about the practical implications of requiring an individual to attend an interview, particularly those not based in the UK. It suggested Ofcom considers the logistical challenges, especially given the seven-day notice period which would make travel arrangements and potential visa requirements difficult if not impossible to comply with. It recommended Ofcom prioritise the use of virtual interviews from non-UK residents to alleviate the logistical burden but ensure the process is efficient and accessible.
- 6.8 The Federation of Small Businesses went on to suggest this power may impose a greater burden on small or medium businesses, so more notice would be reasonable to allow appropriate planning, for example with resource or to ascertain whether legal support is needed.
- 6.9 One stakeholder [redacted] referenced the financial impact of the interviews power, agreeing that the financial costs, such as travel and other expenses, should not fall on Ofcom, but be borne by the service provider, as the entity under scrutiny. It said that this is especially relevant for interview parties who are obliged to attend but no longer work for the provider.

### Our response

- 6.10 We have considered the above comments and consider that no material changes are required to the Guidance.
- 6.11 The Guidance makes it clear that we will take a proportionate approach when exercising our information gathering powers, and this includes cases where we require interviews.
- 6.12 Where virtual interviews are a possibility, we will explore the viability of this on a case-by-case basis. As set out in paragraph 6.16 of the Guidance, we will take account of all relevant factors, which may include the geographical location of the individual and the cost and time required for them to attend in person.

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<sup>132</sup> [Federation of Small Businesses](#) response to July 2024 consultation, page 4.

<sup>133</sup> [redacted]

- 6.13 We do not have a specific power to require service providers to pay for the interview costs in respect of the people who work or previously worked for them (whether as officers, partners or employees). It is a legal requirement for a person to comply with a requirement to attend an interview, even if they need to incur costs in doing so. However, we will take the likely costs to the person concerned into account in deciding the arrangements for the interview (as set out in the Guidance).<sup>134</sup> Whether a service provider will cover the cost for its employee (or former employee) to attend an interview is a matter between the interviewee and the service provider, although in most cases we would expect that the service provider will be prepared to cover the costs of the people who work for them given that attending such an interview is likely to be part of their employment duties.

## General process Ofcom will follow

### Stakeholder comments

- 6.14 TechUK<sup>135</sup> ask that Ofcom commits to the standard practice of sending draft notices to individuals, so that individuals can comment on the scope and request reasonable modifications. Clear criteria and safeguards should be in place to protect the privacy of the individuals, particularly for sensitive or personal data, in line with privacy laws. TechUK say individuals are not legally responsible under the Act unless they fail to attend the interview or respond to Ofcom’s questions. They also said that if their names were to be made public, there would be a significant concern of abuse in that case.
- 6.15 Google<sup>136</sup> suggested Ofcom should provide an indicative list of questions beforehand, the interview should be conducted in working hours, the interviewee should be given an opportunity to comment on the accuracy of the transcript and questioning should be delayed allowing for legal advisers to attend where applicable.
- 6.16 Meta<sup>137</sup> noted para. 6.1 of the Guidance which says 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”. It said that we should not frame an investigation as something that occurs where there has been non-compliance as this risks giving the impression that Ofcom’s investigation will treat this as a foregone conclusion.

### Our response

- 6.17 We have considered the above feedback and consider that no material changes are required to the Guidance.
- 6.18 We note TechUK’s request for Ofcom to commit to sending draft notices as standard practice. In line with our approach set out in Section 3 of the Guidance, we cannot commit to sending draft notices in each case, but we have explained that in most cases we would expect to do this . We also do not consider it will necessarily be appropriate to

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<sup>134</sup> Ofcom will not reimburse any of the costs incurred by the individual being interviewed or the service provider relating to Ofcom’s decision to exercise its interview power, including for example, the cost of obtaining legal advice, or travel costs.

<sup>135</sup> [TechUK](#) response to July 2024 consultation, page 4.

<sup>136</sup> [Google](#) response to July 2024 consultation, page 2.

<sup>137</sup> [Meta platforms Inc](#) response to July 2024 consultation, page 14.

share pre-planned questions ahead of the interview. In order to conduct a fair and effective investigation, we may on occasion decide that it is appropriate to require an interview at short notice and that it isn't suitable to issue a draft first. Nonetheless, where possible we will endeavour to provide as much information as possible, for example relevant context, to help the interviewee prepare or to arrange legal counsel.

- 6.19 We also note TechUK's concern about the disclosure of information gathered during an interview. As outlined in more detail above and in Section 3 of the Guidance Ofcom is subject to restrictions relating to the disclosure of information we have gathered using its statutory powers under the Act, and it is a criminal offence to disclose information in contravention of applicable statutory provisions. As such, we consider this is already adequately covered in the Guidance.
- 6.20 We note Google's suggested additions to the process. As set out in the Guidance, we expect to use the interview power in a reasonable and proportionate way, considering any reasonable adjustments that need to be made (see paragraph 6.16 of the Guidance). We have opted not to specify specific timeframes within which interviews would take place, as this will depend on the individual circumstances of the case. Nonetheless, will take account of all relevant factors, which may include the geographical location of the individual and relevant time zones. .
- 6.21 Further, should any party involved in the interview require a copy of minutes or transcripts, this should be agreed by all at the beginning and arranged on a case-by-case basis. We have updated the Guidance to make this clear at paragraph 6.18.
- 6.22 Ofcom will also support a collaborative approach when arranging the interview. We will ensure notice is provided, and we expect open communication from the parties included in the interview where accommodations may be required. For example, where the interviewee has requested and arranged for a legal representative to accompany them to the interview, it is their responsibility to ensure the legal adviser is available for the agreed interview date. We would expect the individual or their legal representative to contact us as soon as possible if they are at risk of not being able to attend the interview. If the legal representative is unable to attend on the date specified, we may delay the interview by as reasonable period so as to allow them to attend. We will decide this on a case-by-case basis. We have updated the Guidance at paragraph 6.17 to make this clear.
- 6.23 In relation to Meta's comment that our Guidance implied that non-compliance was a foregone conclusion at the time we open an investigation, we accept that the wording in our draft Guidance could have been clearer. We have amended paragraph 6.1 of the Guidance to state that Ofcom may open an investigation *into whether* a provider of a regulated 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.

# 7. Powers of audit, entry and inspection under Schedule 12

## Summary of Section 7 of the Guidance

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- 7.1 Schedule 12 to the Act grants Ofcom the power to authorise persons to:
- i) enter and inspect certain premises without a warrant;
  - ii) apply for and execute a warrant to enter and inspect certain premises; and/or
  - iii) carry out audits on a service (which may also involve entering and inspecting premises).
- 7.2 For each of these powers, Section 7 of the Guidance sets out:
- i) when we might use these powers; and
  - ii) the typical process we expect to follow.
- 7.3 Section 7 of the Guidance also sets out that, in general, our use of powers of entry, inspection and audit will typically be reserved for more serious or complex cases. We recognise that entering and inspecting premises (including as part of an audit) is a significant step and is one we do not anticipate taking often. We are only likely to enter and inspect premises where our other information gathering powers are unlikely to enable us to obtain the information which we need to perform one or more of our regulatory functions under the Act.

## Proportionality

### Stakeholder comments

- 7.4 Some respondents urged Ofcom to act proportionately when exercising its powers of entry and inspection with or without a warrant under the Act, and two services urged Ofcom to act proportionately when exercising its powers of audit.
- 7.5 TechUK commented that when exercising entry and inspection powers Ofcom should seek to balance public safety with individual rights; to apply for warrants only “when necessary”; and to use force to enter premises in “scenarios of last resort” only.<sup>138</sup> A second stakeholder [§<] asked that we use our powers of entry and inspection only in “exceptional circumstances” and asked us to provide additional guidance to set out more detail on what those circumstances might be.<sup>139</sup> Ukie advised Ofcom that its audit, entry and inspection powers “should be reserved for the most serious cases”.<sup>140</sup>
- 7.6 TechUK recommended that the Guidance emphasise proportionality and cooperation, taking a risk-based approach to audits that account for service size and nature.
- 7.7 Two stakeholders asked Ofcom to use its audit power more frequently, arguing that the threshold is currently too high. OpenMined Foundation expressed concern that audits are only carried out after a system has already led to significant harm and urged Ofcom

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<sup>138</sup> [TechUK](#) response to July 2024 consultation, page 6.

<sup>139</sup> [§<]

<sup>140</sup> [Ukie](#) response to July 2024 consultation, page 2.



to use its audit power as a preventative measure to limit risk and harm<sup>141</sup>. UK Finance recommended that the audit power “should not be reserved only for serious or complex cases.”<sup>142</sup>

## Our response

- 7.8 We acknowledge the points stakeholders have raised about the impact our use of entry and inspection powers may have on service providers. We address how we will exercise our powers in a proportionate way in full at paragraphs 3.10-3.19 of the Guidance, and in paragraph 3.12 in particular.<sup>143</sup>
- 7.9 The approach we have set out in paragraphs 3.10 to 3.19 of the Guidance aligns with the position urged by stakeholders. We set out the factors we will take into account when reaching a decision about whether to exercise our information gathering powers (see paragraph 3.12) and further, paragraph 7.2 of the Guidance makes it clear that we expect our powers of audit, entry and inspection under Schedule 12 will typically be reserved for the more serious and complex cases. We recognise that entering and inspecting premises is a significant step and is therefore one we do not anticipate taking often.
- 7.10 As such, we have not made material changes to Section 7 of the Guidance as regards proportionality. We have, however, added a cross-reference to our full position on the proportionate use of our powers into the Audit, Entry and Inspection chapter for ease of reference for the reader.
- 7.11 We have also considered the request for us to produce additional guidance on the scenarios in which we envisage using our powers of entry and inspection. The Guidance already sets out examples of circumstances in which we might use our powers of entry and inspection without a warrant at paragraph 7.12. We also set out the statutory basis on which we could apply for a warrant at paragraph 7.26. As such, we do not consider it necessary to provide any further examples.
- 7.12 We acknowledge stakeholders’ concerns that the threshold for conducting an audit is too high, but as explained above, the threshold is set at this level because we recognise that entering and inspecting premises, including as part of an audit, is a serious step. We have therefore amended paragraph 7.2 of the Guidance to make this explanation clearer.

## Confidentiality, security and privilege

### Stakeholder comments

- 7.13 Google made a number of comments about data privacy, confidentiality, and privileged information in its consultation response. It asked Ofcom to clarify whether the Authorised Persons who will exercise Ofcom’s powers of entry and inspection would be employed by Ofcom and subject to “appropriate confidentiality and information security restrictions”.<sup>144</sup>

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<sup>141</sup> [OpenMined Foundation](#) response to July 2024 consultation, page 1.

<sup>142</sup> [UK Finance](#) response to July 2024 consultation, page 4.

<sup>143</sup> [Guidance for information gathering powers under the Online Safety Act 2023](#), paragraph 3.11.

<sup>144</sup> [Google](#) response to July 2024 consultation, page 13.

- 7.14 Google also asked Ofcom to confirm that only documents relevant to the investigation named in the Notice would be seized during an entry and inspection without a warrant, and that in the event of an entry and inspection under warrant, Ofcom would only seize documents covered by the scope of the warrant. Google went on to request confirmation that all information seized by Ofcom during the exercise of its entry and inspection powers would be treated as confidential until the service provider has been given an opportunity to make representations on confidentiality.<sup>145</sup>
- 7.15 Google asked Ofcom to clarify how it would treat legally privileged information when exercising its powers of entry and inspection.

## Our response

- 7.16 We appreciate the importance of maintaining high levels of information security in our work and understand stakeholders' wish for reassurance on this point. All persons authorised by Ofcom to execute our powers of entry and inspection with or without a warrant will be subject to appropriate confidentiality and information security restrictions, namely those set out in Section 3 of the Guidance.
- 7.17 Regarding seizure of documents during an entry and inspection, the scope of these powers is set out in the Act.
- 7.18 During an entry and inspection without a warrant, a person authorised by Ofcom can take copies of any document found or produced while exercising their powers<sup>146</sup> only so far as is required in connection with the exercise of our functions under the Act.<sup>147</sup> When exercising our powers of entry and inspection with a warrant, Ofcom can only take the actions set out in paragraph 7 of Schedule 12 (such as seizing documents or searching the premises) for the purposes of an investigation into a service's failure to comply with an enforceable requirement under the Act.<sup>148</sup>
- 7.19 We have also noted the points stakeholders have raised about data privacy and legally privileged information.
- 7.20 The Guidance sets out our position on all of these important aspects of our work in Section 3 which applies to the exercise of all our information gathering powers under the Act. Full details on our approach to the issues raised by stakeholders can be found in the Guidance as follows:
- Confidential information: paras 3.27 - 3.32
  - Disclosure of information: paras 3.31 - 3.50
  - Record retention and personal data: paras 3.51 - 3.58
  - Information security: paras 3.59- 3.61
  - Privileged information: para 3.18.
- 7.21 Since all the information stakeholders have requested on data privacy and privilege in relation to our powers of entry and inspection are covered in Section 3, we do not

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<sup>145</sup> [Google](#) response to July 2024 consultation, page 13.

<sup>146</sup> Paragraph 2(6), Schedule 12 to the Act.

<sup>147</sup> Paragraph 2(7) Schedule 12 to the Act.

<sup>148</sup> Paragraph 7, Schedule 12to the Act.

intend to make any substantive changes to Section 7 of the Guidance on this subject.<sup>149</sup> However, we have included in Section 7 a cross-reference to Section 3 to improve the navigability of the document.

## Other comments

### Stakeholder comments

- 7.22 One stakeholder [3<] expressed concerns about the seven calendar days' notice that the Act states Ofcom must give to service providers if it intends to enter and inspect premises without a warrant. Concerns centred upon the opportunity this notice period may give service providers to conceal or destroy evidence prior to Ofcom's inspection. The stakeholder recognised that Ofcom is unable to amend the notice period in the Act, but urged Ofcom to recommend removal or shortening of the seven-day notice period if Ofcom's advice on amendments to the Act is sought in future.<sup>150</sup>
- 7.23 Google asked Ofcom to confirm in the Guidance that Ofcom cannot force a business to provide answers that would require an admission that it has infringed the law.
- 7.24 Meta asked for more information on when or why Ofcom may decide that an audit is the appropriate means of gathering information and assessing compliance.<sup>151</sup>

### Our response

- 7.25 We have considered the points raised by stakeholders set out above and have decided not to make material changes to the Guidance. Below we explain the remit of this Guidance and how we think it addresses the feedback received.
- 7.26 We understand the concerns raised about the notice period Ofcom must give to service providers if we intend to enter and inspect premises without a warrant. As the stakeholder who raised this point has acknowledged, Ofcom is legally required to give seven days' notice, so this is not at our discretion.<sup>152</sup> Amendment of the Act is a matter for Government and Parliament.
- 7.27 We would highlight however, that the Act does make it an offence to suppress, destroy or alter evidence requested by Ofcom in a notice of our intention to enter and inspect premises without a warrant or an audit notice.<sup>153</sup> Section 111(3) of the Act says a person commits an offence if:
- the person suppresses, destroys or alters, or causes or permits the suppression, destruction or alteration of, any information required to be provided, or document required to be produced, by a notice to which this subsection applies, and

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<sup>149</sup> We note that paragraph 17(3) of Schedule 12 to the Act provides that powers conferred by paragraph 2 (entry and inspection without warrant) and powers exercisable under a warrant are not exercisable in relation to information or documents in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications, could be maintained in legal proceedings.

<sup>150</sup> [3<]

<sup>151</sup> [Meta Platforms Inc](#) response to July 2024 consultation, page 17.

<sup>152</sup> Schedule 12, 2(1) of the Act.

<sup>153</sup> Section 111(5)(a) of the Act.

- the person’s intention was to prevent OFCOM from being provided with the information or document or (as the case may be) from being provided with it as it was before the alteration.

7.28 The consequences of committing an offence under section 111(3) are:

- A fine;<sup>154</sup>
- Imprisonment,<sup>155</sup> or
- Court order requiring the person to comply with a requirement of the audit notice or Entry and Inspection Notice.<sup>156</sup>

7.29 We acknowledge the legal principle that Google refers to, insofar as a service provider cannot be required to provide answers that would require an admission that it has infringed the law. However, this Guidance is not intended to set out comprehensively all legal principles related to information gathering. As noted in the Guidance at paragraphs 7.8 and 7.20, legal advisers may be present when we exercise our powers of audit, entry and inspection. If they are present stakeholders could seek legal advice if they chose to. Full details of the consequences of failure to comply with Ofcom’s information gathering powers under the Act are set out at Section 8 of the Guidance.

7.30 We acknowledge Meta’s request for justification for our decision to conduct an audit and clarification on next steps. As we have not exercised the power before, our approach will evolve over time, and we are not able to say more at this time.

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<sup>154</sup> Section 113(2) of the Act.

<sup>155</sup> Section 113(2) of the Act.

<sup>156</sup> Section 111(6) of the Act.

# 8. Consequences of failure to comply with information gathering powers

## Summary of Section 8 of the Guidance

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- 8.1 Section 8 of the Guidance explains the consequences of a failure to comply with Ofcom's online safety information gathering powers. It provides:
- i) details of the enforcement action Ofcom may take against providers of regulated services (and certain others) which fail to comply with the duties imposed on them;
  - ii) a list of the information powers that may be subject to enforcement action (Table 8.1);
  - iii) an overview of the criminal offences associated with a failure to comply with Ofcom's statutory information gathering powers, including the defences and possible consequences of committing an offence (Table 8.2).

## Proportionality

### Stakeholder comments

- 8.2 Two stakeholders raised concerns that the consequences applied in cases of failure to comply should be proportionate and suggested that Ofcom should consider the size of the business before deciding on the enforcement action.<sup>157</sup>

### Our response

- 8.3 We have considered the points raised by stakeholders set out above. We have decided not to make changes to the Guidance. Below we explain how we think the Guidance addresses the comments made.
- 8.4 The Guidance sets out at paragraph 8.5 that when taking enforcement action for non-compliance with our information gathering powers, we will enforce in line with the Act and our Online Safety Enforcement Guidelines.
- 8.5 Our Online Safety Enforcement Guidelines, along with paragraphs 3.6 to 3.9 of the Guidance, detail that the Communications Act requires Ofcom to have regard, in all cases, to the principles under which regulatory principles should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed. In terms of enforcement, this means that Ofcom will take action where it is proportionate and appropriate to do so, but with a willingness to intervene firmly, promptly and effectively when required.
- 8.6 Further details of how we decide whether to take enforcement action, and the processes that we would typically follow, can be found within the Online Safety Enforcement Guidelines. Meanwhile, the Guidance is intended to briefly summarise the

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<sup>157</sup> [Federation of small businesses](#) response to July 2024 consultation, page 2.

[TechUK](#) response to July 2024 consultation, page 6.

circumstances in which we may take enforcement action, the information powers that may be subject to enforcement action by Ofcom, and the criminal liability that may be applicable.

## 9. General duties and impact assessment

- 9.1 This chapter provides an overview of the main UK legislative provisions relevant to our decisions in this statement (other than the specific provisions which grant us our information gathering powers, which are addressed above). It also sets out our Impact Assessment, our Equality Impact Assessment, and our Welsh Language Impact Assessment.
- 9.2 We received no specific feedback relating to our Impact, Equality Impact, and Welsh Language Impact Assessments as part of our Consultation on the draft Guidance. Nonetheless, we have reviewed this section in light of the further updates made to the Guidance in response to stakeholder feedback and we consider that no further updates are required to our Impact, Equality Impact, and Welsh Language Impact Assessments.

### Our general duties

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- 9.3 Section 3(1) of the Communications Act states that it shall be our principal duty, in carrying out our functions:
- i) to further the interests of citizens in relation to communication matters;
  - ii) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 9.4 Under section 3(2)(g), we are required to secure (among other things) the adequate protection of citizens from harm presented by content on regulated online services, through the appropriate use by providers of such services of systems and processes designed to reduce the risk of such harm. Further, in performing our duties in relation to such matters, section 3(4A) sets out additional matter that we must have regard to as relevant in the circumstances. These include the risk of harm to citizens presented by regulated services.
- 9.5 In performing our duties, we are required under section 3(3) of the Communications Act to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles appearing to Ofcom to represent the best regulatory practice.

### Impact assessment

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- 9.6 Section 7 of the Communications Act requires us to carry out and publish an assessment of the likely impact of implementing a proposal which would be likely to have a significant impact on businesses or the general public, or when there is a major change in Ofcom's activities. In accordance with section 7(4B) of the Communications Act, we have to consider the likely impact on small and micro businesses in relation to proposals connected with our online safety functions. As a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our

policy decisions, although the form of that assessment will depend on the particular nature of the proposal.

- 9.7 Our Guidance on online safety information gathering powers is intended to help interested persons understand our statutory information gathering powers under the Act, when and how we might use each power, and the potential consequences of non-compliance. As such this Guidance does not in itself impose any additional burdens on providers of regulated services or any other persons who might end up being subject to these powers, including small and micro businesses. Rather, by explaining our approach, it is intended to assist providers in understanding the regime and our approach, and therefore should help to reduce the future burden on affected persons as to what such a request might involve. We therefore do not consider we need to separately consider the costs the Guidance might pose on businesses.
- 9.8 Information gathering powers are an important part of allowing us to gather information we need to meet our legal duties. Section 3 of the Guidance explain that we will consider on a case-by-case basis whether exercising any information gathering power would be proportionate. In connection with proportionality, we would generally seek the least intrusive regulatory methods of achieving our objectives. When deciding whether and how to exercise an information gathering power, the factors that we will consider include the size and capacity of the stakeholder, the resources required to provide the information, whether the information could be obtained in a less intrusive way, and any other potential impacts or costs involved. We will therefore consider the impact and proportionality of each individual information request. Section 4 of the Guidance explains that we will typically send a draft information notice prior to issuing a final notice to allow the recipient to comment before the notice is finalised.
- 9.9 In setting out our decisions in this statement we have also considered the way in which our information gathering powers could impact human rights:
- 9.10 First, we recognise that our power to gather personal data may impact upon the right to privacy. However, as set out in Section 3 of the Guidance, we will seek to limit the personal data which we require under our information gathering powers to that which is necessary for the performance of our functions under the Act.
- 9.11 Second, we recognise that some of our powers may impact upon the right to the peaceful enjoyment of property. These are our powers to enter and inspect premises (with<sup>158</sup> and without<sup>159</sup> a warrant) and to conduct an audit.<sup>160</sup> However, as set out in Section 3 of the Guidance, we must exercise all our information gathering powers in a proportionate manner. Further, we state in Section 7 of the Guidance that:
- i) in general, our use of these powers will typically be reserved for more serious or complex cases;
  - ii) we recognise that entering and inspecting premises is a significant step and is one we do not anticipate taking often;
  - iii) we are only likely to enter and inspect premises where our other information gathering powers are unlikely to enable us to obtain the information we need;

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<sup>158</sup> Paragraph 7 of Schedule 12 to the Act.

<sup>159</sup> Paragraph 2 of Schedule 12 to the Act.

<sup>160</sup> To the extent that this involves a power to require a provider of a regulated service to permit an authorised person to enter and inspect premises: see paragraph 4(2)(a) of Schedule 12 to the Act.



- iv) we have no power to enter domestic premises; and
- v) where we do enter and inspect premises, this will be done at a reasonable hour, unless it appears that the purpose of the search would be frustrated or seriously prejudiced by entering at a reasonable hour.

9.12 Third, we have considered whether our information gathering powers could have an impact on freedom of expression. However, we do not think that this is the case. Parliament has provided Ofcom with information gathering powers under the Act to enable Ofcom to perform its statutory functions. We recognise that certain duties imposed by the Act, and certain aspects of Ofcom’s regulation (e.g. measures that Ofcom includes in Codes of Practice), could potentially impact freedom of expression. However, we do not consider that this impact derives from the exercise of Ofcom’s information gathering powers. Further, we can only exercise these powers in a reasonable and proportionate manner. In making this assessment, we will consider (among other factors) any potential impacts of the exercise of our information gathering powers on users’ rights (see Section 3 of the Guidance).

## Equality impact assessment

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- 9.13 We have given careful consideration to whether our proposals will have a particular impact on persons sharing protected characteristics (broadly including race, age, disability, sex, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership and religion or belief in the UK and also dependents and political opinion in Northern Ireland), and in particular, whether they may discriminate against such persons or impact on equality of opportunity or good relations. This assessment helps us comply with our duties under the Equality Act 2010 and the Northern Ireland Act 1998.
- 9.14 When thinking about equality we think more broadly than persons that share protected characteristics identified in equalities legislation and think about potential impacts on various groups of persons (see paragraph 4.7 of our Impact Assessment Guidance<sup>161</sup>).
- 9.15 We do not consider that our proposals will in themselves have any adverse equality impacts. As noted above, our proposals should provide additional certainty and transparency to stakeholders, by setting clear expectations around when and how we might use each power, and the potential consequences of non-compliance. In some instances, we expect that there will be a positive impact on some equality groups. For example, in circumstances where neurodiverse individuals are involved in responding to statutory information notices.

## Welsh language

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- 9.16 The Welsh language has official status in Wales. To give effect to this, certain public bodies, including Ofcom, are required to comply with certain Welsh language standards.<sup>162</sup> Accordingly, we have considered:
- a. the potential impact of our policy proposals on opportunities for persons to use the Welsh language;

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<sup>161</sup> Ofcom [Impact Assessment Guidance](#), 19 July 2023.

<sup>162</sup> The [Welsh language standards](#) with which Ofcom is required to comply are available on our website.

- b. the potential impact of our policy proposals on treating the Welsh language no less favourably than the English language; and
- c. how our proposals could be formulated so as to have, or increase, a positive impact; or not to have adverse effects or to decrease any adverse effects.

9.17 Ofcom's powers and duties in relation to online safety regulation are set out in the Act and must be exercised in accordance with our general duties under section 3 of the Communications Act. In formulating our decisions in this statement, where relevant and to the extent we have discretion to do so in the exercise of our functions, we have considered the potential impacts on opportunities to use Welsh and treating Welsh no less favourably than English. We do not think that our decisions will have any adverse treatment of the Welsh language, and we do not consider that there is scope, acting within our powers, to formulate our decisions differently so as to have increased positive effects on these matters.

9.18 We will continue to issue some statutory information notices in Welsh, where required by Welsh stakeholders. We do not intend to translate the Guidance into Welsh.