

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 April 2018

**Public Authority:** The Advisory Committee on Business Appointments

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

#### Decision (including any steps ordered)

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1. The complainant has requested copies of communications between the Advisory Committee on Business Appointments (ACOBA) and George Osborne, including all discussions in relation to an application by Mr Osborne to ACOBA further to his appointment as editor of the Evening Standard. ACOBA has withheld the information held within the scope of the request relying on the exemptions at sections 36(2)(b), 36(2)(c) and 40(2) FOIA.
2. The Commissioner's decision is that ACOBA was entitled to rely on the exemptions at section 36(2)(b) FOIA.
3. No steps required.

## Background

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4. Under the Ministerial Code, Ministers and senior civil servants must seek advice from ACOBA about any appointments or employment which they wish to take up within two years of leaving office and must abide by that advice.
5. ACOBA considers applications under the Business Appointment Rules set by the Government (the Rules). It provides advice on the application of the Rules in relation to the most senior Crown servants (civil servants at Director-General and above, and their equivalents) and to all former Ministers of the UK, Scottish and Welsh Governments. The Rules explain the process for making applications to ACOBA and the tests adopted by ACOBA in considering applications
6. Applicants seeking advice from ACOBA 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 it will involve dealings with their former Department or government more generally. ACOBA collects wider evidence where necessary, for example, the views of other Departments, including the Cabinet Office, as "owner" of the Rules.
7. The Rules also stipulate that approaches to ACOBA are handled in confidence and remain confidential until an appointment or employment is publicly announced or taken up, at which time ACOBA publishes its advice (whether or not the advice was followed). ACOBA's policy is also to confirm whether or not its advice has been sought in relation to any specified appointment.
8. However, ACOBA has no power to compel applicants either to seek advice before taking up appointments or to accept the advice given. Similarly, it does not have the power to compel departments to cooperate with it.<sup>1</sup>

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<sup>1</sup> Additional information on ACOBA's role and decision-making process can be found in its Eighteenth Annual Report:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/632627/170720\\_ACOBA\\_2016-17\\_Annual\\_Report\\_ACOBA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632627/170720_ACOBA_2016-17_Annual_Report_ACOBA.pdf)

## Request and response

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9. On 21 March 2017, the complainant wrote to ACOBA and submitted a request for information in the following terms:

“This request concerns ACOBA deliberations over George Osborne MP.

  1. Please provide all records of communications between George Osborne and ACOBA from January 1st 2017 to date.
  2. Please provide the records of all discussions concerning George Osborne’s appointment as editor of The Evening Standard from February 1st 2017 to date.”
10. ACOBA issued a substantive response on 18 May 2017. It confirmed that it held relevant information relating to the request. It explained that some of the information, namely, its advice letter to Mr Osborne dated 28 April 2017 (post-dating the request), had been published on its website since the request was made. It considered the information held within the scope of the request exempt on the basis of the provisions in section 36(b)(i) and (ii), section 36(2)(c) and section 40(2) FOIA.
11. The complainant requested an internal review on 18 May 2017.
12. ACOBA wrote back to the complainant with details of the outcome of the internal review on 4 July 2017. The review upheld the original response.

## Scope of the case

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13. The complainant contacted the Commissioner on 4 July 2017 to complain about ACOBA’s decision to withhold the information requested. He specifically disagreed with the decision to rely on the exemptions at sections 36(2)(b), 36(2)(c) and 40(2) FOIA.
14. All of the information in scope has been withheld relying on the exemptions at sections 36(2)(b) and (c). Some of the information in scope has been withheld relying on the exemption at section 40(2).

## Reasons for decision

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### Withheld information

15. The withheld information largely comprises of applications from Mr Osborne for advice on taking up roles in the private sector, emails between ACOBA and Mr Osborne's office in relation to his applications, and emails between various relevant parties in relation to Mr Osborne's application with respect to taking up the editorial role at the Evening Standard (ES).

### Section 36(2)(b)(i) and (ii)

16. The Commissioner has first considered whether ACOBA was entitled to rely on the exemptions at section 36(2)(b).

- 17 Section 36(2) partly provides –

“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.”<sup>2</sup>

18. The exemptions can therefore only be engaged if, in the reasonable opinion of the qualified person, disclosure would or would be likely to result in any of the effects set out in section 36(2)(b).

### **ACOBA's position**

19. ACOBA's submissions with respect to engaging the exemptions are summarised below.
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<sup>2</sup> The full text of section 36 FOIA can be found here:  
<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

20. The qualified person, Baroness Angela Browning, issued her opinion on 17 May 2017 that disclosure of the withheld information would be likely to result in any of the effects set out in section 36(2)(b).
21. The qualified person was of the view that releasing the withheld information puts at risk the full and frank provision of information from and discussion with, and exchange of views with, government departments and individuals who are subject to the Rules. This is because applicants and departments may not feel confident about approaching ACOBA and might feel inhibited from cooperating fully if they thought that full details of their applications provided in confidence and correspondence about them would be released at a later date. This is particularly relevant as ACOBA does not have the power to compel applicants and departments to cooperate.
22. The qualified person was also of the view that releasing internal emails which contain ACOBA's deliberations with respect to Mr Osborne's editorial role at the ES role puts at risk full and frank discussion amongst ACOBA's members in future. Its members may feel restricted in exchanging views freely and frankly before coming to a collective decision for fear their emerging views at the time will be released at a later date.
23. ACOBA's submissions with respect to the balance of the public interest are summarised below.
24. There is a public interest in knowing that a former Minister, in particular a senior Cabinet Minister with a significant public profile such as Mr Osborne who was also an MP at the time, has properly complied with the duty under the Ministerial Code to seek ACOBA's advice, and that he has provided relevant and accurate information to ACOBA.
25. There is a public interest in knowing that ACOBA has considered relevant information and come to a reasoned decision.
26. There is however a strong public interest in those subject to the Rules not refusing to provide information for fear of it being released. This also applies to government departments ACOBA will have to seek information and advice from regarding proposed appointments.
27. ACOBA agrees it is extremely important that applicants and departments provide true and complete information. However, in relation to this specific point, it should be noted that the information provided by Mr Osborne has been put to and confirmed by HM Treasury officials.
28. Furthermore, ACOBA considers that it had put enough information into the public domain to meet the public interest factors identified above

with respect to disclosure, specifically the information published on its website.<sup>3</sup> ACOBA explained that this information sets out what information was provided by Mr Osborne, what was taken into account, and why ACOBA came to provide the advice it did.

29. There is also a strong public interest in ACOBA members being able to freely exchange frank opinions to enable full and proper deliberation.

### **Complainant's position**

30. The complainant has argued that the public interest in disclosure has not been fully taken into account by ACOBA. He submitted that the withheld information ought to be disclosed in the public interest for reasons summarised below.
31. Generally speaking, there is a public interest in understanding "the justification of what" government figures do with their accumulated power, connections and authority after they leave office.
32. Specifically, Mr Osborne's decision to take on a number of jobs while still an MP has been met with considerable public criticism, and as ACOBA's "decision notice"<sup>4</sup> shows, he failed to fully engage with ACOBA before taking on these appointments.
33. As such it seems clear that there is a strong public interest in making the relevant communications with Mr Osborne about this process public, to assuage the British public that the policies holding former Ministers to account are robust, and they engage in the process of vetting fully. It seems clear that this interest far outweighs any concerns for a chilling effect on ministerial engagement with ACOBA.
34. In addition, Mr Osborne is a hugely influential former cabinet Minister, as former chancellor, and as a result there is an extremely high public interest in seeing that ACOBA has properly dealt with his case. This far outweighs any concern for the chilling effect this disclosure could have on free and frank discussion.

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<sup>3</sup> <https://www.gov.uk/government/publications/osborne-george-chancellor-of-the-exchequer-hm-treasury-acoba-recommendation/summary-of-business-appointments-applications-rt-hon-george-osborne-mp>

<sup>4</sup> Referring to ACOBA's published letter to Mr Osborne on 28 April 2017.

## **Commissioner's analysis**

### Was the qualified person's opinion reasonable?

35. The Commissioner is satisfied that Baroness Angela Browning is the appropriate qualified person for ACOBA by virtue of section 36(5)(c) FOIA.
36. In keeping with the requirement of the exemption, the Commissioner first considered whether her opinion was reasonable.
37. In doing so the Commissioner has considered all of the relevant factors including:
  - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.
38. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
39. The Commissioner is satisfied that the crux of the qualified person's opinion, that is; prejudice to free and frank exchanges and provision of advice, relates to section 36(2)(b). The Commissioner is also satisfied that the qualified person had full knowledge of, and was involved in considering, Mr Osborne's applications to ACOBA.
40. Having inspected the withheld information, the Commissioner is satisfied that in the circumstances, it was reasonable for the qualified person to conclude that it engaged the exemptions at section 36(2)(b).

### Public interest test

41. The Commissioner next applied the public interest test set out in section 2(2)(b) FOIA. The Commissioner therefore considered whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.
42. The Commissioner has carefully considered the complainant's submissions with respect to the weight of the public interest in disclosure. The Commissioner considers that there is a public interest in judging whether ACOBA is able to properly vet applications by former government figures, particularly those who were in influential senior positions, in order to ensure that they have not been rewarded with roles for decisions they took in government and, that their accumulated power, connections and authority will not be used improperly by their new employers to gain advantage over competitors and to influence government policy. The Commissioner equally shares the view that there is a public interest in judging whether these individuals fully engage with the vetting process.
43. The public interest in such public scrutiny is strong in this case in particular given Mr Osborne's decision to take up new roles including in the private sector following his position as Chancellor of the Exchequer but while remaining a Parliamentarian. The fact that Mr Osborne's appointment as editor of the ES was announced before ACOBA had concluded its consideration of his application adds weight to the view that the public should be able to judge whether those subject to the Rules are fully engaging with the vetting process.
44. Whilst the Commissioner has given due weight to these factors she has also considered other factors in this case relevant to the public interest in transparency and accountability. ACOBA's remit does not extend to considering whether it is appropriate for MPs to have other jobs. It is a matter for Parliament whether it is appropriate for MPs to have other jobs, remunerated or otherwise, and of a high public profile or not.
45. ACOBA has published information in relation to Mr Osborne's applications to ACOBA for advice. It has published a summary of his applications and ACOBA's advice in relation to same which includes information provided by Mr Osborne, what was taken into account, and why ACOBA came to provide the advice it did. The advice to Mr Osborne in relation to his appointment as editor of the ES also



criticised Mr Osborne's decision to sign the contract of employment before receiving ACOBA's advice.<sup>5</sup>

46. It is therefore against this backdrop that the Commissioner has considered the factors in favour of maintaining the exemption.
47. As mentioned, ACOBA is an advisory body rather than a statutory authority and as such cannot compel applicants and departments to cooperate with it. It is dependent upon the voluntary provision of information to enable it to fulfil its role. In light of this, the Commissioner considers that the public interest in not disclosing information which would pose a real and significant risk of those subject to the Rules refusing to engage freely and frankly with ACOBA is a significant one. Similarly significant is the public interest in ACOBA members and staff being able to discuss applications internally and externally with other departments, and provide advice in relation to same in a free and frank manner without the inhibiting fear that their views could be revealed soon after deliberations have concluded.
48. The Commissioner did not necessarily share the view that ACOBA had published "enough information" with respect to Mr Osborne's applications particularly in view of the unease with the fact that his appointment as editor of the ES was announced whilst ACOBA was still considering his application. ACOBA's guidance in relation to timing of applications states:

"The Advisory Committee aims to respond to any requests for advice within 15 working days. We would strongly advise that you do not enter into any contractual agreement with a potential employer or client until you have received the Committee's final advice. The Committee is happy to consider speculative applications. You should also ensure that no new appointments are announced before the Committee has been able to provide its advice. If your request is urgent please contact the Secretary (see below)."
49. However, given that the published letter to Mr Osborne also addresses this issue, the Commissioner considers that the weight of the public interest in disclosing the exchanges relevant to the issue is less than it would otherwise have been in the circumstances. It is important to also bear in mind that the relevant information provided by Mr Osborne

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<sup>5</sup> <https://www.gov.uk/government/publications/osborne-george-chancellor-of-the-exchequer-hm-treasury-acoba-recommendation/summary-of-business-appointments-applications-rt-hon-george-osborne-mp>

pursuant to his applications was put to and confirmed by officials at HM Treasury.

50. The Commissioner considers that, given the constraints upon ACOBA, the important public interest in transparency and accountability in this case is proportionately met by the information it has published. In the Commissioner's view, this strikes the most realistic public interest balance between providing information to the public to enable an informed scrutiny of ACOBA's vetting process whilst not taking any action which would undermine or compromise its ability to carry out its role and function.
51. Therefore, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.
52. In view of this decision, the Commissioner has not considered the application of the remaining exemptions.

## Right of appeal

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

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

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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.

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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
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