

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 18<sup>th</sup> September 2008

**Public Authority:** Office of Communications  
**Address:** Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA

#### Summary

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The complainant requested details of the complaints made to Ofcom in relation to BGTV. Ofcom refused to disclose the information under section 44 of the Act explaining that section 393 of the Communications Act prohibited it from disclosing the information. The Commissioner has investigated and found that section 393 does prohibit disclosure of the information and that section 44 of the Act is therefore engaged.

#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

#### The Request

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2. On 29 August 2007 the complainant made the following request for information to the Office of Communications (Ofcom):

*"Could I please request details of the NATURE of the complaints to OFCOM from BGTV viewers – and the dates and time. Could you please give me this under the FOI Act as it is within the public interest."*

The complainant stated that he needed to be reassured about the nature of the complaint made by 49 people to Ofcom and that he was not requesting the complainants' details.

3. Ofcom responded on 20 September 2007 informing the complainant that the requested information is exempt under section 44 of the Act. Ofcom stated that this was due to the fact that disclosure is prohibited under section 393 of the Communications Act.
4. The complainant requested an internal review of this decision on 21 September 2007. Ofcom responded on 22 November 2007 upholding its original decision.

## **The Investigation**

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### **Scope of the case**

5. On 28 December 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public interest in disclosure of the requested information. The Commissioner notes that section 44 of the Act is an absolute exemption and therefore not subject to the public interest test.

### **Chronology**

6. The Commissioner began his investigation by writing to Ofcom on 3 June 2008 and asking a number of questions regarding the application of the exemption and the statutory bar and for a copy of the withheld information.
7. Ofcom responded on 8 August 2008 providing the Commissioner with a detailed explanation regarding its application of the exemption and with a copy of the withheld information.

### **Background Information**

8. Big Game TV! (BGTV) was a dedicated Call TV quiz service produced by Big Game Television Limited. This channel launched in May 2005 and was re-branded as The Daily Quiz on 13 March 2006. It broadcast on the Sky Digital Platform and was simultaneously broadcast daily on ITV between 10pm and 3am. However, in June 2007, the channel closed down.
9. The information being withheld consists of the complaint summaries for each complaint received about BGTV. Ofcom is withholding this information under section 44, 41, 40 and 43 of the Act.

## Analysis

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### Exemption: Section 44 'Prohibitions on disclosure'

10. Section 44 (1) (a) provides that information is exempt if its disclosure by the public authority is exempt by or under any enactment. Ofcom state that section 393 of the Communications Act 2003 prohibits it from disclosing the requested information.

11. Section 393(1) of the Communications Act 2003 (CA) states that:-

*“information with respect to a particular business, which has been obtained in exercise of a power conferred by (a) this Act, is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business.”*

Subsection (2) provides gateways for disclosure of information.

12. In order for the Commissioner to determine if section 393 of the CA prohibits disclosure he must assess the following things:

- Is the information requested information with respect to a particular business
- Was the information obtained in exercise of a power contained in the Communications Act
- Does the Authority have consent to release the information
- Do any of the exceptions in section 393(2) apply

In the particular circumstances of this case the Commissioner has also considered if the business in question, BGTv, is one which 'continues to be carried on'.

13. The Commissioner considers that the information requested clearly relates to a particular business as the request is specifically for the nature of the complaints received about BGTv. Further, the Commissioner notes that section 1(3) of the CA provides that:

*“Ofcom may do anything which appears to them to be incidental or conducive to the carrying out of their functions, including borrowing money.”*

This gives Ofcom the power to do anything as long as it is related to carrying out their functions. Section 319 of the CA states that Ofcom has a duty to set, review and revise standards for the content of television programmes, and to ensure that those standards are observed. Section 325(2) states that Ofcom has a duty to establish procedures for the handling and resolution of complaints about the observance of standards set under section 319. Ofcom has published its Broadcasting Code covering rules relating to a number of areas including

- protecting the under eighteens, harm and offence, impartiality and accuracy, fairness, privacy and sponsorship.
14. Ofcom explained that in its view the term 'in exercise of a power' is wide and encompasses receiving, considering and responding to complaints in relation to potential breaches of the Broadcasting Code. The Commissioner agrees that section 393 is not limited to information Ofcom has obtained using its powers but also includes instances when Ofcom has been provided with information in light of its powers. The information in question was provided to Ofcom by members of the public in relation to BGTV and therefore was obtained by Ofcom in the exercise of its powers under the CA.
  15. Ofcom approached BGTV to ask if it consented to disclosure of the requested information and BGTV has declined to consent. The Commissioner has also considered if any of the provisions in section 393(2) apply. One of these is subsection (a) which applies to disclosure made for the purpose of facilitating the operation by Ofcom of any of their functions. The Commissioner notes that compliance with the Freedom of Information Act is a duty imposed upon public authorities but is not a function for the purpose of 393(2). The Commissioner also notes that none of the other gateways in 393(2) are applicable in this case.
  16. Finally the Commissioner has also considered if BGTV constitutes a business that continues to be 'carried on'. The wording of section 393 is such that the statutory bar only applies to businesses that continue to be carried on and BGTV is no longer broadcasting. Ofcom consider that at the time of the request, BGTV was a business which continued to be carried on for the purposes of section 393(1). Ofcom explained that there are two companies listed on the Companies House website, Big Game Television Ltd and Big Game TV Ltd. However, Big Game Television Ltd (i.e. BGTV) was the licensee and it is therefore the status of that company which is relevant to this case.
  17. At the time of the information request BGTV was still licensed by Ofcom (although it had ceased broadcasting in or around June 2007, it only handed its licence back to Ofcom on 31 October 2007). BGTV was therefore still active in August 2007 when the information request was made, albeit not actively transmitting a service. The Commissioner accepts that although BGTV was no longer broadcasting at the time of the request it was still a business which continued to 'be carried on'.
  18. The Commissioner finds that section 393 of the CA prohibits disclosure of the requested information and that the information is therefore exempt under section 44 of the Act. Section 44 is an absolute exemption and is therefore not subject to the public interest test.
  19. As the Commissioner's decision is that section 44 is engaged, there is no requirement for him to go on to consider the application of the other exemptions.

## **The Decision**

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20. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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21. The Commissioner requires no steps to be taken.

## Right of Appeal

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22. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 18th day of September 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

### **Prohibitions on disclosure.**

**Section 44(1)** 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,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

**Section 44(2)** provides that –

“The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”

Communications Act 2003

### ***Disclosure of information***

#### **393 General restrictions on disclosure of information**

(1) 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,
- (b) the enactments relating to the management of the radio spectrum (so far as not contained in this Act),
- (c) the 1990 Act, or
- (d) the 1996 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.

(2) Subsection (1) does not apply to any disclosure of information which is made—

- (a) for the purpose of facilitating the carrying out by OFCOM of any of their functions;
- (b) for the purpose of facilitating the carrying out by any relevant person of any relevant function;

(c) for the purpose of facilitating the carrying out by the Comptroller and Auditor General of any of his functions;

(d) for any of the purposes specified in section 17(2)(a) to (d) of the Anti-terrorism, Crime and Security Act [2001 \(c. 24\)](#) (criminal proceedings and investigations);

(e) for the purpose of any civil proceedings brought under or by virtue of this Act or any of the enactments or instruments mentioned in subsection (5); or

(f) for the purpose of securing compliance with an international obligation of the United Kingdom.

(3) Each of the following is a relevant person for the purposes of this section—

- (a) a Minister of the Crown and the Treasury;
- (b) the Scottish Executive;
- (c) a Northern Ireland department;
- (d) the Office of Fair Trading;
- (e) the Competition Commission;
- (f) the Consumer Panel;
- (g) the Welsh Authority;
- (h) a local weights and measures authority in Great Britain;
- (i) any other person specified for the purposes of this subsection in an order made by the Secretary of State.

(4) The following are relevant functions for the purposes of this section—

- (a) any function conferred by or under this Act;
- (b) any function conferred by or under any enactment or instrument mentioned in subsection (5);
- (c) any other function specified for the purposes of this subsection in an order made by the Secretary of State.

(5) The enactments and instruments referred to in subsections (2) and (4) are—

- (a) the Wireless Telegraphy Act 1949 (c. 54);
- (b) the Marine, &c., Broadcasting (Offences) Act 1967 (c. 41);
- (c) the Wireless Telegraphy Act 1967 (c. 72);
- (d) the Trade Descriptions Act 1968 (c. 29);
- (e) the Fair Trading Act 1973 (c. 41);
- (f) the Consumer Credit Act 1974 (c. 39);
- (g) the Competition Act 1980 (c. 21);
- (h) the Telecommunications Act 1984 (c. 12);
- (i) the Consumer Protection Act 1987 (c. 43);
- (j) the 1990 Act;
- (k) the 1996 Act;
- (l) the Wireless Telegraphy Act [1998 \(c. 6\)](#);
- (m) the Competition Act [1998 \(c. 41\)](#);
- (n) the Enterprise Act [2002 \(c. 40\)](#);
- (o) the Consumer Protection (Northern Ireland) Order 1987 (S.I. 1987/2049 (N.I. 20));
- (p) the Control of Misleading Advertisements Regulations 1988 (S.I. [1988/915](#)).



(6) Nothing in this section—

(a) limits the matters that may be published under section 15, 26 or 390;

(b) limits the matters that may be included in, or made public as part of, a report made by OFCOM by virtue of a provision of this Act or the Office of Communications Act [2002 \(c. 11\)](#);

(c) prevents the disclosure of anything for the purposes of a report of legal proceedings in which it has been publicly disclosed;

(d) applies to information that has been published or made public as mentioned in paragraphs (a) to (c).

(7) Nothing in this section applies to information obtained in exercise of the powers conferred by section 196 of the 1990 Act (powers of entry and search).

(8) Information obtained by OFCOM in exercise of functions which are exercisable by them concurrently with the Office of Fair Trading under Part 1 of the Competition Act 1998 is subject to Part 9 of the Enterprise Act 2002, and not to the preceding provisions of this section.

(9) Section 18 of the Anti-terrorism, Crime and Security Act [2001 \(c. 24\)](#) (restriction on disclosure of information for overseas purposes) shall have effect in relation to a disclosure by virtue of subsection (2)(d) as it applies in relation to a disclosure in exercise of a power to which section 17 of that Act applies.

(10) A person who discloses information in contravention of this section is guilty of an offence and shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

(11) No order is to be made containing provision authorised by subsection (3) or (4) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

(12) In this section “legal proceedings” means civil or criminal proceedings in or before any court, or proceedings before any tribunal established by or under any enactment.