



OFFICE OF THE ADVISORY COMMITTEE ON BUSINESS APPOINTMENTS

G/7 Ground Floor, 1 Horse Guards Road SW1A 2HQ

Telephone: 020 7271 0839

Email: acoba@acoba.gov.uk

Website: <http://www.gov.uk/acoba>

6 September 2018

By email: !

Dear !

I am responding to your request for information under the Freedom of Information Act 2000 (the Act) which we received on 13 August 2018.

You requested:

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

Background

ACOBA is independent from Government and its role is to provide advice on applications submitted under the Government's Business Appointment Rules (the Rules). In doing so it considers the risks posed by an application and advises on the conditions that should apply. It is not ACOBA's role to pass judgement on the appointment/ employment with regards to other matters.

The Rules for former Ministers seek to counter suspicion that:

1. the decisions and statements of a serving Minister might be influenced by the hope or expectation of future employment with a particular firm or organisation; or
2. an employer could make improper use of official information to which a former Minister has had access; or
3. there may be cause for concern about the appointment in some other particular respect.

Response

I can confirm that ACOBA does hold relevant information relating to this request.

The Chair of the Committee, Baroness Angela Browning (the 'qualified person' for the Committee for the purposes of Section 36 of the Act) considered that the information you have requested is caught by Section 36(2)(b)i, (b)ii and (c) of the Act, as disclosure of it would be likely to inhibit the free and frank provision of advice and exchange of views; and would be likely to prejudice the effective conduct of public affairs.

I will explain below why the information is being withheld under this exemption. However, I will first outline what information is already available to you in relation to your request.

Publicly available information

The letter published on the website details: the description of Mr Johnson's role at *The Telegraph*; the timing of his application to ACOBA and its retrospective nature; the relevant sections of the Ministerial Code and the Rules; ACOBA's view - that it is unacceptable the Rules were not followed in this instance; ACOBA's refusal to provide advice for this reason; information received from the FCO about the application; and the steps Mr Johnson volunteered to take, including adding a clause to his contract which precludes him from using privileged information.

I have attached this letter for information.

Consideration under Section 36(2) (b)i, (b)ii and (c) of the Act (prejudice to the effective conduct of public affairs)

Guidance from the Information Commissioner's Office says that information may be exempt when disclosure would likely inhibit the ability of public authority staff and others to *'express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.'*

The information being withheld includes that which was provided voluntarily by Mr Johnson and his office, to enable ACOBA to properly consider this case. If the information provided by Mr Johnson and his office is released in this case, it puts at risk the likelihood of full and frank provision of information from; discussion with; and exchange of views with individuals who are subject to the Rules in future.

ACOBA has no enforcement or coercive powers and therefore depends on voluntary cooperation from applicants, both in terms of making an application for advice in the first place; and in terms of provision of information about the proposed appointment/ employment and their former role. ACOBA seeks to ensure such cooperation by assuring those it deals with that communications will be kept confidential unless and until an applicant takes up a proposed appointment/employment - at which point ACOBA publishes a detailed letter that sets out the material information relating to its advice.

Disclosure of the information requested would, or would be likely to, make applicants reluctant to share information as freely with ACOBA in future, especially if there was any perceived sensitivity about the information. This in turn would compromise the advice that ACOBA is able to give. Disclosure of the information requested would also make it more

likely that some of those subject to the Rules would not approach ACOBA for advice in circumstances where they should have done.

As such, the qualified person considers that disclosure of the information requested would, or would be likely to prejudice the free and frank exchange of views for the purposes of deliberation (**Section 36(2)(b)(ii)**); and/ or the free and frank provision of advice (**Section 36(2)(b)(i)**). It would also make it more difficult for ACOBA to ensure that the purpose of the Rules is fulfilled. If ACOBA's ability to obtain sufficient information was compromised, it would have a negative impact on transparency and accountability, and the ability of ACOBA to discharge its role effectively and would not be in the public interest (**Section 36(2)(c)**).

Section 36 is a qualified exemption and therefore, we considered whether the public interest favoured disclosure of the information or maintenance of the exemption.

We recognise there is significant public interest in knowing that a former Foreign Secretary, with a significant public profile, has properly complied with their duties to seek ACOBA's advice; and that ACOBA has considered relevant information and come to a well-reasoned decision. Further, ACOBA recognises the importance of relevant information being accessible so that members of the public and/ or the press may question it and hold individuals to account. ACOBA considers the public interest in transparency in these respects is well met by the information that it has published on its website.

The public interest in maintaining the exemption is strong for the reasons set out above and given the information provided in the letter which has been published on ACOBA's website, we consider the public interest here is sufficiently met.

Therefore, on balance, we have concluded that the public interest favours maintenance of the exemptions under Section 36 (2)(b)i, (b)ii and (c) and the information should be withheld.

Consideration under Section 40(2) of the Act (personal data)

ACOBA is clear about its approach to both transparency and confidentiality. The Rules for former Ministers state that *"all approaches to the Advisory Committee will be handled in strict confidence, and will remain confidential until the appointment or employment is publicly announced or taken up, at which time the Committee will make public its advice, alongside summary details of the former Minister's last Ministerial post, and the appointment or employment to be taken up. Details will be placed on its website and in its annual report."*

We consider this amounts to an assurance to applicants that the personal data they share during the application process will be treated in confidence. Therefore, we consider that disclosure of personal data, other than that which the applicant has consented to be published (the information routinely published on our website and in our annual report, as stated in the Rules) would be unfair. Accordingly, we rely on an absolute exemption and there is no requirement to consider whether the public interest in disclosing information outweighs the public interest in maintaining the exemption.

However, for completeness, it should be noted that if we considered there was no unfairness in releasing this data, we consider in any event that any legitimate interest (for example, in the role and what was considered by ACOBA) is already served by the publication of ACOBA's correspondence. Publishing this information in the public domain allows ACOBA to achieve a proportionate balance between any wider interest and the individual's privacy.

Next steps

If you are unhappy with this response to your request, you may write to the senior manager with responsibility for ACOBA, Peter Lawrence, at the address below to ask for an internal review. Please note that we will not normally accept an application for internal review if it is received more than two months after the date that the reply was issued.

Peter Lawrence
Room G/08, 1 Horse Guards Road
London
SW1A 2HQ
Email: acoba@acoba.gov.uk

If you are not then content with the reply, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House, Water Lane, Wilmslow
Cheshire
SK9 5AF

Yours sincerely,

Sarah Parkington
Committee Secretariat



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G/8 Ground Floor, 1 Horse Guards Road, London SW1A 2HQ

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19 October 2018

Dear I

Freedom of Information Act 2000 – Internal Review

I am writing further to your request for an internal review of our response to your request for information under the Freedom of Information Act 2000 (the Act).

I have examined all the relevant documentation. I have considered whether the correct procedures were followed and assessed the reasons for the content of our response to you. I confirm that I was not involved in the initial handling of your request.

My findings are set out below. My main conclusion is that the original response was correct.

Chronology

1. Original FOI request: 13 August 2018.
2. Response from ACOBA: 6 September 2018
3. Request for internal review: 18 September 2018

Subject of request:

4. On 13 August 2018 you contacted ACOBA and requested the following:

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

Response from ACOBA:

5. ACOBA responded to the request by confirming that it held information relevant to your request. However ACOBA has published information on this case and the response stated that it felt the information published was sufficient to satisfy any public interest in this appointment. The response is at **Annex A**. ACOBA also attached a copy of the letter to Mr Johnson to your response. This letter is available on the ACOBA website.

Your request for an internal review:

6. You requested an internal review on 18 September 2018. Your request for an internal review is at **Annex B**.

Procedural issues:

7. You submitted your request for information on 13 August 2018.
8. ACOBA responded on 6 September 2018 (the 17th day) to inform you that it was considering the use of section 36 of the Act in relation to your request.
9. You were informed of the right to an independent internal review into the handling of the request, as is required by section 17(7)(a) of the Act. The response also informed you of the right of complaint to the Information Commissioner, as specified by section 17(7)(b) of the Act.

Consideration of the response:

10. I have considered afresh the information that you requested and have concluded that the response given to you was correct. I will consider the two exemptions used below.

Section 40 – personal information

11. I agree with the original response that some of the information we hold is personal data. Under article 5(1)(a) of the GDPR, personal data can only be disclosed if to do so would be fair and lawful. As part of the consideration of whether it would be fair and lawful to disclose the requested information I took into account a number of factors, including the reasonable expectations of the individual at the time their personal data was collected and at the time of the request under the Act.
12. I have considered that the disclosure of the information must be fair to the data subject and that assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public. ACOBA is, and always has been, clear that the process is a confidential one, apart from the information published after an appointment has been taken up. I believe that publication of the documents mentioned in our original response to you

already meets any legitimate public interest in the application process and meets any transparency requirements.

13. It would therefore not be fair to disclose personal data collected during the process and to do so would breach article 5(1)(a) of the GDPR.
14. Section 40 is an absolute exemption so there is no public interest test to reconsider. If, as I believe, the information does constitute personal data, and to disclose it would breach article 5(1)(a), then it cannot be disclosed.

Section 36 – prejudice to the effective conduct of public affairs

15. The information that was withheld is additionally covered by section 36(2)(b) and (c) of the Act because its release would be likely to inhibit the free and frank provision of advice and exchange of views and would be likely to prejudice the effective conduct of public affairs.
16. I asked Baroness Browning, the “qualified person” for the Committee under the Act, to review whether she believes that this information is caught by section 36 (2)(b) and (c) of the Act. She remains of the view that disclosure of this information would be likely to inhibit the free and frank provision of advice and exchange of views and would be likely to prejudice the effective conduct of public affairs.
17. As you are aware, section 36 is a qualified exemption and, therefore, I have considered again whether the public interest favours disclosure of the information, or maintenance of the exemption. Applying the public interest test requires balancing what could be gained from being fully transparent against the risk to the ability of the Committee to function effectively if it released this information.
18. In considering whether to disclose this information to you, I considered the fact that there is clearly a public interest in bodies being as transparent as possible and thereby ensuring there is public confidence in their operations. There is clear public interest in this case in Mr Johnson’s appointment. This is why the Committee publishes, on its website and in its annual reports, its final advice on applications (including information about retrospective applications) and the factors it has taken into account. It also publishes information about its processes and about the way applications are dealt with. The information published sets out details of the appointment, the factors considered by the Committee and any conditions imposed by the Committee.
19. I consider that this information is sufficient both to inform the public and to show the transparency of the process. ACOBA has no enforcement powers and relies on cooperation from applicants. Applicants and departments are informed that the information that they give to ACOBA is provided in confidence. There is clearly a risk that if it was known that all the information provided would be published, this may inhibit applicants and departments from providing the confidential and comprehensive details that are essential

for the Committee to complete its deliberations and make informed decisions on the cases it considers.

20. I have therefore concluded that, insofar as it is not already exempt under section 40, section 36 was correctly applied to the withheld information.
21. In relation to the points you have raised about why Mr Johnson did not follow the ACOBA process, I consider that sufficient information has been published to satisfy any public interest in this case. ACOBA published its view on the failures by Mr Johnson to comply with the Business Appointment Rules (which apply by virtue of the Ministerial Code). You mention that Mr Johnson cannot be held to account without publication of this information. However, the advice letter does hold him to account by including the relevant detail.
22. Further, as you are aware, ACOBA is an advisory committee with no enforcement powers. ACOBA relies on voluntary applications to the Committee and this means that it is vital that applications and correspondence are dealt with on a confidential basis, including retrospective applications. I consider that the risk of applicants failing to make applications to ACOBA would be greater if **all** correspondence and applications were released and this outweighs the public interest you have set out in your internal review application. ACOBA aims to be transparent in its dealings with applicants and puts all relevant information in the advice letters published on its website.
23. You have stated in your internal review request that you do not consider that the use of section 36 is appropriate in this case as the public interest is in favour of releasing the information. As I have set out, in order to invoke section 36 we have to consider the arguments both in favour of disclosure and against disclosure, as we did in our response to you. We then must reach a view which, in this case, was that the arguments in favour of withholding the information were stronger than those in favour of disclosure. Whilst you may disagree with this decision, ACOBA is permitted, under the Act, to set out the relevant arguments and take a decision that, on balance, in its view, section 36 is invoked and the information should be withheld.

Conclusion:

24. The original response was correct and the exemptions at sections 36 and 40 were correctly applied to the information requested.

If you are not content with the outcome of this internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

The Information Commissioner's Office
Wycliffe House

Water Lane
Wilmslow
SK9 5AF

Yours sincerely

Peter Lawrence

