Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **16 July 2019**

Public Authority: **Ofcom**
Address: **Riverside House**
2a Soutwark Bridge Road
London
SE1 9HA

Decision (including any steps ordered)

1. The complainant requested information related to a TV programme submitted to Ofcom by a local television station.

2. The Commissioner's decision is that Ofcom does not hold any further information that is within the scope of the complainant's request.

3. The Commissioner does not require the public authority to take any steps.

Background to the request

4. The complainant outlined to Ofcom that it sent an email to That's Solent TV in 2015 wherein it asked for a full-length recording of a news programme, 'Solent News Now' to be submitted to it on DVD. The request refers to this recording.

5. The complainant provided the Commissioner with a copy of a letter from another individual that he considered was related to the clip. On examining the letter, it appears to refer to Ofcom requesting recordings from That's Solent TV during the approximate time period that the clip may have been requested. It does not however, explicitly refer to the programme. Therefore she cannot say with certainty that the letter is about the programme that is the subject of the request.

Request and response

6. On 3 October 2018, the complainant wrote to Ofcom and requested information in the following terms:

   "I am requesting the following please:

   1. A copy of the full-length video recording of the That's Solent TV news programme that was submitted to Ofcom as explained above.

   2. A copy of all correspondence regarding this video recording."

7. Ofcom responded on 31 October 2018. It explained that it did not hold any information relating to either part of the request. It advised the complainant that it did hold a clip from the programme, but that it was exempt from release under section 44(1)(a) of the FOIA, prohibitions on disclosure.

8. The complainant requested an internal review stating he believed Ofcom held a full-length recording of the programme, not only a clip. He added that he knew of at least one complaint that had been sent to Ofcom about the clip. Ofcom responded to the complainant on 7 January 2019. It revised its previous position and provided a clip of the programme requested to the complainant but maintained it did not hold a full recording or any related correspondence.

Scope of the case

9. The complainant contacted the Commissioner on 23 February 2019 to complain about the way his request for information had been handled.

10. The Commissioner considers the scope of the request to be whether Ofcom holds the full-length recording of the clip and/or any correspondence relating to it.

Reasons for decision

Section 1 – general right of access

11. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, subject to the application of any exemptions, to have that information communicated to them.

12. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

13. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or held such information at the time of the request).

14. Ofcom explained to the Commissioner that it does not routinely obtain and retain programme recordings. It requests this material if there are compliance concerns, complaints or for other uses such as internal training.

15. It explained that licensed television broadcasters including Local TV (LTV) licensees such as That's Solent, are required under The Broadcasting Act 1990 to retain recordings for 60 days, and to provide them to Ofcom for examination or reproduction if the content is the matter of a complaint about standards, fairness or privacy.

16. Ofcom outlined that it is required to retain broadcasting complaints, recordings and any information relating to compliance for a five year period. Otherwise information is retained 'whilst relevant'.

17. As the information the complainant requested was acquired for other reasons, Ofcom explained there was no statutory requirement to retain the information for five years. All other information is retained by Ofcom 'whilst relevant'.

18. Ofcom stated that it is possible that the circumstances regarding the acquisition of the clip from That's Solent were as follows:

    - Ofcom requested clips as examples of output from LTV stations to allow staff to familiarise themselves with content from various television stations.

    - It also requested a full-length recording of an episode of the main news programme.

    - It is likely that correspondence was sent asking for the recording(s), as on 3 June 2015 a similar request was sent for recordings from other local broadcasters.

19. It relayed that the clip was combined with extracts from other local television programmes to form a compilation to be used for training.

20. Ofcom explained it searched digital records within its information management and storage system. This was undertaken in conjunction with members of its ICT team. The system contains all licensee and licence-related documents and correspondence.

21. The terms used to search the digital file store were '(employee name)', 'That's Solent' and 'Solent News Now'.

22. The Outlook account and local drives of an employee the complainant named as having sent correspondence to the LTV station were searched in relation to both points of the request.

23. A file regarding the LTV station was retrieved from the archive and searched page by page to see if the information requested was held.

24. Ofcom outlined that it is possible that it did, at one point, hold a full-length recording of the programme in question. It stated that if this was the case, it was destroyed in line with its records management policy around 2017.

25. Ofcom explained that over a period of several weeks around 2017, it reviewed all of its records including video recordings and paper records. It assessed if it needed to retain them. If a record was no longer needed, it was securely destroyed. If it was still required, it was transferred off-site.

26. Ofcom explained that the clip was retained as part of a combination of clips it had procured for training purposes. The clip was not destroyed as it continued to have a business use.

27. As the full-length recording and any correspondence related to it was no longer required, Ofcom stated the information is likely to have been destroyed.

28. Ofcom explained that it does not have a record of the destruction, as the recording and correspondence were not obtained for the purpose of a complaint or compliance issue. Therefore, there was no statutory requirement to keep the clip for a set period of time and record its destruction.

29. It explained that it is likely to have once held correspondence relating to That's Solent about the recording if it was held, as some correspondence to other broadcasters around the same time is held by Ofcom. However, it maintained that it does not hold any correspondence relating to the programme, including the email the complainant described in his request.

The Commissioner's view

30. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 11 and 12 above, the Commissioner is required to make a finding on the balance of probabilities.

31. For clarity, the Commissioner is not expected to prove categorically whether the information is held; she is only required to make a judgement whether on the balance of probabilities a public authority holds any information within the scope of the request.

32. As outlined in the guidance published by the Information Commissioner's Office, a public authority is not obliged to communicate information deleted before the request has been received[1].

33. The guidance also outlines that if a public authority can show that information was deleted in accordance with records management policies and retention schedules, there will be no requirement to communicate deleted information to a requester.

34. In the Code of Practice the Cabinet Office has produced for public authorities, it states that:

    "If a reasonable search in the areas most likely to hold the requested information does not reveal the information sought, the public authority may consider that on the balance of probabilities, the information is not held."[2]

35. It is the Commissioner's view that the searches conducted by Ofcom were detailed, sufficient and targeted the appropriate areas.

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[1] https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

36. The Lord Chancellor's Code on the management of records states that authorities should dispose of records when they are no longer needed[3]. Paragraph 12.3 states that records should not be kept after they are no longer of use to the authority, unless there is a good reason for doing so.

37. The guidance published by the Commissioner's Office explains that when considering whether information was held and has now been destroyed, she will take into account of both the age and importance of the information to the public authority when deciding whether she agrees that this is likely to have been the case.

38. As the information requested was dated 2015, the information is more likely to have been destroyed in line with the records management policy than newer information may have been. The information sought by the complainant was not held for a statutory reason. Therefore it was less likely to have been retained for a longer period of time, having no statutory constraints on deletion. Ofcom understands that it was destroyed during a review of records around 2017.

39. Under section 1(4) of the Act, the information would need to be held at the time of the request in order for this to be communicated to the complainant.

40. Having considered the details provided by Ofcom, it is the Commissioner's view that, on the balance of probabilities, Ofcom do not hold the requested information. If the full-length clip and any correspondence related to it had previously been held, the Commissioner believes it was destroyed in accordance with Ofcom's records management policy in a review of its records around 2017. The Commissioner therefore considers that Ofcom has complied with section 1 of the FOIA.

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3 https://webarchive.nationalarchives.gov.uk/20130206150440/https://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf

Right of appeal

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

42. 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.

43. 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 .....

Pamela Clements
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