

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2019

Public Authority: The Advisory Committee on Business Appointments

Address: G/08
1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested a copy of all communications between the Advisory Committee on Business Appointments (ACOBA) and Boris Johnson concerning his appointment as columnist at The Telegraph. ACOBA withheld the requested information under sections 36(2)(b) and (c) and 40(2) of the FOIA. The Commissioner is satisfied that the requested information is exempt from disclosure under section 36 of the FOIA and that the balance of the public interest supports maintaining the exemption.

Background

2. The Advisory Committee on Business Appointments (ACOBA) was established in 1975 and is an independent, advisory, non-departmental public body, whose sponsoring Department is the Cabinet Office.
3. ACOBA advises on the application of the Government's Business Appointments Rules on outside appointments (the Rules), which apply to both Crown servants and Ministers after they leave office. ACOBA provides independent advice on the application of the Rules in relation to the most senior Crown servants (civil servants at Director-level and above, and their equivalents), and to all former Ministers of the UK, Scottish and Welsh Governments.

4. The Business Appointments Rules are set by the Government, and as ACOBA's Nineteenth Annual Report 2017-2018 states:

'It has been the view of successive Governments that it is in the public interest that people with experience of public administration/ Government should be able to move into business or other sectors, start a new career or resume a former one'.

5. The aim of the Rules is to avoid any reasonable concerns that:

a) an individual might be influenced in carrying out his or her official duties by the hope or expectation of future employment with a particular firm or organisation, or in a specific sector; or

b) on leaving Crown service, an individual might improperly exploit privileged access to contacts in Government or sensitive information; or

c) a particular firm or organisation might gain an improper advantage by employing someone who, in the course of their official duties, has had access to:

i. information relating to unannounced or proposed developments in Government policy, knowledge of which may affect the prospective employer or any competitors; or

ii. commercially valuable or sensitive information about any competitors.

6. ACOBA publishes its advice on all appointments it has considered that are subsequently taken up or announced (with the exception of appointments of a small number of individuals from the intelligence agencies, where information may be withheld for security reasons) and states in its Annual Report that *'it makes public as much detail as it is able to, after taking into account its responsibilities under data protection and freedom of information legislation'.*

7. ACOBA states (at paragraph 52 of its Annual Report) that:

'Transparency is at the heart of the Committee's work. It is through transparency that all those involved in the business appointments process (including applicants, government departments, outside employers and the Committee) are accountable to the public'.

8. ACOBA's advice, and the other material it publishes about how it operates, are available on its website. Since March 2010 the minutes of all Committee meetings have been published.

9. Applicants must complete a standard application form which is available on ACOBA's website. The form requests details of their current and previous posts as well as information on the proposed appointment,

including whether or not it was advertised and if it will involve dealings with their former Department or government more generally. Applicants must also state if they have had any contractual or official dealings with their prospective employer, competitors of their prospective employer or the sector in which the employer operates over the previous two years; and if they have been involved in policy development or the award of grants that could affect either the prospective employer or its competitors.

10. Applicants must submit the application to both their countersigning officer and the Department's HR division for them to provide their assessments. The Department then sends the completed application to the Committee's secretariat. The Committee relies on the information provided by the Department and countersigning officer to inform its consideration of the application. The Committee considers each case individually against the Rules. ACOBA collects wider evidence where necessary, for the example, the views of other Departments, including the Cabinet Office, as "owner" of the Rules. In some instances the Committee will meet applicants to discuss the proposed appointment further.
11. The Committee proceeds to reach a view on whether there should be any restrictions on the applicant taking up the proposed appointment, and once its advice has been agreed, ACOBA writes to the relevant final decision-maker (whether Minister or Permanent Secretary), who then considers the application and the Committee's recommendation. Once he or she has made the decision ACOBA is informed, along with the Department and the applicant.
12. The Rules make it clear that retrospective applications will not normally be accepted. Paragraph 49 of the Annual Report notes that, *'the Committee needs to be free to offer the most appropriate advice in any situation without it appearing to be constrained by an appointment already having been announced, or an individual already having signed a contract or taken up a post'*.
13. ACOBA states (at paragraph 50 of the Annual Report) that the Committee will make its concerns public when applications are received retrospectively by publishing the letter it writes to the individual (in the case of former Ministers) or the department (in the case of former Crown servants). The Committee explains that it *'takes this approach in the expectation that drawing attention to a failure to submit an application will encourage others to follow the correct process. It also means that any improper appointment does not pass without comment'*.

14. In April 2017, the Public Administration and Constitutional Affairs Committee (PACAC) published its report¹ following its enquiry into the role and effectiveness of ACOBA. The PACAC found that ACOBA's effectiveness remains restricted, by both its lack of powers and narrow remit. In respect of retrospective applications the PACAC report stated (at paragraph 88) that:

'The Rules state that retrospective applications will not normally be accepted but it is clear from press coverage that this element of the Rules is meaningless. ACOBA can choose not to accept an application but this does not stop individuals taking up the post regardless of the lack of advice from ACOBA about its propriety. Currently, the only action that the Committee can take in response to a retrospective application is to send a letter conveying its displeasure. This does not instil public confidence in a system that was established to prevent any perceived or actual impropriety that may result from moving between the public and private sector. Ministers and senior civil servants seem complacent about the effect that this has on public confidence in the values of people who lead in politics and in Whitehall'.

15. On 9 July 2018, Boris Johnson MP resigned as Foreign Secretary, having been in that office for two years. He remained a backbench Member of Parliament for Uxbridge and South Ruislip. It became public knowledge that Mr Johnson would be taking up a role as columnist for The Telegraph when the newspaper started advertising his column on the weekend of 14 and 15 July 2018. Mr Johnson signed a contract with The Telegraph on 12 July 2018 but ACOBA did not receive his application (for advice) until 26 July 2018.
16. In a letter to Mr Johnson dated 8 August 2018, and published on ACOBA's website, the Committee stated that they considered *'it to be unacceptable that you signed a contract with The Telegraph and your appointment was announced before you had sought and obtained advice from the Committee, as was incumbent on you on leaving office under the Government's Business Appointment Rules'*. On 24 July 2019 (seven months after the complainant's request) Mr Johnson took office as Prime Minister of the United Kingdom.

¹ Managing Ministers' and Officials' Conflicts of Interest: Time for Clearer Values, Principles and Action

Request and response

17. On 13 August 2018, the complainant wrote to ACOBA and requested information in the following terms:

'A copy of all communications between ACOBA and Boris Johnson concerning his appointment as columnist at the Telegraph'.

18. ACOBA responded to the request on 6 September 2018 and confirmed that they held information within scope of the same. They advised the complainant that the Chair of the Committee, Baroness Browning (the qualified person) considered that the information was exempt from disclosure under sections 36(2)(b)(i), (b)(ii) and (c) of the FOIA, as disclosure of the information would be likely to inhibit the free and frank provision of advice and exchange of views, and would be likely to prejudice the effective conduct of public affairs. ACOBA also advised that they were applying section 40(2) (third party personal data) to withhold the requested information.
19. Following an internal review ACOBA wrote to the complainant on 19 October 2018. The review upheld the decision and the application of both exemptions.

Scope of the case

20. The complainant contacted the Commissioner on 22 October 2018 to complain about the way his request for information had been handled.
21. The Commissioner has had sight of the withheld information and submissions from both parties.
22. The Commissioner considers that the scope of her investigation is to determine whether ACOBA is entitled to rely on sections 36 and 40 as a basis for refusing to provide the withheld information.

Reasons for decision

23. Section 36(2) provides that –

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation , or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs’.

24. Section 36 can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out in section 36(2) of the Act.
25. ACOBA provided the Commissioner with copies of the submissions which were provided to Baroness Browning, the Chair of the Committee, in her capacity as the qualified person. The submissions included the draft responses to the complainant. ACOBA provided the Commissioner with Baroness Browning’s written confirmation of her opinion. The Commissioner is satisfied that Baroness Browning was the appropriate qualified person for the purposes of the exemptions at sections 36(2)(b) and (c).
26. The next step in determining whether the exemption is engaged is to consider whether the opinion of the qualified person was reasonable. The Commissioner’s guidance explains that the opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.
27. The qualified person accepted the recommendation provided by ACOBA that the exemptions at sections 36(2)(b) and (c) should be relied upon to withhold the information requested by the complainant. Baroness Browning agreed with the reasoning set out in the response to the complainant which reflected legal advice taken by ACOBA. Such reasoning being that disclosure of the requested information (provided voluntarily to ACOBA by the applicants and in confidence) would be likely to inhibit the free and frank discussions and exchange of views between ACOBA and its applicants. Applicants may not feel confident approaching ACOBA or feel inhibited from cooperating fully if it was thought that full details of applications and correspondence would be disclosed. This would lead to a system that could not function effectively.
28. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. The issue is whether disclosure of the information would inhibit the processes of providing advice or

exchanging views (section 36(2)(b)) or would otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).

29. In *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC), the Upper Tribunal (UT) found that the First Tier Tribunal (FTT), in finding that section 36 was not engaged in EA/2016/0055, had erred in law by taking into account matters of public interest when deciding whether an opinion of the qualified person was reasonable for the purpose of section 36(2), which is concerned with substantive but not procedural reasonableness.
30. Having reviewed the withheld information the Commissioner is satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b) and (c) applied to it. The Commissioner accepts that as Chair of ACOBA, the qualified person is fully aware that the Committee's role and remit is that of an advisory body. It is not a statutory authority and does not have the power to compel applicants to cooperate with it. It is reasonable to conclude that any disclosure which may limit the voluntary cooperation of applicants with ACOBA would be likely to prejudice its function and the transparency of the activities of former Ministers and Crown servants.
31. As a qualified exemption, section 36 is subject to a public interest test. Having accepted the opinion of the qualified person that prejudice would be likely to result from disclosure of the information, the Commissioner must then consider whether the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.

Public Interest Test

Arguments in favour of disclosure

32. In its response of 6 September 2018 to the complainant's request, ACOBA recognised that '*there is significant public interest in knowing that a former Foreign Secretary, with a significant public profile, has properly complied with their duties to seek ACOBA's advice; and that ACOBA has considered relevant information and come to a well-reasoned decision*'. The Committee also recognised the importance of relevant information being accessible so that members of the public and/or the press may question it and hold individuals to account. ACOBA stated that it considered that the public interest in transparency in this matter was '*well met by the information that it has published on its website*' (i.e. ACOBA's letter to Mr Johnson of 8 August 2018).
33. In submissions to the Commissioner, ACOBA recognised that the specific circumstances of this case, given that it was publicly announced that Mr Johnson had taken up his appointment at The Telegraph before approaching ACOBA for advice (which is contrary to the Rules), meant

that there was significant public interest in knowing as much as possible about ACOBA's process and the decision in this case. For that reason, ACOBA's advice letter, which was made public as soon as the Committee reached a view, set out all the relevant information in the case, including ACOBA holding Mr Johnson to account for the timing of his application.

34. ACOBA noted that their letter to Mr Johnson of 8 August 2018, published on their website, clearly set out that:
- Seeking advice was a requirement under the Rules, by virtue of the Ministerial Code;
 - All Ministers are required to sign the Ministerial Code on entering office;
 - Mr Johnson saw the Ministerial Code again in January 2018 when it was updated (and was required to confirm in writing that he understood his obligations under it);
 - The Foreign and Commonwealth Office confirmed Mr Johnson was written to on the day he left office, a letter which also reminded him of his obligations to seek advice from ACOBA on any appointment/employment for two years on leaving office; and
 - Mr Johnson said this last letter (dated 9 July 2018) did not reach him until after he had signed the contract in question.
35. ACOBA advised the Commissioner that they did consider, at the time of the complainant's request, whether there was any other information contained in the withheld information that would add to the public interest in this case, but concluded that there was not. ACOBA stated that the pertinent information which Mr Johnson provided about the timing of his application (dates and that he received information reminding him of his obligations after he had signed the contract) was included in the advice letter which ACOBA published on their website.
36. In submissions to the Commissioner, the complainant contended that ACOBA did not fully take into account the public interest in disclosure of the requested information. He stated that, *'Boris Johnson simply did not follow the ACOBA rules in this case, as the authority stated in its response. There is therefore a strong public interest in understanding how he was able to do it, why he did it, and how he justified himself in private for not doing it'*.
37. The complainant submitted that given that ACOBA has no powers to enforce the following of its advice, it is *'even more in the public interest for the body to reveal Boris' defence for not doing so, which has so far not been forthcoming'*. The complainant contended that this public

interest *'clearly outweighs concerns that former public officials will not make disclosures, something that, as this case shows, is often simply not happening anyway, undermining this point'*.

38. The complainant explained to the Commissioner that his main argument in support of his view that it was in the public interest for ACOBA to disclose the requested information was as follows:

'If ACOBA is unable to hold politicians to account through its actions, with little or no cost to their failure to follow its recommendations, then it is in the public interest to know as much as possible about the politicians' interactions with ACOBA, and how the process works. This would allow greater scrutiny of both ACOBA and the politicians in question, and if the public agreed based on this information that the process of accountability was not strong enough, the government would be pressured to introduce alternative and more effective arrangements. This seems to be a very good public interest reason to disclose currently private records of ACOBA's interaction with Boris Johnson'.

Arguments in favour of maintaining the exemption

39. In their response of 6 September 2018 to the complainant's request, ACOBA advised that if its ability to obtain sufficient information was compromised, it would have a negative impact on transparency and accountability, and the ability of the Committee to discharge its role effectively. ACOBA stated that this would not be in the public interest and that there was a strong public interest in maintaining the exemption to the requested information. Therefore, on balance, ACOBA concluded that the public interest supported maintaining sections 36(2)(b) and (c) to the information requested.
40. In submissions to the Commissioner, ACOBA contended that releasing the requested information put at significant risk the ability of the Committee to carry out its role effectively in the future. ACOBA stated that, *'should others subject to the Business Appointment Rules (whether they have a significant public profile or not) refrain from providing information for the fear of it being released – ACOBA would no longer be able to carry out its role effectively in the future'*. In addition, ACOBA contended that if members of the Committee could not feel free to exchange frank opinions and views to enable deliberation, ACOBA would no longer be able to carry out its role effectively in the future.
41. ACOBA confirmed that they did not identify anything in the withheld information (not already in the public domain) that it determined would be of such public interest that it outweighed the public interest in ACOBA being able to carry out its function effectively in the future.

Balance of the public interest

42. The Commissioner recognises that there is a significant and strong public interest in knowing why a former Foreign Secretary (as the current Prime Minister was at the time of the request) with a particularly high public profile, failed to comply with his duty under the Ministerial Code and seek ACOBA's advice prior to taking up his position as a columnist for The Telegraph.
43. This public interest is particularly prominent as this is not the only case in recent years where a former senior government minister has been found not to have complied with the Rules. In April 2017, ACOBA noted that it was '*a matter of regret*' that former Chancellor of the Exchequer, George Osborne MP's appointment as Editor of the Evening Standard was announced on 17 March 2017, only four days after Mr Osborne had submitted his application to ACOBA and before the Committee had an opportunity to make the necessary enquiries, consider his application, and provide its advice. In a letter to Mr Osborne (published on the ACOBA website) of 28 April 2017, the Committee stated that it was not appropriate for him to have signed his contract of employment with the Evening Standard on 20 March 2017, without having received the Committee's advice.
44. In Mr Johnson's case, in keeping with its usual practice in retrospective application cases, ACOBA published on its website the letter which it sent to Mr Johnson on 8 August 2018 (see paragraph 32 above). The letter noted that Mr Johnson had told the Committee that the letter of 9 July 2018 from Sir Simon McDonald, Permanent Under Secretary and Head of the Diplomatic Service (which reminded Mr Johnson that former Ministers are required to seek advice from the Committee on any appointments or employment they may wish to take up within two years of leaving office), did not reach him until after he had signed his contract with The Telegraph. This information reflects the withheld information (the information provided to ACOBA by Mr Johnson).
45. However, this information could neither be an explanation for Mr Johnson's failure to comply with the Rules nor a '*defence*', to use the complainant's wording, to the non-compliance. This is because even without sight of Sir Simon's letter, Mr Johnson was already well aware of the Rules and the requirement to follow the same. All Ministers are asked to sign the Ministerial Code (the Code) on entering ministerial office and paragraph 7.25 of the Code clearly states that upon leaving office, Ministers must '*seek advice from the independent Advisory Committee on Business Appointments (ACoBA) about any appointments or employment they wish to take up within two years of leaving office. Former Ministers must ensure that no new appointments are announced, or taken up, before the Committee has been able to provide its advice*'.
46. In addition to the above, the Ministerial Code was updated in January 2018 and Ministers (including Mr Johnson, who was Foreign Secretary at

the time) were required to confirm in writing that they had read the Code and understood their obligations under it. Therefore, to take the complainant's arguments for disclosure in turn, in terms of understanding 'how' Mr Johnson was able to not follow the Rules and yet secure his contract with The Telegraph, the withheld information cannot be of assistance. There is currently no formal sanction for failing to follow the Rules and secure employment or an appointment without seeking or waiting to receive advice from ACOBA and so the system effectively depends upon the observance of personal honour and respect. Retrospective applications will not normally be accepted and ACOBA refused to provide retrospective advice in Mr Johnson's case.

47. In terms of 'why' Mr Johnson failed to follow the Rules, the withheld information is of no avail here since only Mr Johnson will know why he failed to act in accordance with the Rules and the Ministerial Code. As for how he '*justified himself in private*' (i.e. in his communications with ACOBA) for not following the Rules, the Commissioner notes that the Committee have already provided a large degree of transparency on this point by way of their published letter to Mr Johnson of 8 August 2018. As noted above, that letter refers to Mr Johnson having told the Committee that he did not receive Sir Simon's letter until after he had signed his contract with The Telegraph. However, for the reasons detailed above, this could not afford Mr Johnson a valid explanation, justification or defence for having failed to follow the Rules, which is why it was not treated as such by ACOBA in their highly critical letter to him of 8 August 2018.
48. Having had sight of the withheld information, the Commissioner is satisfied that there is no further information of significance contained in the communications between Mr Johnson and ACOBA, beyond that already noted in the Committee's published letter of 8 August, that would show why Mr Johnson did not seek advice from the Committee when he clearly should have done. The facts of this matter are as set out by ACOBA in their published letter. In terms of accountability, the Committee was unequivocal in that they found Mr Johnson's failure to follow the Rules to be unacceptable and refused to provide retrospective advice. Therefore, ACOBA has held Mr Johnson to account for his actions, within their limited ability to do so.
49. As the Commissioner has noted in previous decisions², it is not her role or remit to critically assess (as others have done) ACOBA's effectiveness (save for how that effectiveness may be affected by disclosure of the requested information). Like any organisation, ACOBA can only be as

² E.g. FS50605349 (November 2016)

effective as the powers available to it allow. The important reality, central to this and other similar cases, is that being an advisory rather than a statutory body, ACOBA does not have the power to compel applicants to cooperate with it and is very much dependent upon the voluntary provision of information to enable it to fulfil its role. Therefore, any action, such as the disclosure of the information requested by the complainant, which would inhibit applicants from providing ACOBA with sufficient information for it to provide informed advice (or refuse to provide such advice in this case) on an appointment(s) would have a negative impact on transparency and accountability and not be in the public interest. As the UT noted in the Malnick case, *'it is difficult to see how an applicant would be encouraged to be open and frank about, say, matters of commercial sensitivity if there was a risk that those discussions would subsequently be made public'* (paragraph 42).

50. Whilst it is possible that the disclosure of applicant information provided in confidence to ACOBA would not necessarily stop future applicants from cooperating with the Committee, the Commissioner considers that the level and degree of such cooperation would almost certainly be reduced, with applicants not providing as much information and detail as at present. As an advisory body and not a statutory authority, ACOBA would have no power to compel applicants to provide further or more detailed information and even requests for the same would not be resource or time effective. Were ACOBA to have less information available to it when considering the propriety of outside appointments then this would clearly constrain and negatively impact upon the Committee's ability to discharge its role effectively. This would not be in the public interest.
51. The Commissioner considers, in all the circumstances of the case, that the public interest in maintaining the exemptions outweighs the public interest in disclosure of the withheld information. The Commissioner is satisfied that the public interest in transparency and accountability in this matter has been appropriately and proportionately met by ACOBA's publishing of its letter to Mr Johnson of 8 August 2018. The information contained in that letter reflects the withheld information and the latter would not disclose any further explanation, justification or defence made by Mr Johnson for his failure to follow the Rules³. Had ACOBA not placed such information in the public domain, then the withheld

³ Mr Johnson's failure to follow the Rules was referenced in a House of Lords debate on 10 September 2018, when Lord Hunt of Kings Heath asked what action the Government was taking to ensure that all former Ministers seek advice from ACOBA before taking up appointments within two years of leaving ministerial office.

information in this matter would have assumed a greater weight and significance.

52. For the reasons given above, the Commissioner considers that the public interest in ensuring that ACOBA is afforded the maximum scope for discharging its role and function as effectively as possible, outweighs any residual public interest in disclosure of the specific information in this case. The Commissioner is therefore satisfied that the exemptions at sections 36(2)(b) and (c) have been correctly applied and the public interest favours maintaining the same.
53. Having found that the withheld information is exempt under sections 36(2)(b) and (c), the Commissioner has not gone on to consider the additional application of section 40(2).

Right of appeal

54. 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

55. 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.
56. 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

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