

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2018

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

Decision (including any steps ordered)

1. The complainant requested information from the Office of Communications (OFCOM) about transparency standards.
2. The Commissioner's decision is that OFCOM complied with the procedural sections of the FOIA and provided the complainant with all of the recorded information which it held that was relevant to his request.
3. The Commissioner does not require OFCOM to take any steps.

Request and response

4. On 3 September 2017, the complainant wrote to OFCOM. He requested a "yes or no answer" to the following questions:

"1) What is Ofcom's position: is it acceptable for the Ombudsman Services not to respond to requests for transparency? i.e. all email requests for clarification are ignored and no acknowledgment of request is given - no attempt is made to deal with the transparency issue.

- 2) Is it acceptable for the Ombudsman not to clarify whether or not the deadlock letter has been upheld? The deadlock letter states the final position taken by the company."*
5. On 29 September, OFCOM responded and explained that *"we set general requirements for OS [Ombudsman Services] to be transparent in its processes but do not specify how it should handle individual cases."*
 6. On 1 October and 6 October the complainant asked for clarification of OFCOM's response and also made the following requests:
 - "3) Ofcom operates under the Communications Act 2003 - section 52(3)(a) places a duty on Ofcom to ensure resolution of disputes are transparent. It is for Ofcom to decide what it considers the appropriate standard for transparency. Ofcom should be open and honest about what transparency standard it has set for the Ombudsman Services. Does Ofcom want the Ombudsman Services to respond to requests for transparency when Final Decisions are unclear?"*
 - "4) As part of the approval of Ombudsman Services, Ofcom imposes a general requirement for the Ombudsman Services to be transparent. Is the Ombudsman Services in breach of this transparency requirement by not responding to requests for transparency?"*
 7. On 19 October 2017 the complainant wrote again to OFCOM and made the following request:
 - "5) Ofcom has a statutory duty to set a transparency standard for the Ombudsman Services. I am asking to know what standard of transparency Ofcom has imposed on the Ombudsman Services?"*
 8. OFCOM did not respond to the emails of 1, 6 and 19 October 2017 and on 6 November 2017, the complainant formally requested that OFCOM conduct an internal review into its handling of his requests.
 9. On 7 November 2017, OFCOM responded. It explained that it did not consider that requests 1) – 4) were valid requests for information under the FOIA because they were not requests for information as such, but *"rather they ask for Ofcom's views and policy position on matters concerning Ombudsman Services ("OS") and how they should handle individual cases."*
 10. With regard to request 5, OFCOM explained that it was able to provide a response under the FOIA and it provided a link to some published information about OFCOM's decision-making principles and alternative

dispute resolution (“ADR”) schemes, as well as extracts from that published information which it considered were relevant.

11. On 12 November 2017, the complainant requested a further internal review. On 13 December 2017, OFCOM provided the following internal review response:

“I am satisfied that Ofcom has fully responded to [request 5]. You asked Ofcom to disclose the standard of transparency which it has imposed on the OS. In response to that question we explained this transparency requirement, and also provided other relevant information and a link to relevant documents. Further, I also consider that Ofcom’s approach to questions 1 to 4 of your request is correct.”

Background to the requests

12. The complainant’s requests relate to a duty that OFCOM has under the Communications Act 2003¹ in relation to public communications providers. This duty relates to complaints handling and dispute resolution.
13. The requests specifically concern OFCOM’s role in regulating Ombudsman Services (“OS”), which itself deals with unresolved complaints between customers and communication providers.
14. The complainant’s requests relate to a transparency standard which OFCOM may have imposed on OS under the terms of the Communications Act 2003.

Scope of the case

15. The complainant contacted the Commissioner on 21 December 2017 to complain about the way his requests for information had been handled.
16. During the course of the investigation, the Commissioner invited OFCOM to reconsider its handling of the requests, and whether any further

¹ <https://www.legislation.gov.uk/ukpga/2003/21/contents>

recorded information may be held; for example, any specific transparency standard which it requires OS to comply with.

17. OFCOM revisited the request, and wrote to the Commissioner on 5 June 2018. It explained that it had located a statement, which had been published on its website, which it considered would be helpful to the complainant but which had been missed in its internal review response of 13 December 2017. Because of this, OFCOM was in the process of conducting further searches in case it had missed further potentially relevant information.
18. OFCOM also wrote to the complainant on the same date, providing a link to the statement which it had located, and explaining that further checks would be carried out.
19. This led to some further questions being raised by the complainant, who also stated that he did not consider the information in the published link was relevant.
20. OFCOM wrote again to the complainant and the Commissioner on 19 June 2018. It explained that further searches had been carried out. While stating that it had not located any information relevant to the complainant's "*original requests*", it provided responses to some specific questions raised subsequently by the complainant, and some further links to published information "*to be as helpful as possible*".
21. The complainant wrote to the Commissioner on 4 July 2018. He explained that he was dissatisfied not to have received a response to requests 1) – 4) as set out above. In addition, he commented that: "*Ofcom must confirm whether Ofcom has defined the transparency condition imposed on the Ombudsman Services.*"
22. The following analysis considers whether OFCOM, on an objective reading of the request, has complied with the FOIA by providing all of the relevant information which it holds.

Reasons for decision

Section 1 - General right of access to information

23. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled—

- a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- b) *if that is the case, to have that information communicated to him."*
24. Public authorities are therefore required to respond to requests for recorded information in accordance with the statutory provisions of the FOIA. However, as explained on the Commissioner's website², if a request is made to a public authority which requires the public authority to express an opinion or judgment that is not already recorded, the public authority would be expected to deal with such a request in the normal course of business, rather than under any particular statutory obligations.
25. The Commissioner, as the regulator of the FOIA, does not have any remit to comment on responses which are made in the normal course of business.
26. The Commissioner therefore considered whether the five requests which led to the complaint being brought were valid requests for the purposes of the FOIA; that is, whether, on an objective reading of the requests, they were requests for recorded information held by OFCOM.

Was each request valid for the purposes of the FOIA?

27. The Commissioner notes that requests 1) and 2) specifically asked for a "yes or no answer" before asking whether it is "*acceptable for the Ombudsman Services not to respond to requests for transparency*" and whether it is "*acceptable for the Ombudsman not to clarify whether or not the deadlock letter has been upheld.*"
28. The Commissioner understands that the requests relate to transparency standard(s) which may have been imposed upon OS by OFCOM. The complainant expected OFCOM to be able to explain its approach to these specific matters, in line with any existing transparency standard or policy, by confirming either yes or no.
29. However, while a public authority may be expected to produce a written policy or document that imposed an expected standard (if asked for it) there is no requirement under the FOIA for the public authority to

² <https://ico.org.uk/your-data-matters/official-information/>

explain how it typically interprets or applies any such document, which is what a "yes or no answer" would require.

30. In the Commissioner's view, requests 1) and 2) are not asking for the content of any specific recorded information, but are asking for OFCOM's normal interpretation or application of a policy (if such policy exists); the requests are demanding an answer as to what is OFCOM's normal practice.
31. Requests 1) and 2) are therefore not valid requests for the purposes of the FOIA, and OFCOM's handling of these requests necessarily falls outside the scope of this decision notice.
32. With regard to requests 3) and 4), the Commissioner has considered the wording. The complainant asked in request 3) whether OFCOM "*want[s] the Ombudsman Services to respond to requests for transparency [with regard to the] transparency standard [OFCOM] has set*" and, in request 4), asks whether OS is in breach of "*this transparency requirement*".
33. While at first glance this may look like a request for interpretation of a policy, or an opinion, the Commissioner considered that, on an objective reading of the request, the complainant was, arguably, asking OFCOM to consider whether it held any recorded transparency standard or requirement, and if so, asking for the contents.
34. The Commissioner therefore invited OFCOM to consider requests 3) and 4) as valid under the terms of the FOIA, and to consider whether it held any recorded information relevant to the scope of these requests.
35. With regard to request 5), OFCOM had already considered that it was a valid request for information under the FOIA and had issued a response. The Commissioner agrees that request 5) is a valid request for recorded information for the purposes of the FOIA.

Has OFCOM provided all relevant recorded information?

36. The Commissioner considered whether OFCOM has provided to the complainant all of the information which it holds falling within the scope of the requests.
37. In cases where there is a dispute over the amount of information which is held, the Commissioner, following a number of decisions of the First-tier Tribunal (Information Rights), will make a decision based on the balance of probabilities.

38. OFCOM's position is that it does not hold a specific transparency standard of the type requested. It explained that:

"OFCOM do not hold a specific transparency standard which we require the Ombudsman Service to comply with. OFCOM periodically reviews its approval of alternative dispute resolution schemes. In doing so we look, amongst other things, at the extent to which schemes' decisions and decision-making processes are clear to consumers and communications providers (i.e. transparent). We publish statements on the outcomes of our reviews which set out our assessments. However, this is not the same as setting a specific standard."

39. OFCOM explained what searches it carried out for information falling within the scope of the requests after the Commissioner had invited it to revisit the requests.

40. Searches were carried out of the ADR and consumer policy SharePoint sites, OFCOM's internal intranet, its website and of potentially relevant emails, using the search terms 'Transparent OS', 'Transparent Ombudsman Services', 'Transparency Ombudsman Services' and 'Transparency OS.'

41. Individuals at OFCOM also had verbal discussions with colleagues who previously worked on ADR, and are currently working on it, on both the policy and enforcement sides.

42. This led to OFCOM determining that, while no specific transparency standard was held with regard to requests 3), 4) and 5), there was some further published information on its website which may be helpful to the complainant, and it provided links.

43. The Commissioner is aware that the complainant considers that OFCOM should be able to provide a definitive answer as to whether it considers OS to have breached a transparency standard. The complainant has stated to the Commissioner:

"The main principle behind FOI legislation is that citizens have a right to know about the activities of public authorities. It is in the public interest to know what decisions Ofcom has made about ensuring consumers receive a clear decision from the Ombudsman Services... I want to establish the facts and I expect the ICO to provide advice and assistance and to force Ofcom to be open and transparent."

44. He has also stated:

"Why has Ofcom provided no information on the transparency condition imposed on the Ombudsman Services? I want Ofcom to confirm whether Ofcom has taken the decision to allow the Ombudsman Services the option of providing unclear final decisions to some consumers."

45. The issue here, however, is not about whether the complainant is correct about the information that OFCOM *should* hold, it is about what OFCOM *does* hold. On that point, the Commissioner is satisfied that OFCOM has conducted adequate and appropriately-targeted searches that were likely to locate recorded information falling within the scope of the requests.
46. On an objective reading of the request, the Commissioner considers that OFCOM, in addition to providing the information it had already issued to the complainant, was obliged to consider whether it held a specific transparency standard or requirement that it had imposed on OS under the terms of the Communications Act 2003.
47. Her decision is that, on the balance of probabilities, no such specific transparency standard or requirement is held by OFCOM.
48. The Commissioner is satisfied that OFCOM has complied with section 1 of the FOIA and does not require it to take any steps.

Right of appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

50. 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.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Ben Tomes
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