IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2012/0034**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50416106
Dated: 19 January 2012

Appellant: **Mander Faw**

Respondent: **The Information Commissioner**

2nd Respondent: **Office of Communications**

Heard on the papers: Field House

Date of Hearing: **27 June 2012**

Before

Christopher Hughes

Judge

and

Nigel Watson and **David Wilkinson**

Tribunal Members

Date of Decision: **17 July 2012**

Subject matter:

Section 44(1)(a) Freedom of Information Act 2000

Section 393(1) Communications Act 2003

Cases:

Brennan v Bedford Borough Council (EAT/0317/03/SM)

Ofcom v Gerry Morrissey and the Information Commissioner (Upper Tribunal case No. GIA/605/2010)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 19 January 2012 and dismisses the appeal.

Judge Chris Hughes

Dated: 17 July 2012

REASONS FOR DECISION

Introduction

1. The Appellant requested information about complaints about pornographic broadcasts made to the Office of Communications (Ofcom). He requested "…the original wording of each complaint…" Certain information was disclosed and, following an investigation by the Information Commissioner, a complaint relating to a broadcaster which had gone out of business was disclosed but the wording of complaints against businesses which continued to operate was not disclosed. Ofcom argued and the Commissioner agreed that the effect of section 44(1)(a) FOIA which exempts information which is prohibited from disclosure by any enactment and s.393(1) of the Communication Act 2003 which contained such a prohibition meant that the material was exempt from disclosure.

2. The Appellant remained dissatisfied and on 14 February 2012 appealed to this Tribunal challenging the interpretation of the law which the Commissioner and Ofcom had adopted. He argued:-

   "The decision reached is based on an incorrect interpretation of statutory terms. Third party complaints do not constitute confidential "information" "about" a business but are instead opinion. Complains about public broadcasts do not relate to confidential business information. Complaints are provided by third parties independent of Ofcom and not as a result of Ofcom "exercising" its powers."

3. He gave instances of Ofcom selectively disclosing information about complaints in its publication "Broadcast Bulletin" which quoted from complaints and identified the broadcaster. He concluded that the only thing at issue was the specific wording of the complaints. He submitted that the purpose of s.393(1) of the Communication Act was to protect the commercially sensitive information which the broadcasters were compelled to provide to their regulator and not third party complaints against broadcasters which would have a range of content which might not be accurate and was volunteered to Ofcom rather than information obtained by it "in the exercise of a

power". In the absence of compulsion on the part of Ofcom receipt of information was not "handling" of a complaint.

The question for the Tribunal

4. The key issue the Tribunal has to resolve is whether or not a complaint voluntarily made to Ofcom is one whose disclosure can be required by the submission of a FOIA request.

Legal framework

5. The starting point is s.44(1)(a) FOIA. This provides that:-

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) Is prohibited by or under any enactment"

6. Ofcom and the Commissioner rely in their analysis on s.393(1) of the Communications Act 2003. This provides that:

"Subject to the following provisions of this section, information with respect to a particular business which has been obtained in exercise of a power conferred by-

(a) This Act

Is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business."

7. The powers which Ofcom and the Commissioner consider relevant to this case are those contained in s.3

"(2)The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following— .

…..

(e)the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;"

and s.325

"(1)The regulatory regime for every programme service licensed by a Broadcasting Act licence includes conditions for securing— .

(a)that standards set under section 319 are observed in the provision of that service; and .

(b)that procedures for the handling and resolution of complaints about the observance of those standards are established and maintained. .

(2)It shall be the duty of OFCOM themselves to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319." .

8. In summary Ofcom and the Commissioner argued Ofcom is required to maintain standards to protect the public and to operate a complaints procedure in order to help maintain those standards. These are therefore powers of Ofcom, receiving complaints is an exercise of these powers and therefore the statutory prohibition applies.

Analysis of the appeal

9. Although the Appellant disputed whether the actual wording of complaints was "information with respect to a particular business" it seems to the Tribunal that a complaint about a broadcast programme must be of the form "I saw a programme broadcast by broadcaster A with a content of which I disapprove" and that cannot be other than information about the activities of broadcaster A and therefore "information with respect to a particular business". The accuracy and interpretation of what was recalled may be a matter of dispute but the complaint is an attempt to communicate information about broadcaster A and therefore must fall within the statutory wording.

10. The submissions made by the Appellant that since Ofcom voluntarily published certain material the statutory prohibition was ineffective to bar his FOIA request was unsatisfactory. Even if Ofcom were in breach of its obligations by publishing certain material (which it was not); if a statutory prohibition on publication existed, then in dealing with a FOIA request Ofcom and then the Commissioner had to apply the law as laid down by statute.

11. The second substantive point which the Appellant made is whether the disputed information is "obtained in the exercise of a power". He submitted that since it was

volunteered it was not obtained and that the statutory powers relied upon by Ofcom apply only when it is actually handling complaints, therefore the original receipt of the complaint could not fall within the exemption.

12. Both the Commissioner and Ofcom sought to interpret "obtained" in a broad and purposive manner because if the protection from disclosure where restricted to occasions when Ofcom had used its coercive powers to obtain information from a broadcasting company; then its ability to regulate effectively would be restricted since it is likely that fewer complaints would be received. In its submissions Ofcom reminded the Tribunal of the decision in Brennan v Bedford Borough Council [2003] EAT. This considered the meaning of the phrase "obtained by" in the context of the Audit Commission Act 1998. This provides at s.49:-

"**Restriction on disclosure of information**..

(1)No information relating to a particular body or other person and obtained by the Commission or an auditor, or by a person acting on behalf of the Commission or an auditor, pursuant to any provision of this Act or of Part I of the Local Government Act 1999 or in the course of any audit or study under any such provision shall be disclosed except— "

13. The functions of the Audit Commission, in its role of overseeing and regulating activities of other bodies, are closely analogous to the functions of Ofcom. In this employment case disclosure of material was sought. The EAT stated that:-

""No information obtained by the Commission or an auditor shall be disclosed", it seems plain, relates clearly to the following:

…..

(2) Documents created by others (informants or otherwise) for the purpose of submission to the Auditor or the Commission. Thus, if, for example, a would-be informant prepares a statement, creates a memo, sends a letter or e-mail, or causes or permits the lawyer to do so on his behalf, then that document, it appears to me plainly, would fall within the provisions of Section 49."

14. In that case therefore documents created by informants for the purpose of submission to the Audit Commission were not to be disclosed because they had been "obtained by the Commission". They had not been generated by the Commission, they may indeed

have been unsolicited, nevertheless they fell within the category of documents "obtained". The EAT held that the purpose of the statutory provision was:-

" *to encourage frankness and openness as between those who are providing information to the Auditor or the Audit Commission, not to discourage the provision of information"*.

15. In the light of this decision and the clear statutory purpose of protecting Ofcom's ability to gather information in confidence the Tribunal is satisfied that "obtained" must in this content not be restricted to "obtained by use of coercive powers" but must be given its natural, broad meaning.

16. The Tribunal noted the decision of the Upper Tribunal in Ofcom v Morrissey and the Information Commissioner which found that it was ultra vires the Commissioner to consider "whether an exercise of judgement by Ofcom under the 2003 Act was vitiated by unreasonableness". The effect of this is that given the existence of the statutory prohibition the Commissioner could not review a decision by Ofcom that a disclosure of information would not facilitate its carrying out of its various functions.

Conclusion and remedy

17. The Tribunal is therefore satisfied that the material sought was protected from disclosure by a statutory prohibition and therefore the appeal must fail.

18. Our decision is unanimous

Judge Chris Hughes
Date: 17 July 2012