

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 2 November 2022

**Public Authority:** Department for Education  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

#### **Decision (including any steps ordered)**

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1. In a five part request, the complainant has requested information about the appointment of Rachel Houchen to the Board of the Office for Students. The Department for Education (DfE) addressed three parts of the request. It has withheld information within scope of parts a) and b) of the request under sections 36(2) and 40(2) of FOIA. These exemptions concern prejudice to the effective conduct of public affairs and personal data respectively.
2. The Commissioner's decision is as follows:
  - DfE has correctly applied sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA to parts a) and b) of the request and, in the case of part a), correctly applied section 36(2)(c). In each case the public interest favours maintaining the exemption in respect of part b) but not in respect of part a).
  - DfE can also rely on section 40(2) of FOIA to withhold the information requested in part b) of the request but not part a).
3. The Commissioner requires DfE to take the following step to ensure compliance with the legislation:
  - Disclose the information requested in part a) of the request.
4. DfE must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner

making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Background and context**

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5. In its submission to the Commissioner, DfE has provided the following background and context.
6. A recruitment campaign for Non-Executive Directors of the Office for Students (OfS) ended in March 2022. Following the conclusion of the campaign, including notification of the outcomes to successful and unsuccessful candidates, DfE became aware of a link between one of the panel members, Lord Wharton, OfS Chair, and the husband of one of the successful candidates, Rachel Houchen - her husband being Ben Houchen. [Ben Houchen is Tees Valley Mayor and a Member of the Conservative Party].
7. The advisory assessment panel comprised Hannah Sheehan (DfE Director) as panel chair, Lord Wharton and Mary Curnock-Cook (Independent Panel Member). Although Lord Wharton declared and was transparent to the panel that he knew Rachel Houchen and had encouraged her to apply, he did not declare the extent of his link to her husband to the panel.
8. An article, which came to light as preparations for final appointments were being made, highlighted that in 2019, Lord Wharton's company, GMWB Limited (of which he is the sole Director) donated £10,000 to Ben Houchen's mayoral campaign.
9. However, DfE says it is clear that the entire appointments process was conducted in accordance with the governance code for public appointments. It has confirmed that after raising the matter with the Commissioner for Public Appointments, the Commissioner confirmed that the appointment does not present an issue, and Rachel Houchen's appointment went ahead as planned.

## **Request and response**

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10. On 30 March 2022 the complainant wrote to DfE and requested information in the following terms:
  - "Please could you:
    - a) Provide a copy of any declarations of personal interest made by Lord Wharton in relation to the appointment of Rachel Houchen to the board of the Office for Students as non-executive director, or any

declarations of personal interest made by any other person involved in the recruitment process in relation to the appointment.

b) State whether any assessment was made of Ms Houchen's suitability against the essential criteria, including "understanding of financial and corporate governance at a strategic level" was made. If so, please could you provide a copy of this assessment.

c) Confirm whether her appointment was referred to the Commissioner for Public Appointments, either to the office or to the Commissioner personally, at any stage of the appointment process.

d) Please confirm whether any concerns were expressed by the Commissioner for Public Appointments, any of the panel or others involved in the recruitment process in relation to her relationship with Ben Houchen, Mayor of Tees Valley, or whether this was raised as a potential reason not to make the appointment. If those concerns were made in writing, please provide a copy.

e) Please state the number of applications made for the role, how many were considered by the panel personally, and how many persons were interviewed for the role."

11. On 11 May 2022 DfE responded. It withheld information within scope of parts a) and b) of the request under section 40(2), addressed part c) and d) and disclosed the information requested in part e).
12. The complainant requested an internal review on 24 May 2022 regarding DfE's application of section 40(2).
13. DfE provided an internal review on 7 July 2022. It maintained its reliance on section 40(2) and also applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to parts a) and b) of the request.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 15 July 2022 to complain about the way their request for information had been handled.
15. The Commissioner's investigation has focussed on DfE's application of section 36(2)(b)(i) and (ii) and/or section 36(2)(b)(c) and/or section 40(2) to the information it has withheld, and the balance of the public interest where relevant.

## **Reasons for decision**

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### **Section 36 – prejudice to effective conduct of public affairs**

16. Section 36 of FOIA is an exemption that differs from all other prejudice exemptions in that, in most cases, the judgement about prejudice must be made by the legally authorised, qualified person for that public authority.
17. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person (QP) considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
18. DfE has provided the Commissioner with a copy of the information it is withholding: a 'Declaration of Panel Interests' document and a 'Summary of Advisory Assessment Panels Views' document.

### **Section 36(2)(b) – provision of advice / exchange of views**

19. Section 36(2)(b)(i) of FOIA says that information is exempt if its disclosure would or would be likely to inhibit the free and frank provision of advice.
20. Section 36(2)(b)(ii) of FOIA says that information is exempt if its disclosure would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
21. To determine, first, whether DfE correctly applied the exemptions under section 36(2)(b), the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
22. Therefore, in order to establish whether the exemptions have been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
23. In this case, the QP was Michelle Donelan MP, then the Secretary of State for Education. The Commissioner is satisfied that, under sub-section 36(5)(a) of FOIA, Michelle Donelan was an appropriate QP at the time of the request.
24. DfE has provided the Commissioner with a copy of the submission it sent to the QP, dated 24 June 2022. The submission seeks the QP's opinion on DfE's proposed approach to the complainant's request. An

email from a member of the QP's Private Office on 4 July 2022 evidences that the QP had confirmed that, in her opinion, disclosing the withheld information would be likely to have the effects set out under section 36(2). The Commissioner is therefore satisfied that an opinion was given by the QP.

25. The request was submitted on 30 March 2022. The QP's opinion is dated 4 July 2022. DfE's internal review response, when it relied on section 36 for the first time, was provided on 7 July 2022. As such, the Commissioner is satisfied that the opinion was given at an appropriate time.
26. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion.
27. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
28. The QP's opinion in this case is that the prejudice envisioned under the section 36(2) exemptions would be likely to occur if DfE disclosed the withheld information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
29. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in public authority's interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
30. In the submission it provided to the QP, DfE provided: a background to, and copy of, the request, a description of the section 36(2) exemptions, reasoning as to why the information should be withheld under these exemptions and a recommendation. Of relevance to section 36(2)(b)(i) and section 36(2)(b)(ii), DfE's reasoning included an explanation of why disclosing the information being withheld could inhibit the provision of views and advice in future panels.
31. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(b) exemptions to form an opinion on the matter of whether reliance on those exemptions with regard to the requested information was appropriate.

32. The Commissioner has noted the evidence at paragraph 30 and, since he is satisfied that the remaining points at paragraph 22 have also been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that DfE was entitled to rely on section 36(2)(b)(i) and section 36(2)(b)(ii) to withhold the information. The Commissioner will go on to consider the public interest test associated with these exemptions.

## **Public interest test**

### **Public interest in disclosing the information**

33. DfE has presented the following arguments:
- Considerations for disclosure add up to an argument that more openness about the assessment and interview process for such non-executive positions and may lead to greater accountability, an improved standard of public debate, and improved trust.
  - There is a general public interest in disclosing information to the public, to demonstrate that government is open and transparent.
34. At the point of their request for an internal review, DfE was relying on section 40 only. However, the public interest arguments the complainant put forward in that correspondence are relevant to section 36.
35. The complainant argued that it was in the public interest to ensure the process around public appointments was transparent. They considered that disclosure was necessary as there was no other way to ensure full transparency about Lord Wharton's declaration ie to assess whether he was clear about his close relationship with Ben Houchen and declared his previous donation to Ben Houchen, so that DfE officials could take those factors into account.
36. The complainant considered that the fact that Ben Houchen's wife was appointed to the OfS role, when she did not have previous experience of working in national or regional education management, posed a clear conflict of interest. This was evidenced by the fact a conflict of interest declaration was made. In the complainant's view, such a clear conflict of interest increased the risk that the appointment was made in a "corrupt" manner. A manner that favoured a connected party to a political ally rather than served the public interest through the objective appointment of the best possible person to conduct public administration in the most effective manner.
37. With regard to section 36 specifically, in their complaint to the Commissioner, the complainant said DfE has wrongly applied this exemption in a blanket manner, rather than considering the public interest in disclosure of each part of the material. They consider that a

proper redaction process could help address the concerns raised in the public interest test DfE set out at internal review. The complainant also argues that publishing material could either expose wrongdoing or assure the public the process was properly handled.

### **Public interest in maintaining the exemptions**

38. **For section 36(2)(b)(i)** DfE has presented the following arguments:

- Good government depends on good decision-making. This needs to be based on the best advice available and a full consideration of the options based on the evidence available. Interview assessments and declarations of interests by panel members are key to ensuring all parties involved in this process can provide advice freely and frankly. It also ensures that the process of sift, interview and the offer of positions is completed in line with the following statement of compliance:

“I certify that this appointment competition was carried out in accordance with the Governance Code and Public Appointment principles except where detailed below and that this return and certification has been agreed with all members of the Advisory Assessment Panel as required by paragraph 7.3 of the Governance Code”.

- If assessments and declarations, particularly declarations where no concerns were raised were to be released, it is likely that advice and evidence provided by panel members as part of this process, would be less candid in future. This would lead to DfE not being fully abreast of the information and evidence. This in turn would lead to DfE’s decision-making role in such instances being impaired.
- It is clear from the withheld assessment and declaration, that those involved in the application and interview process feel able to provide free and frank views due to the fact these assessments and declarations were not intended to go into the public domain. However, should DfE make such information public, the likely result is that future advice given by panel members, as well as the way in which this is recorded, would be less open and honest. This is especially in cases when discussing some particularly sensitive, and at times critical assessments of individual applicants.
- The information in scope contains advice and the exchanges of advice and views between the interview panel members and subsequently senior DfE officials and the Secretary of State and ministers. This allows the parties involved to present and provide free and frank views, opinions and advice, as well as exchange



views, for the purposes of deliberation, and where appropriate challenge interview assessments within a 'safe space'.

- DfE's interview panel members play an important role in ensuring clear advice is passed to the Secretary of State, ministers and senior officials, to allow it to appoint the best people for to the roles available. The ability of panels to provide candid and sensitive advice to DfE, and for there to be free and frank discussion on such assessments, is essential. This is so DfE can undertake an informed assessment of each applicant, resulting in the best and most suitable candidates being offered key departmental positions.
- The detail and advice contained within the withheld information further needs to be protected as such interview reports often contain sensitive information/assessments relating to individual applicants. DfE and its interview panels need to be confident in recording and sharing such assessments internally within the department, so that a fully informed decision can be made on the suitability of candidates. This needs to be done within a safe space, without this information going into the public domain. Releasing such advice into the public domain, following interviews, would be likely to damage DfE's relationship with historic, current and future applicants. It may make them more hesitant to apply for such positions, or for the panel to record and share their candid assessments with DfE in future, for fear that their advice may then be disclosed.

39. **For section 36(2)(b)(ii)** DfE has presented the following arguments

- Members of interview panels and DfE officials must have confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge advice/views presented to them as part of a process of assessment and deliberation. The withheld information contains some frank comments regarding the suitability of those interviewed, highlighting whether the panel believes a candidate is/is not appointable and giving advice and views to support their position.
- This is in the context of DfE requiring candid information from all relevant parties so as to consider the applications and interview outcomes of those applying for key departmental roles. If DfE is required to put this information into the public domain, DfE officials and panel members would be likely to be inhibited from providing free and frank exchange of interview outcomes via such interview reports. This in turn would have a negative impact on DfE's ability to deliberate and ultimately decide on the



appropriateness, or otherwise, of individuals applying for departmental positions.

- Disclosing the information would be likely to remove the space within which officials and panel members are able to openly share their assessments of candidates and whether or not they believe individuals to be appointable. Panel members, and potentially applicants, would also be less likely to share candid information and assessments as part of the interview process for fear that such assessments as to the appropriateness of individuals make it into the public domain. This would also limit DfE's ability to find the most suitable individuals effectively and efficiently. DfE needs to ensure that those with the most appropriate set of skills, expertise and experience are offered key departmental positions, which will help the department deliver its key policies.
- DfE believes that the reasoning behind the balance of public interest arguments and its decision to withhold this information is the same as that which was accepted by the Information Commissioner in a recent decision notice (FS50587396), as outlined below:

"25. The Commissioner considers that there is a strong public interest in openness and transparency and in further public understanding of the process of discussion which leads ultimately to decision-making within public authorities such as the DfE. Disclosure of the withheld information may increase public trust and confidence in the DfE and its decision-making process.

26. Whilst there are strong arguments in favour of disclosing the withheld information, the Commissioner considers that there is a strong public interest in the DfE being able to discuss issues freely and frankly and to be able to have space to consider all issues and make informed decisions. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision."

- As with decision notice FS50587396, DfE believes that in instances where it is called upon to make a final decision on offering the most suitable candidates key departmental positions, there is "...a strong public interest in the DfE being able to discuss issues freely and frankly and to be able to have space to consider all issues and make informed decisions. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision". The 'issue' in

this instance being finding the most suitable candidate for departmental posts via the sharing and deliberation of interview assessments prior to decisions being made.

### **Balance of the public interest**

40. There are two items of information under consideration here - the 'Declaration of Panel Interests' document ('the Declaration') requested in part a) of the request and the 'Summary of Advisory Assessment Panels Views' ('the Summary') document that falls within scope of part b).
41. DfE considers that disclosing the Declaration could dissuade members of interview panels from being candid, and that disclosing the Summary could dissuade interview panel members from being fully open and honest in their discussions about applicants, and in how they record their views about applicants. Applicants may also be deterred from being fully open and honest in their interviews or from applying at all. These consequences could undermine DfE's recruitment process and its appointments to public roles. In turn, bodies such as the OfS Board may not perform to the expected standard and DfE considers that would not be in the public interest.
42. DfE has advised that the process of recruiting OfS Non-Executive Directors ended in March 2022. Facts associated with the appointment of Rachel Houchen as an OfS Non-Executive Director became public subsequently; the Commissioner has noted an article published on 29 March 2022, which may be the one DfE referred to. However, the actual recruitment process had been concluded and was no longer 'live' at the point of the complainant's request on 30 March 2022.
43. Regarding the Declaration, DfE argues that "advice and evidence provided by panel members ... would be less candid in the future" if they thought their declaration could be disclosed into the public domain. As a result DfE's decision making would be impaired. The Commissioner cannot see a connection. DfE may mean that panel members would be less willing to record potential conflicts of interest if they thought their declaration would be disclosed. The Commissioner is not persuaded. A panel member **must** record a potential conflict of interest, whether they thought the declaration would be disclosed or not. DfE must have that expectation of its panel members; that senior individuals recruiting to the Board of a public body will act with professionalism and integrity.
44. If DfE meant that disclosing their conflict of interest declaration would lead to a panel member being less prepared to engage in the recruitment and interview process more generally, again the Commissioner is not persuaded as he cannot see a causal link. These are professional individuals recruiting at a senior level.

45. Moreover, in both cases the Commissioner does not consider that DfE has made a strong case that disclosing the Declaration would undermine the public interest in individuals being prepared to provide advice and exchange views, which are the focus of section 36(2)(b).
46. Given the fact about Lord Wharton that was subsequently raised, and that the recruitment process had been completed, the Commissioner considers that at the time of the request there was greater public interest in complete transparency about Lord Wharton's participation in the appointment of Rachel Houchen.
47. The Commissioner has taken account of the weight brought by the QP's opinion. He has considered the actual content and sensitivity of the information in question and does not consider it is especially sensitive. The Commissioner's decision is that, in respect of the Declaration requested in part a) of the request, the balance of the public interest favours disclosure. As such, the Commissioner will go on to consider DfE's application of section 36(2)(c) to part a) of the request.
48. Regarding the Summary document within scope of part b), the Commissioner considers that DfE has presented a stronger case that disclosing this information would not be in the public interest as it could deter panel members in the future from candidly providing advice and exchanging views about individuals who they had interviewed. It is in the public interest for panel members to feel able to openly discuss candidates' interview performance so that any decisions that are made about public appointments are sound. It is also in the public interest that a wide range of candidates apply to these appointments. Disclosure may dissuade potential candidates from applying out of concern that views on any future interview they may give may be put in the public domain.
49. The Commissioner's decision is therefore that, in respect of the Summary requested in part b) of the request, the balance of the public interest favours maintaining the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions. It is not necessary to consider DfE's application of section 36(2)(c) to that information but in the interests of completeness, the Commissioner will consider DfE's application of section 40(2) to the information.

**Section 36(2)(c) – otherwise prejudice effective conduct of public affairs**

50. Section 36(2)(c) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

51. In terms of the reasonableness of the QP's opinion the Commissioner has again considered DfE's submission to the Minister of 24 June 2022. The QP's opinion is again that the prejudice envisioned under section 36(2)(c) be likely to occur if DfE disclosed the withheld information. Again 'would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
52. In addition to the background to, and copy of, the request and a recommendation, the submission also describes the section 36(2)(c) exemption and provides reasoning as to why the information should be withheld under this exemption. Of some relevance to section 36(2)(c), DfE's reasoning included an explanation of why disclosing the information being withheld could otherwise prejudice the effective conduct of public affairs. This was that disclosure may discourage future panels from operating effectively and discourage future, potential applicants from applying for a public appointment vacancy.
53. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the section 36(2)(c) exemption to form an opinion on the matter of whether reliance on this exemption with regard to the withheld information was appropriate.
54. The Commissioner has noted the evidence at paragraph 30 and, since he is again satisfied that the remaining points at paragraph 22 have also been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that DfE was entitled to rely on section 36(2)(c) to withhold the information. The Commissioner will go on to consider the public interest test associated with this exemption.

## **Public interest test**

### **Public interest in disclosing the information**

55. DfE's and the complainant's arguments are those presented under the section 36(2)(b) analysis.

### **Public interest in maintaining the exemption**

56. DfE has presented the following arguments:
  - DfE relies on the clear and forthright information provided by interview panels to help make informed decisions on which applicants are appointable to the posts they are being interviewed for. These types of deliberations need to remain confidential to ensure they are handled sensitively and appropriately. This is particularly the case in instances where the assessment feedback within such reports will be negative in nature when assessing named individuals.

- If DfE is required to disclose the requested information, it would be likely to prejudice its ability to effectively recruit the best people for key departmental roles. This could hinder DfE's ability to decide the best candidates to offer such roles. This is because the officials and panel members would be less likely to candidly engage in such exchanges of views as part of these assessment reports going forward. This would particularly be the case where there is sensitive, personal information surrounding individual applicants and their performance at interview. This could lead to DfE being unable to decide quickly on whether candidates are appointable, leading to interview and recruitment process taking longer than necessary.
- DfE may also need to ask frank questions and undertake free and frank discussions about each candidate's interview performance and the evidence they have provided. As part of these discussions, and the internal dissemination of the assessment reports, the panel members and DfE officials needs to be able to provide a 'critical voice' within such reports, without publicly undermining or criticising those applying for positions.
- Panel members and DfE officials must have confidence that they can share views with one another via such assessment reports and declarations. There must be an opportunity to understand and, where appropriate, challenge views put forward during the interview and assessment process. If DfE is required to put this information into the public domain, panel members and officials would be likely to be inhibited from providing free and frank exchange of views for the purposes of deliberation, which in turn would have a negative impact on its ability to conduct public affairs effectively when finding the best people to fill departmental positions.
- Applicants may also be less likely to engage as fully, or engage in the process at all, if they fear their performance at interview were to be made public. There is the potential that a negative assessment could damage their professional reputation and potentially impede them when applying for future roles. This, in turn, would be likely to reduce the pool of expertise from which DfE can attract applicants for key positions, which would not be in the public interest.
- Disclosure would put into the public domain all of DfE's concerns and discussions regarding the suitability of individuals following interview. It is essential that DfE can, in such cases, have a 'safe space' in which to share such detail and candid assessments without fear of release. This allows the appropriate information to be shared and discussed ahead of any final decision being made

as to who should be offered the position(s). To inhibit this would be likely to be prejudicial to DfE's conduct of public affairs.

- Releasing this information could potentially damage the relationship and trust between DfE and members of these interview panels, as well as raise questions of confidentiality and trust with those applying for positions.
- Disclosing the information would be likely to prejudice the effective conduct of public affairs in the future as it would remove the space within which officials and interview panel members are able to discuss and present their assessment of interviewees freely and frankly. It would make it more difficult for DfE to come to an informed final decision and offer the best people for key departmental roles effectively and efficiently.

### **Balance of the public interest**

57. As for the section 36(2)(b) exemptions, the Commissioner has taken account of the withheld information, the complainant's arguments and the timing of the request.
58. The Commissioner has also considered DfE's section 36(2)(c) arguments and notes that several of them are more relevant to the section 36(2)(b) exemptions as they concern providing advice and exchanging views. He notes too that the majority of the arguments appear to be focussed on the Summary document information. The Commissioner does not consider that DfE has made a compelling argument that disclosing the Declaration document would not be in the public interest as disclosure would be likely to prejudice the conduct of public affairs for reasons other than inhibiting the exchange of views and provision of advice.
59. The Commissioner has again taken account of the weight brought by the QP's opinion and the sensitivity of the information, but in view of the factors referred to in the section 36(2)(b) analysis, and the lack of strong public interest arguments for withholding the Declaration, the Commissioner considers that the balance of the public interest also favours disclosing the Declaration document that DfE withheld under section 36(2)(c). As such, the Commissioner has gone on to consider DfE's application of section 40(2) to part a) of the request, as well as to part b).
60. **Section 40 - personal information**
61. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.



62. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
63. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
64. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

65. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

66. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
67. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
68. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
69. In this case part a) of the request is for the Declaration of Interest made by Lord Wharton or anyone else involved in the appointment of Rachel Houchen to the OfS Board. DfE confirmed it held a Declaration of Interest made by Lord Wharton.
70. The Commissioner is satisfied that that information is Lord Wharton's personal data; it relates to him and he can be identified from it.
71. Part b) of the request is for any assessment of Rachel Houchen's suitability against the essential criteria. DfE is withholding a 'Summary

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



of Advisory Assessment Panels Views' document, which summarises the panel's views about Rachel Houchen's interview.

72. Panel members are not named in the document, but the Commissioner is satisfied that this information is Rachel Houchen's personal data; it relates to her and she can be identified from it because she is named in the request.
73. The Commissioner is satisfied that information to which DfE has applied section 40(2) both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
74. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
75. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

76. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

77. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
78. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

**Lawful processing: Article 6(1)(f) of the UK GDPR**

79. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful **only** if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
80. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and

freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.

81. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

82. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

83. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

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<sup>2</sup> Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

84. DfE says it has taken transparency into account in relation to the data and information already available, and in the public domain. This is the criteria against which applicants are assessed and the fact that panel members must declare interests. DfE therefore does not consider that there is "a legitimate reason to release the requested information." DfE also says in its submission that it does not consider there is a legitimate interest in releasing the information. The Commissioner notes that the legitimate interest in this context concerns the applicant's interest in the information, not any legitimate reasons or [public] interest arguments for releasing information.
85. In light of facts that subsequently emerged, the complainant has an interest in the detail of Rachel Houchen's appointment to the OfS Board. They are concerned that Rachel Houchen's appointment was not open and fair. The Commissioner considers that that is a legitimate interest for the complainant to have and there is a wider public interest in the process of appointing individuals to public positions being objective and honest.

### **Is disclosure necessary?**

86. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
87. In its submission to the Commissioner, DfE says it is clear that it is not necessary for the information to be released. This is because, it says, the public can be reassured that the relevant due process, checks, declarations of interest and due diligence was, and is, undertaken in relation to interviewing and selecting individuals for key departmental positions such as that of the OfS Board.
88. However, the complainant is seeking Declaration because they consider that Lord Wharton did not declare all his potential conflicts of interest ie his "close" relationship with, and previous donation to, Ben Houchen, Rachel Houchen's husband. Disclosing the Declaration would evidence what potential conflicts of interest Lord Wharton declared and, in the Commissioner's view, is therefore necessary to meet the complainant's legitimate interest.
89. The complainant is seeking the Summary document because they consider that Rachel Houchen was not appointed on merit but because of her association, through her husband, with Lord Wharton, a member

of the interview panel. Disclosing the Summary document would evidence the panel's discussion about Rachel Houchen's interview and what factors the Panel took into account and assessed. It would not be possible to determine Lord Wharton's views specifically from the Summary document. However, the Commissioner's will accept that disclosure is again necessary to meet the complainant's legitimate interest.

### **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

90. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
91. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
92. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
93. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
94. With regard to the Declaration document, at the time of the request, Lord Wharton's conflict of interest declaration was not in the public domain but a concern about the appointment of Rachel Houchen had been published. The Commissioner considers Lord Wharton to be a senior figure and the OfS Board to have a relatively high profile. The Commissioner would expect Lord Wharton to be aware of FOIA and that recorded information a public authority holds may be disclosed. And in this case, the information provided by Lord Wharton was provided in a professional capacity.

95. As discussed in the section 36 analysis, there is a public interest in Lord Wharton's participation in Lucy Houchen's recruitment to the OfS Board.
96. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so disclosing the information would be lawful.
97. Even though it has been demonstrated that disclosing the requested information under FOIA would be lawful, it is still necessary to show that disclosing the Declaration would be fair and transparent under the principle (a).
98. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. The requirement for transparency is met because, as a public authority, DfE is subject to FOIA.
99. To conclude, in this instance, the Commissioner has decided that DfE has failed to demonstrate that the exemption at section 40(2) is engaged in respect of the Declaration document requested in part a) of the request.
100. Regarding the Summary document requested in part b), the Commissioner has taken account of the fact that no specific panel members can be identified from that document. It is the personal data of Rachel Houchen only. She had been appointed to the OfS Board at the point of the request, and therefore had a relatively senior position. She was also likely to have been aware of FOIA. However, the Commissioner nonetheless considers that Rachel Houchen would reasonably expect that a summary of the interview panel's assessment of the interview she gave would not be disclosed to the world at large as the result of a FOIA request. Disclosing that document would therefore be likely to cause Rachel Houchen distress and, as the Commissioner has noted, disclosure is not certain to address the complainant's legitimate interest in any case.
101. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the Summary document would not be lawful.

102. The Commissioner has therefore decided that DfE was entitled to withhold the Summary document within scope of part b) of the request under section 40(2), by way of section 40(3A)(a).

## **Right of appeal**

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103. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

104. 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.

105. 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**

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**