

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2022

Public Authority: Advisory Committee on Business Appointments
Address: Room G/08
1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested correspondence relating to 18 applications for advice that were subsequently withdrawn. The Advisory Committee on Business Appointments ("ACOBA") pointed to some information that was already in the public domain but refused to provide the remainder of the information it held, relying on section 36 of FOIA (prejudice to the effective conduct of public affairs) in order to do so.
2. The Commissioner's decision is that ACOBA has correctly applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to the withheld information and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 1 April 2021 the complainant requested information of the following description:

"ACOBA's latest Annual Report, says that there were 204 applications made to the committee in the year 2019-20. Of these, 18 applications were subsequently withdrawn. This FOI relates specifically to these 18 applications.

"I would like to request copies of all written correspondence that was sent by ACOBA to the individuals who made each of these 18 applications.

"Please note, I am only requesting correspondence that relates specifically to these 18 applications. If ACOBA has corresponded with these individuals about other matters, then this can be omitted from the FOI response."

5. On 4 May 2021, ACOBA responded. It refused to provide the requested information. It primarily relied on section 36 of FOIA to withhold the requested information, but also noted that some of the information was the personal data of third parties.
6. The complainant requested an internal review on the same day. ACOBA sent the outcome of its internal review in June 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 2 June 2021 to complain about the way his request for information had been handled.
8. ACOBA did not provide copies of the withheld information to the Commissioner although it is clear that it only considers section 40(2) to apply some of the information within scope – whereas section 36 has been applied to the information in its entirety. The Commissioner has therefore considered whether any of the limbs of section 36 apply first. If and to the extent that none of the limbs apply, he will consider whether section 40(2) of FOIA applies to the remaining information.

Reasons for decision

9. Section 36(2) of FOIA states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of that information:
 - (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

- (iii) the work of the Cabinet of the Welsh Assembly Government.
 - (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.
10. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

11. ACOBA provided the Commissioner with a copy of an email that was sent to the Rt Hon the Lord Pickles, the Chair of ACOBA in which its secretariat set out a justification for applying three limbs of the section 36 exemption. It also provided a copy of an email from Lord Pickles, responding to the correspondence later the same day, in which he states:

"I confirm that I have carefully considered the response to the request, which I endorse."

12. The Commissioner is satisfied that Lord Pickles is entitled to act as the qualified person for the purposes of section 36 of FOIA. He (the Commissioner) is also satisfied that, in responding as he did, Lord Pickles provided an opinion on 30 April 2021.

What was the opinion and was it reasonable?

13. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.

14. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
15. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
16. Having considered the correspondence, the Commissioner considers that Lord Pickles has, by responding as he did, explicitly adopted the ACOBA secretariat's reasoning as his own opinion. The reasoning for applying the exemption was as follows:

"The information to which Section 36 would be applied includes, for example, the emails sent from ACOBA to individuals who have gone on to withdraw their applications. If all email correspondence was to be released in this case, it puts at risk the likelihood of full and frank provision of information from, and discussion with, those who are subject to the Rules in the future. This is particularly important given ACOBA does not have the power to compel former Ministers to comply with the Rules and seek advice from ACOBA; and they may not feel confident approaching ACOBA, or feel inhibited from cooperating fully, if it was thought that full details of all applications and correspondence would be disclosed.

"These factors as outlined above are likely to result in inhibiting the free and frank exchange of views for the purposes of deliberation 36(2)(b)ii and the free and frank provision of advice 36(2)(b)i. We do not police the thoughts of applicants which is why we publish applications only when announced/taken up and we want to encourage full and frank provision of information. If ACOBA's ability to obtain sufficient information was compromised, it would have a negative impact on transparency and accountability; and the ability of ACOBA to carry out its role effectively. This would not be in the public interest 36(2)(c). **Therefore, releasing this information would prejudice the effective conduct of public affairs.**" [original emphasis]

17. The complainant explained why he did not consider that the claimed prejudice would occur. He pointed out that ex-ministers and ex-civil servants still remained bound to some aspects of their respective codes of conduct even after the leave office. Specifically, they are required seek advice from ACOBA if they take up an appointment within a specified period.

18. Whilst recognising that that there is some force in the complainant's argument, the Commissioner does not consider that it renders Lord Pickles' opinion unreasonable.
19. ACOBA has no legal powers so it cannot compel a person to seek its advice. Whilst the majority of ex-ministers and ex-civil servants do seek advice when required, there is little that ACOBA can do in the event that a person chooses to defy the code.
20. Furthermore, Lord Pickles' opinion does not just imply that individuals would choose not to co-operate with ACOBA at all, but that those that do seek advice may be less forthcoming in providing information if they think it will be published.
21. In the Commissioner's view it is reasonable to consider that individuals will be less forthcoming in seeking advice if they consider that they will be publicly "shamed" for having acted on ACOBA's advice not to take up a particular appointment. They may choose to be less co-operative in the process or they may not engage at all. Therefore it is reasonable to suppose that the free and frank provision of advice and the free and frank exchange of views would be inhibited by disclosure and that the chances of such an inhibition are more than remote or hypothetical. Equally, as ACOBA relies on what is effectively voluntary co-operation, any reduction in willingness to co-operate undermines the effective operation of ACOBA which would be likely to "otherwise" prejudice the effective conduct of public affairs.
22. As the Commissioner considers that Lord Pickles' opinion was reasonable, it follows that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA are all engaged.

Public interest test

23. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, a public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
24. Given that the Commissioner has accepted the possibility that disclosure of the remaining emails might cause prejudice, there will always be an inherent public interest in preventing that prejudice from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
25. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that that the chance of prejudice occurring does not have to be more likely than not, but there must still

be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.

26. The complainant considered that there was a strong public interest in transparency around this particular subject and that ACOBA had not demonstrated that those who approached it had any reasonable expectation that their correspondence would remain private.

27. ACOBA on the other hand argued that:

"The [ACOBA] Rules also states: 'All approaches to the Advisory Committee will be handled in strict confidence, and will remain confidential until the appointment or employment is publicly announced or taken up...'. ACOBA does not publish information unless the appointment is taken up or announced. Individuals should feel free to be able to seek advice on appointments without fear of publication of applications they considered, and did not go on to take up - as long as they have followed that advice.

"However, we took into account the strong public interest in knowing that the process is transparent and accountable. ACOBA takes the public interest in knowing that there has been a comprehensive gathering of facts; that ACOBA has considered these and come to a reasoned decision; and whether the Rules have been followed very seriously. If advice is provided and the role is subsequently taken up, ACOBA publishes all the relevant details, including the name of the applicant, their previous official post, their new post, the information and evidence assessed by ACOBA and any conditions or safeguards the ACOBA has advised. Further, it recognises the importance of members of the public, being able to access relevant information so that, should an individual not comply with the advice, or should it transpire that the advice relied on an incorrect fact provided by an applicant or department for example, members of the public and/or the press may call this into question."

28. In the Commissioner's view the balance of the public interest should favour maintaining the exemption.

29. ACOBA has noted that, where an individual takes up a role, whether or not it was in accordance with ACOBA's advice, the advice given will be published. Not only is there a strong public interest in such information, publication also acts as a powerful incentive to follow ACOBA's advice: those that do so will be able to demonstrate that they followed the correct procedure; those that do not do so will face legitimate questions about their decision.

30. However, where individuals submit a formal request for advice, but subsequently withdraw it (which can be for a variety of reasons) the Commissioner considers that there is a much lower public interest in disclosure. The fact that a person may withdraw an application does not necessarily indicate wrongdoing and there could be perfectly legitimate reasons why the advice is no longer necessary.
31. The Commissioner has issued a number of decision notices surrounding correspondence with ACOBA.¹ His view has always been that there is a strong public interest in ensuring that individuals are not discouraged from approaching ACOBA and that preserving a certain degree of confidentiality is necessary for that purpose. In the Commissioner's view the public interest lies in individuals engaging pro-actively and wholeheartedly with ACOBA and in ACOBA feeling able to provide advice or discuss sensitive matters freely and frankly. That approach was one approved by the Upper Tribunal in *Information Commissioner v Malnick & ACOBA* [2018] UKUT 72 (AAC).
32. Lord Pickles, as ACOBA's qualified person, has provided an opinion stating that disclosure would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views and would also be likely to otherwise prejudice the effective conduct of public affairs. The Commissioner considers that that is a reasonable opinion and sees no compelling public interest that would override such concerns. Indeed, he considers that there is relatively little public interest in the particular information being withheld compared to the damage that its disclosure might bring about.
33. The Commissioner is therefore satisfied that, in the circumstances of this case, the public interest favours maintaining the exemption.

¹ See for example: https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560652/fs_50591296.pdf, <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625335/fs50605349.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258777/fs50689319.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616091/fs50795901.pdf>

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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

Roger Cawthorne
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