



Neutral citation number: [2024] UKFTT 1042 (GRC)

Case Reference: EA/2022/0265

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard by: CVP Remote Hearing

Heard on: 30 January 2024

Decision given on: 20 November 2024

Before

**TRIBUNAL JUDGE JACQUELINE FINDLAY
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER EMMA YATES**

Between

HENRY DYER

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) DEPARTMENT FOR BUSINESS AND TRADE (formerly the Department for
International Trade)
(3) CABINET OFFICE**

Respondents

Representation:

The Appellant: Mr Henry Dyer

Respondents:

The Information Commissioner: not represented

Department for Business and Trade: Mr Robin Hopkins, Counsel

Witness: Mr Anthony Green

Cabinet Office: Mr Fraser Campbell, Counsel

Mr R Fakhoury, Counsel

Witness: Mr Simon Madden

Decision

The appeal is dismissed.

In reaching its decision the Tribunal took into account that disclosure was made to Mr Dyer by the Department for Business and Trade (“the Department”) of information on 29 January 2024 and there was a further disclosure on 2 February 2024, post-hearing, following queries from the Tribunal in the Closed Session as set out in the Gist disclosed to Mr Dyer during the hearing.

REASONS

Background and Request

1. From 7 February 2023 the Department for International Trade (“DIT”) was renamed the Department for Business and Trade (“the Department”). DIT was the relevant public authority at the time of request by Mr Dyer (“the Request”) and is referred to as such throughout the bundles.

2. This appeal is brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) against the Commissioner’s Decision Notice dated 23 August 2022 (“the DN”) with reference IC-82237-V8D3 which is a matter of public record.
3. The Tribunal conducted a hearing by CVP and considered an Open Bundle (“OB”), Closed Bundle (“CB”) and authorities bundle. The Tribunal took into account all the evidence before it and made findings on the balance of probabilities.
4. The full details of the background to this appeal, Mr Dyer’s Request for information and the Commissioner’s decision are set out in the DN.
5. On 29 June 2020 Mr Dyer made a FOIA Request in the following terms:

“I am seeking, under the Freedom of Information Act, all records held by the Department with regard to the Permanent Secretary being consulted by the Advisory Committee on Business Appointments on a job taken up by former DIT SoS Liam Fox. The ACOBA letter to Liam Fox, which contains the responses from the Permanent Secretary (s.13) is here, but I would like to see all records that relate to the consultation by ACOBA and the formulation of the Perm Sec’s response by the Department or anybody related to the Department.”

6. On 28 September 2020, the Department responded and refused to provide the requested information. It cited the following exemptions: section 40 (personal information), section 43 (commercial interests) and section 36 (prejudice to conduct of public affairs). The Department drew Mr Dyer’s attention to published advice from the Permanent Secretary.
7. Mr Dyer requested an internal review on 11 October 2020 as follows:

“As the Department press office wrote to me on 30 June 2020: ‘We update our records database on an ongoing basis. When we wrote to ACOBA in March there were no records of Liam Fox or the Department officials meeting with Oxford Nanopore. Teams in the Department have now updated the records database and

we have found evidence of the Department officials meeting with Oxford Nanopore before 2019, however there is no record of Dr Fox meeting with them and this has been confirmed with his private office.’

As the records analysed by the team putting the response together was, by the Department's own admission, out of date, the statement provided was factually incorrect. There is a clear case for transparency in the circumstance of this case, in order for the public to be able to see the decision-making process that led to the publication of the Department's factually incorrect statement to Acoba, which was not corrected until enquiries were made.”

8. The Department issued the outcome of its internal review upholding its position on 14 December 2020.
9. Mr Dyer contacted the Commissioner on 13 January 2021 to complain about the way his Request had been handled. He complained about the Department’s use of exemptions and its delays in handling his Request.
10. The Commissioner considered the delays in handling the Request and the Department’s reliance on exemptions.
11. The Department confirmed to the Commissioner that it had applied section 36 FOIA to all the withheld information. Where the Commissioner was satisfied that the section 36 exemption did not apply the Commissioner considered the Department’s reliance on sections 40 and 43 to elements of the withheld information where it had been applied.

The Decision Notice

12. The Commissioner’s decision was that the Department was entitled to rely on section 36(2)(b)(i) & (ii) and section 36(2)(c) FOIA as its basis for withholding the requested information. The Commissioner also found that the Department contravened its obligations under section 10 in failing to respond within 20 working days. No steps were required to be taken.

13. On 20 September 2022 Mr Dyer lodged an appeal.

Legal Framework

14. Section 1 of FOIA confers a general right of access to information held by public authorities. A person is entitled to be informed whether the public authority holds information of the description specified in the request (section 1(1)(a)) and, if so, to have that information communicated (section 1(1)(b)).

15. A person's rights under section 1 are subject to certain exemptions, as provided for by section 2 and Part II. The exemption set out in section 36, provides as follows:

Prejudice to the effective conduct of public affairs.

(1) This section applies to –

(a) information which is held by a government department...and is not exempt information by virtue of section 35...

(2) 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.

...

(5) In subsections (2) and (3) "Qualified Person"-

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any minister of the Crown..."

16. Section 36 is a qualified exemption, meaning that a public authority may only rely on it in order to refuse to communicate information where "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b), read with section 2(3)(e)).

17. In order for information to be lawfully withheld under section 36(2)(b) and (c) three criteria must be satisfied, namely: (i) a Qualified Person must be of the opinion that disclosure of the information would cause, or be likely to cause, prejudice of the type specified; (ii) that opinion must be reasonable; and (iii) the public interest in maintaining the exemption must outweigh the public interest in disclosing the information.

18. The leading authority on these exemptions is the judgment of the Upper Tribunal in *IC v Malnick and ACOBA* [2018] UKUT 72 (AAC), which also concerned a request under FOIA relating to the Advisory Committee on Business Appointments (“ACOBA”). Relevant points from that case are as follows:
 - 1) An opinion is “reasonable” for section 36(2) FOIA purposes if it is reasonable in substance. Procedural reasonableness is not relevant.
 - 2) The fact that the Qualified Person has provided an opinion must be taken into account in the public interest balancing test.
 - 3) In the context of ACOBA’s work, there is a clear need for a safe confidential space: “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.”
 - 4) The Court of Appeal has said that “it is clearly important that appropriate consideration should be given to the opinion of the Qualified Person at some point in the process of balancing competing public interests under section 36”: *DWP v IC and Zola* [2016] EWCA Civ 758.

19. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made but must decide whether the DN is not in accordance with the law or, to the extent that the DN involved an exercise of discretion by the Commissioner, whether he ought to have exercised his discretion differently.

Factual Background

20. ACOBA is a non-departmental public body, sponsored by the Cabinet Office. The Ministerial Code provides that, on leaving office, Ministers must seek advice from ACOBA about any appointments or employment which they wish to take up within two years of leaving office and abide by that advice. However, ACOBA has no power to compel former Ministers either to seek its advice or to accept that advice once given.
21. The process for applying for advice to ACOBA, and the tests adopted by ACOBA in considering such applications, are set out in the Business Appointment Rules (“the BAR”). The BAR stipulate that approaches to ACOBA are handled in strict confidence and remain confidential until an appointment or employment is publicly announced or taken up, at which point ACOBA publishes its advice (whether or not that advice was followed by the Minister in question). When considering applications, ACOBA may seek further information from senior officials in the relevant government department, and the BAR further state that any such request will again be made in confidence.
22. Between 2016 and 2019, Dr Fox served as Secretary of State for International Trade. After leaving office, Dr Fox sought ACOBA’s advice in relation to his potential appointment by Oxford Nanopore Technologies Ltd, a private company headquartered in Oxford which specialises in the provision of certain DNA/RNA-related technology. In the course of considering Dr Fox’s application, ACOBA consulted the Department. Amongst other things. The Department informed ACOBA that: (i) Dr Fox had not met with Oxford Nanopore Technologies during his time in office; and (ii) whilst the Department was aware of Oxford Nanopore Technologies, it had only met with the company after Dr Fox’s departure from the Department. In March 2020, ACOBA wrote to Dr Fox with its advice, which recommended that Dr Fox’s appointment by Oxford Nanopore Technologies be subject to certain conditions. It also recorded that ACOBA had consulted the Department, and summarised the information provided by the Department. ACOBA published its advice online in June 2020.
23. On 29 June 2020 Mr Dyer lodged his Request. On 30 June 2020, a press officer in the Department wrote to Mr Dyer in the following terms:

“We update our records database on an ongoing basis. When we wrote to ACOBA in March there were no records of Liam Fox or the DIT officials meeting with Oxford Nanopore. Teams in the Department have now updated the records database and we have found evidence of DIT officials meeting with Oxford Nanopore before 2019, however there is no record of Dr Fox meeting with them and this has been confirmed with his private office.”

24. Subsequently, ACOBA updated its website as follows: “Subsequent to the publication of this advice, the Department notified ACOBA it had since found records that indicated the Department officials had met with Oxford Nanopore dating back to 2012. However, the records make no reference to the Rt Hon Dr Fox meeting with Oxford Nanopore. The Department confirmed this new information does not change the substance of its advice to the Committee in relation to this appointment”.
25. On 7 August 2020, the Department sought the opinion of the then Minister of State for Trade Policy, Greg Hands MP, in relation to the Request. On 21 September 2020, Minister Hands confirmed his view that section 36 of FOIA was engaged by the Request. On 28 September 2020, the Department informed Mr Dyer that it was withholding the requested Information pursuant to section 36(2)(b)(i) and (ii).
26. Mr Dyer requested an internal review on 11 October 2020, noting the updated information provided to him by the Department on 30 June 2020. On 9 November 2020, as part of the internal review, Minister Hands confirmed he was still of the view that section 36 of FOIA applied. On 14 December 2020, the Department wrote to Mr Dyer informing him that the internal review had upheld the decision not to disclose the requested Information.
27. After Mr Dyer complained to the Commissioner the Department conducted a further review. On 20 January 2021, the Department sought the view of the Minister of State for Trade Policy, Penny Mordaunt MP, as to whether section 36(2)(c) of FOIA also applied to the requested Information. On 28 January 2022, Minister Mordaunt confirmed her view that section 36(2)(c) of FOIA did apply.

Grounds of Appeal

28. Mr Dyer challenges the Commissioner's decision on the reasonableness of the opinions of the Qualified Persons and the public interest balancing test as follows:
- a. With respect to the reasonableness of the opinions of Minister Hands and Minister Mordaunt, ACOBA only provides assurances of confidentiality to former ministers who apply to it for advice, and not to the government departments from which it requests information. Mr Dyer contends that the Department and/or the ICO have "misunderstood the forms of confidence by which the ACOBA process works" and that the true nature of the process by which ACOBA consults government departments is "contrary to the Qualified Persons' opinions."
 - b. ACOBA has already published its letter and there are no longer any confidences to uphold.
 - c. Minister Hands was wrong to conclude that cooperation from the relevant parties would be unlikely in the future, since: (i) non-cooperation is "not a realistic option" for departments and their permanent secretaries; and (ii) it is unreasonable to suggest that part of the civil service would refuse to respond to a request for information by another part of the government if the relevant records could be published.
 - d. It was unreasonable for Minister Hands to take the view that the quality of the advice and information provided to ACOBA would be undermined if the requested information were published, and for Minister Mordaunt to consider that disclosure would result in ACOBA being unable to carry out its work, contrary to the effective conduct of public affairs. This is because the quality of information provided by the Department to ACOBA was already incredibly low, and because ACOBA had already been unable properly to carry out its work as a result of being provided with incorrect information.
 - e. The Commissioner's assessment of the public interest in maintaining the exemption failed to recognise that the process of confidentiality in this case is

over; and the Department only discovered the further information, and updated ACOBA, after he provided it with evidence of that department's pre-existing relationship with Oxford Nanopore Technologies.

- f. The Department's assessment of the public interest in disclosure is significantly understated such that the Commissioner cannot come to a true view of where the balance of public interest lies, and that the Department was wrong to assert that there is a public interest in knowing that it had 'comprehensively' gathered the relevant facts.
- g. Mr Dyer asserts that public interest clearly favours disclosure and asks that the following factors be considered:
- The Commissioner's assessment of the public interest was undermined by its misunderstanding of the ACOBA confidentiality process.
 - ACOBA was not in possession of complete information as a result of the Department's error. There was a gross failure of transparency and of Whitehall regulatory systems designed to stop corruption.
 - Considerations of confidentiality are outweighed by the fact that: (i) time has passed and ACOBA has published its advice to Dr Fox; and (ii) transparency and public confidence in the ACOBA process will be ensured by disclosure showing how the Department came to provide ACOBA with incorrect information, dispelling any concerns of a "cover-up."
 - The public interest in ensuring that individuals engage with ACOBA, and ACOBA feeling able to provide advice and discuss sensitive matters freely and frankly, is not relevant, because the public authority in question is the Department rather than ACOBA. The primary public interest is in understanding how ACOBA interacted with the Department. Even the Department's update to ACOBA did not provide it with all of the relevant facts.

Commissioner's Grounds of Opposition

29. The Department was entitled to withhold the request information pursuant to section 36(2)(b)(i) and (ii) and (c) of FOIA.
30. Two opinions were given by Qualified Persons within the meaning of section 36(2)(c) of FOIA in respect of the requested information. The Commissioner has been provided with the submissions made to both Minister Hands and Minister Mordaunt.
31. The opinions of the Qualified Person were objectively reasonable and it is not for the Commissioner to substitute his own opinion for that of a Qualified Person.
32. Following the Commissioner's guidance on Prejudice to the effective conduct of public affairs (the Guidance) the Commissioner considered the plain meaning of that word and the Commissioner has taken all relevant factors into consideration including the contents of the submissions made to the Qualified Person.
33. The principal point made in the submission to Minister Hands was that ACOBA does not have a legal mechanism from compelling responses. It depends on voluntary co-operation from applicants and from government departments and seeks to ensure such co-operation by assuring those that it deals with that communications will be kept confidential unless and until a proposed appointment/employment is taken up.
34. There is a reasonable basis for concluding that disclosure of the requested information would inhibit the free and frank provision of advice or exchange of views for the purpose of deliberation within the meaning of section 36(2)(b)(i) and (ii) of FOIA. These exemptions are concerned with the inhibition of the processes of providing advice or exchanging views rather than with the contents of the specific information. Minister Hands' view that disclosure would inhibit those processes was not so unreasonable that no reasonable person could hold it.
35. The submission to Minister Mordaunt emphasised that if ACOBA's ability to obtain sufficient information were compromised it would be less able to carry out its role effectively. This is a reasonable basis for concluding that disclosure would prejudice

the conduct of public affairs within the meaning of section 36(2)(c). Minister Mordaunt's view that disclosure of the information would have an effect on ACOBA's ability to carry out its role effectively was not so unreasonable that no reasonable person could hold it.

36. The Commissioner recognises that the Ministers' opinions were not obtained within the statutory timeframe but does not consider this means the opinions were unreasonable.
37. Taking all the factors into account the Commissioner's view, by a narrow margin, is that the public interest in maintaining the section 36 exemptions is stronger than the public interest in disclosure.

The Department's Grounds of Opposition

39. At the time of, or in the days following, Mr Dyer's Request:

- 1) ACOBA had been transparent about its advice as published in June 2020 and about the input (including from the Department) it had taken into account.

- 2) ACOBA was in the process of considering additional input from the Department, prompted by points that Mr Dyer had raised. Mr Dyer knew about this, not only because of the points he had raised with ACOBA, but also because he contacted the Department, who told him in clear terms on 30 June 2020 about the clarifications it had provided to ACOBA.

- 3) It was envisaged that, if necessary in light of that additional input from the Department, ACOBA would publish any updates about its advice and explain its reasoning. This is ultimately what happened.

38. The Department maintains its reliance on sections 36(2)(b) and (c) FOIA in respect of the entirety of the withheld information. It also relies on sections 40(2), 41(1) and 43(2) FOIA in respect of parts of the withheld information.
39. The leading authority on those exemptions is the judgment of the Upper Tribunal in *IC v Malnick and ACOBA* [2018] UKUT 72 (AAC).

40. The opinion of the relevant Qualified Person, Greg Hands MP was provided on 21 September 2020. That opinion concerned section 36(2)(b). A second opinion of the relevant Qualified Person, Penny Mordaunt MP, was provided on 28 January 2022 in respect of section 36(2)(c). Both of those opinions were reasonable in substance.
41. The Department's position is based on the confidentiality assurances given to applicants. Based on those assurances, applicants can provide candid information to ACOBA, and ACOBA can then share such information with departments such as the Department. This enables ACOBA to obtain appropriate input on and reached an informed view about an application. If applicants are not confident that information they provide to ACOBA will be kept confidential (save as regards the published outcome of ACOBA's deliberations), they are likely to be less forthcoming in what they tell ACOBA. That would be prejudicial to the effectiveness of ACOBA's scrutiny.
42. The Department therefore submits that the public interest in maintaining the exemption so as to avoid the prejudicial consequences envisaged in the opinions of the Qualified Persons is much weightier than the public interest in the disclosure of this particular information.
43. If the Tribunal is not satisfied as to the application of section 36(2) FOIA, the Department invites the Tribunal to order that certain sections of any information ordered for disclosure can be redacted or otherwise withheld, in reliance on the exemptions in section 40(2)/40(3A) FOIA (personal data) which applies where the disclosure of personal data "to a member of the public otherwise than under this Act... would contravene any of the data protection principles." Also section 41(1) FOIA which provides that: (1) Information is exempt information if—(a) it was obtained by the public authority from any other person (including another public authority), and (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person and section 43(2) which provides that information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

44. The Department invites the Tribunal to dismiss the appeal.

The Cabinet Office's Grounds of Opposition

45. Although Mr Dyer's Request was made to DIT and not to the Cabinet Office, it relates to DIT's engagement with the ACOBA which is an operationally independent advisory non-departmental body of the Cabinet office. The Cabinet Office's interest in this appeal arises from its desire to protect the integrity of ACOBA's advisory processes, with a view to ensuring that ACOBA is able effectively to carry out its work as a public body whose remit is designed to protect the integrity of government and improve government transparency and accountability.
46. The Cabinet Office agrees that certain parts of the withheld information also fall within the scope of sections 40 (personal information), 41 (information provided in confidence) and 43 (commercial interests) of FOIA. The Cabinet Office understands that Mr Dyer does not object to the Department's alternative reliance on these sections.
47. The Cabinet office submits that Mr Dyer's assertion that ACOBA "relies on offering assurance of confidentiality" reflects a misunderstanding of the ACOBA process because such assurances are offered to the applicant and not to the third parties consulted by ACOBA in relation to the application.
48. Mr Dyer's point of appeal that because ACOBA have already published its letter to Dr Fox there are no longer any confidences to uphold misses the point that the public interest considerations relate to the consequences of disclosure for ACOBA to be able to exercise its function in the future.
49. The disclosure of the requested information may inhibit future applicants from seeking advice from ACOBA with the consequence that there would be no opportunity for ACOBA to consult a relevant government department in relation to the appointment whether or not that department would be prepared to cooperate. The risk of prejudice is not that third parties will refuse to cooperate with ACOBA but rather they will be inhibited in their cooperation. The consequence would be that the quality of the information or advice they provided would be diminished.

50. Mr Dyer conflates the public interest in disclosure with the public interest in withholding the requested information. The Cabinet Office accepts that there is a real (albeit limited) public interest in enabling the public to understand how it came to be that the information originally provided by the Department to ACOBA included a factual error, however, the public interest in withholding the information is not concerned with the question of whether the quality of the information provided would somehow be prejudiced by disclosure but rather whether disclosure would undermined ACOBA's processes and prejudice the quality of information it received in the future.
51. The fact that there was a factual error in the Department's initial communications with ACOBAA does not diminish the public interest in withholding the information on the grounds that to do so would prejudice ACOBA's ability to carry out its work in other cases.
52. Even if the information sought is intended to improve transparency in relation to failures by the Department its disclosure would have implications for ACOBA's ability to carry out its work effectively, as a result of the chilling effect that disclosure is likely to produce.
53. The Cabinet Office invites the Tribunal to dismiss the appeal.

Discussion and Conclusions

54. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the legislation and case law as set out above. The role of the Tribunal is to consider whether the Commissioner's DN was in accordance with the law. The Tribunal may review any finding of fact on which the DN was based. The Tribunal can review all the evidence before it and makes its own decision.
55. The Department made disclosure of information contained in the first two paragraphs of an email dated 24 June 2020 (B22 of the CB) late afternoon on 29 January 2024.

This disclosure relates to an error detailed by Mr Green in his witness statement dated 22 June 2023 (pages D1 to D9 if OB).

56. In the Closed Session the Tribunal asked whether there was additional text which could be disclosed with redactions. After the hearing Mr MacKenzie, for the Treasury Solicitor, sent a letter to the Tribunal, copied to Mr Dyer, and the representatives for the Respondents stating that after considering the material in the CB further the Department had made further disclosure of two paragraphs in the email of 25 June 2020 from the Permanent Secretary's office to Mr Dyer. The Department was of the view that the paragraphs disclosed fall into the same category of information that details the DataHub oversight and was connected to the DataHub oversight information that was provided to Mr Dyer on 29 January 2024. The information disclosed on 29 January 2024 and 2 February 2024 is no longer part of the disputed information.
57. Mr Hopkins submitted that all the information Mr Dyer asked for in the Request had now been provided. All other information contained in the CB is not in scope and of no relevance to the Request.
58. Mr Dyer submitted that the late disclosure of information on 29 January 2024 was evidence of an incompetent approach towards the duty of transparency and acting in the public interest. He expressed his frustration that it had taken so long for the information to be disclosed and asked why this had not been done earlier.
59. Mr Dyer submitted that it should not be in the Government's gift to decide what should and what should not be disclosed.
60. Mr Dyer was not able to confirm that the disclosure was sufficient because he did not know what else could be disclosed and his position was to seek as much information as possible.
61. Mr Dyer asked the Tribunal to consider that there was no suggestion that the Department had recognised its own error which showed the process had failed. Had he not made the Request the error would not have come to light. The process should provide transparency and accountability but once the error was identified the

response of the Department was to create more secrecy. When something goes wrong the Department's response is not to explain but to obfuscate.

62. Mr Dyer submitted that the public interest was not served by more secrecy and the public interest was served by scrutiny.
63. Mr Dyer referred to a previous request he made to the Wales Office when he received a copy of the response to a request for information from ACOBA.
64. Mr Dyer asked the Tribunal to order the disclosure of all documents. He posed the question that if information could be disclosed after three and a half years what else was there to disclose?
65. Mr Hopkins submitted that in litigation as the Department approached the hearing further attempts were made to narrow the issues and identify if further information could be provided. He submitted that Mr Dyer had been provided with all the information he sought in his Request.
66. Mr Campbell invited the Tribunal to consider that any suggestions that information had been concealed was farfetched and that the email of 40 June 2020 to Mr Dyer (C1) is clear evidence of absolute transparency.
67. The Tribunal heard evidence from Mr Green whose witness statement dated 22 June 2023 appears at pages D1 to D9 of the OB and evidence from Mr Madden whose witness statement dated 23 June 2023 appears at pages D12 to D26 of the OB. Mr Dyer was given the opportunity to question Mr Green and Mr Madden.
68. The Tribunal found that the information originally provided by the Department to ACOBA included a factual error, however, this error was not material. The factual error did not affect the substance of Dr Fox's application and did not impact on the views of either the Department or ACOBA and did not result in ACOBA changing the previously published advice.
69. The Tribunal rejected Mr Dyer's accusations that the Cabinet Office has sought to take advantage of the process to conceal some wrongdoings. The Tribunal found Mr Green's explanation as set out in paragraphs 22 and 23 of his witness statement

(D5) and in his oral evidence to be persuasive. The Tribunal accepted Mr Green's explanation in paragraph 24 (D5) as to why the error was not identified earlier.

70. The Tribunal found that there was public interest in enabling the public to understand why there was an error in the information originally proved, however, the public interest was outweighed by the public interest in withholding the information.
71. The Tribunal found that ACOBA was transparent about the nature and reasons for the clarification it received and accordingly this does not support Mr Dyer's submission that the balance of public interest favours disclosure.
72. The Tribunal rejects Mr Dyer's submission that further disclosure is necessary for accountability and transparency and in the public interest to understand how the error occurred.
73. The Tribunal having considered the withheld information does not consider that it would provide any insight into the circumstances that led to the original error and in these circumstances this does not support public interest in disclosure.
74. In reaching this decision the Tribunal agreed that the opinions of the Qualified Persons should be given appropriate weight. As found by the Commissioner the bar for finding that an opinion is "reasonable" is not a high one and a "reasonable" opinion need only be within the spectrum of opinions that a reasonable person might hold. It is not the role of the Commissioner or the Tribunal to substitute a different opinion for that of the Qualified Person. The Tribunal agreed that neither opinion of the Qualified Persons could be said to be an opinion that no reasonable person in the position of the Qualified Person could hold. Mr Dyer confirmed to the Tribunal that he accepted that Minister Hands and Minister Mordaunt were Qualified Persons.
75. The Tribunal considered it important that ACOBA does not have a legal mechanism for compelling people to respond and it relies on assurances of confidentiality.
76. The Tribunal attached weight to the fact that on its website ACOBA provides two assurances of confidentiality in relation to the BARs for ministers and the assurance is essential to ensure applicants engage freely and candidly with ACOBA. The

assurance of confidentiality gives rise to an expectation that communications between ACOBA and third parties will be handled in confidence and not publicised save than in accordance with the publication of ACOBA's final advice.

77. The Tribunal agreed that in the absence of exceptional circumstances which do not arise in this appeal the expectations of confidentiality of applicants and third parties should be upheld and it would not be in the public interest to create an understanding that consultations with ACOBA may be made public other than in accordance with ACOBA's assurances of confidentiality.
78. The Tribunal found that disclosure would compromise the effectiveness of ACOBA's functions. ACOBA provides a clear and visible process for advising on proposed rules by former Ministers and civil servants. This process is dependent on confidentiality being maintained in discussions among parties up until the advice of ACOBA is published.
79. The Tribunal found that if such information were disclosed it was likely that in future individuals would be unwilling to be involved. In addition it would be possible that the quality of information people would share would be incomplete, insufficient and of less use.
80. The Tribunal rejected Mr Dyer's assertion that because ACOBA has published its letter to Dr Fox there is no further confidences to uphold because disclosure would undermine ACOBA's processes by inhibiting applicants or third parties from engaging frankly and openly with ACOBA for fear that information or advice provided would be disclosed.
81. In reaching its decision the Tribunal attached weight to the evidence, written and oral from Mr Green and Mr Madden. The Tribunal accepted Mr Madden's explanation that there are three categories of advice that may be affected by disclosure, namely: internal advice within and between government departments, advice from government departments to ACOBA and advice from ACOBA to applicants or government departments.

82. The Tribunal found that information disclosed to Mr Dyer in a request to the Wales Office was of no relevance to the present case because the circumstances were different and the relevant information has been disclosed.
83. The Tribunal acknowledged Mr Dyer's frustrations about the delay in information being disclosed and Mr Campbell apologised to Mr Dyer for the inconvenience caused by the late disclosure. Mr Campbell and Mr Hopkins explained that the late disclosure was as a result of procedures of review and preparation for the hearing with the intention of narrowing the issues between the parties. The Tribunal accepted this explanation.
84. The Tribunal noted that there are numerous references to Mr Dyer being a journalist which is of no relevance and should form no part of the decision making process.
85. The Tribunal was invited to consider the additional exemptions under section 40(2)/40(3A) FOIA (personal data), section 41(1) FOIA (breach of actionable confidence) and section 43(2) FOIA (commercial interests). Mr Dyer confirmed that reliance of these exemptions was not in issue between the parties.
86. The Tribunal found that the Department was entitled to rely on section 36(2)(b)(i) & (ii) and section 36(2)(c) FOIA as its basis for withholding the requested information.
87. The Tribunal found that none of the arguments and grounds presented by Mr Dyer identified any error or law in the DN nor did they identify any incorrect exercise of the Commissioner's discretion.
88. Accordingly, the appeal is dismissed.

Signed: **Judge J Findlay**

Date: 4 November 2024