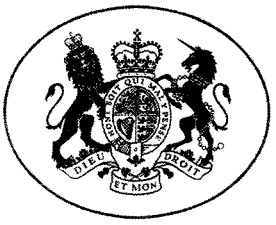

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Appeal Reference: EA/2016/0055

Heard at Field House
On 21 September 2016

Before

JUDGE PETER LANE
STEVE SHAW
DR HENRY FITZHUGH

Between

EDWARD MALNICK

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:

For the Appellant: Adrian Waterman QC and Jude Bunting, instructed by Reynolds Porter Chamberlain
For the Respondent: No appearance or representation

DECISION AND REASONS

A. ACOBA

1. The Advisory Committee on Business Appointments ("ACOBA") is an advisory non-departmental public body, sponsored by the Cabinet Office. ACOBA deals with

approaches from former ministers, senior civil servants and other Crown servants for advice regarding whether it would be appropriate for the person concerned to take a particular job in the private sector, or otherwise outside government and, if so, on what (if any) conditions.

2. So far as Ministers are concerned, the Ministerial Code of England provides:-

"**Acceptance of Appointments After leaving Ministerial Office**	7.25 On leaving office, Ministers will be prohibited from lobbying Government for two years. They must also seek advice from the independent Advisory Committee on Business Appointments about any appointments or employment they wish to take up within two years of leaving office. Former Ministers must abide by the advice of the Committee."

3. In the period with which we are concerned, ACOBA published on its website advice it had given to former Ministers and officials, at their request, regarding appointments in the private sector. Publication took place only after the person concerned had taken up the appointment. This means that the website did not cover cases where a person:-

(a) does not engage with ACOBA before taking up a particular appointment;

(b) takes up an appointment which ACOBA has advised is inappropriate; or

(c) is advised by ACOBA not to take up an appointment, and does not do so.

B. The appellant and his request

4. The appellant is the Deputy Investigations Editor of the *Daily Telegraph*. On 19 February 2015, the appellant wrote to ACOBA, requesting information in the following terms:-

> "Would you please provide me with copies of all correspondence, or records of oral conversations, between ACOBA and Tony Blair/Mr Blair's representatives, in the period from July 2005 to July 2009".

5. On 30 March 2015, ACOBA informed the appellant that it would not provide him with the requested information. ACOBA considered that it was under no obligation imposed by the Freedom of Information Act 2000 ("FOIA") to provide the requested information, since, in ACOBA's view, the information was exempted by sections 36 and 40(2) of FOIA.

6. The appellant complained to the respondent about the way his request had been handed. The appellant told the respondent that:-

> "... there is a great deal of public interest in any commercial intentions that Mr Blair expressed to officials at the time that he left government and the years afterwards.

He has since been accused of a lack of transparency in his business dealings, with some MPs having expressed concern that he should be able to carry out paid work for foreign governments such as Abu Dhabi, Kazakhstan and Kuwait given the knowledge and contacts he acquired as prime Minister."

C. Section 36 of FOIA (prejudice to effective conduct of public affairs)

7. The relevant provisions of section 36 are as follows:-

"(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."

8. The ability of a public authority to rely on section 36(2) is dependent upon:-

(a) the existence of "the reasonable opinion of qualified person"; and

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighing the public interest in disclosing the information.

9. The expression "qualified person" is defined in section 36(5). The requirement in paragraph 5(b) above arises because the exemption conferred by section 36(2) is a qualified one (see section 2(2)).

D. ACOBA's qualified person

10. It is now common ground that, in respect of the appellant's request, Baroness Browning, the Chair of ACOBA, was the qualified person for the purposes of section 36(2). On this issue, the respondent's decision notice of 3 February 2016 had this to say:-

"11. ACOBA informed the Commissioner that after receiving advice from its legal advisor a submission was provided on 17 March 2015 to Baroness Browning, the Chair of the Committee, as the qualified person. The submission comprised the draft response to the complainant. Before giving her opinion Baroness Browning visited the Committee Secretariat's Office on 24 May 2015 to read all the information in the scope of the

request. She gave her opinion verbally at that time. The Commissioner is satisfied that Baroness Browning was an appropriate qualified person for the purposes of the exemptions at sections 36(2)(b) and (c).

12. The next step in determining whether the exemption is engaged is to consider whether the opinion of the qualified person was reasonable. The Commissioner's guidance explains that the opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.

13. The qualified person accepted the recommendation provided by ACOBA that the exemptions at sections 36(2)(b) and (c) should be relied upon to withhold the requested information. She agreed with the reasoning set out in the response to the complainant which reflected legal advice received from ACOBA's legal advisor in the Government Legal Department. That being, disclosure of the information would be likely to inhibit the free and frank provision of advice and exchange of views between ACOBA and its applicants and consequently this would be likely to prejudice the effective conduct of public affairs through the negative impact on public administration created if applicants were deterred from cooperating with a consultation procedure in place.

14. The Commissioner has reviewed the withheld information which comprises the Secretariat's report to ACOBA of discussions between it and the Office of Tony Blair ("OTB") concerning Mr Blair's potential activities and correspondence from OTB seeking advice on various matters relating to Mr Blair's prospective appointments.

15. After reviewing the withheld information the Commissioner is satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b) and (c) applied to it. The Commissioner accepts that as Chair of ACOBA the qualified person is fully aware of the requirement for applicants to voluntarily cooperate with ACOBA. It is reasonable to conclude that any disclosure which may limit that cooperation would be likely to prejudice the function of ACOBA and the transparency of the activities of former Ministers."

E. The public interest balance

11. Having decided that section 36(2) was engaged, the respondent's decision notice turned to the public interest balancing exercise, required by section 2 of FOIA. The respondent noted that ACOBA recognised there was a public interest in transparency, ensuring public confidence in public authorities' operations. It was for this reason, according to ACOBA, that it publishes on its website and in its annual reports its final advice on applications.

12. ACOBA's explanation to the respondent of its arguments in favour of withholding the information was as follows:-

"19. ACOBA explained to the Commissioner that its role and remit is that of an advisory body. It is not a statutory authority and does not have the power to compel applicants to cooperate with it. Consequently it relies on having a safe space to discuss

prospective outside appointments with applicants or applicants' representatives in advance of any public announcement. It considers that if applicants could not feel confident that ACOBA would maintain the confidentiality of their information, there would be a negative effect on future applicants' willingness to consult and cooperate with ACOBA."

13. According to the decision notice, the respondent further investigated the role of ACOBA, in the course of which the respondent concluded that:-

"Although its website states that former ministers must seek advice from ACOBA about any appointments or employment they wish to take up within two years of leaving office, and abide by that advice, neither ACOBA nor the Government audits or enforces compliance with this instruction."

14. The respondent then addressed the striking of the balance. The reasoning was as follows:-

"21. The Commissioner has considered at length the arguments for and against disclosure. In accordance with his guidance the Commissioner has focussed on the concept of a 'chilling effect' inhibiting free and frank future discussions between ACOBA and its applicants. The Commissioner acknowledged that disclosure of the content of such discussions creates a real risk of a chilling effect in terms of how applicants choose to share information with ACOBA in the future. In acknowledging this risk the Commissioner accepts that this would be likely to have a negative impact on ACOBA performing its role. ACOBA relies on applicants voluntarily seeking its advice, if that advice is subsequently disclosed outside of the routine disclosure on ACOBA's website, applicants may choose not to seek its advice or to restrict their discussions resulting in less transparency.

22. The Commissioner considers that there is a strong public interest in ACOBA having the ability to perform its function effectively. Without this function the outside appointments of former ministers and crown servants would not be subject to independent scrutiny or would be subject to less rigorous scrutiny which would potentially result in greater public concern or criticism, whether justified or unjustified.

23. The complainant highlighted accusations against Mr Blair for a lack of transparency in his work with foreign governments ... However, the Commissioner notes that former ministers are only instructed to consult with ACOBA for two years after leaving office. The complainant's request focuses on information relating to the period 2005 - 2009. Mr Blair left office in June 2007 consequently the relevant period of consultation with ACOBA was 2007 - 2009. Some of the work referenced by the complainant in paragraph 7 did not commence until outside of this timeframe.

24. The Commissioner acknowledges the controversy surrounding Mr Blair's work since leaving office which has been comprehensively covered in the media. Although the Commissioner considers that this carries weight in favour of disclosing the requested information, the information covers limited activities. Consequently the withheld information is limited to that information still held by ACOBA within the timeframe of the request. Some information may have been destroyed in accordance with it retention policy.

25. The Commissioner notes that ACOBA proactively publishes the advice it has given and in this respect he considers that ACOBA is demonstrating transparency in its function.

26. Having reviewed the withheld information the Commissioner considers that the information demonstrates that ACOBA is following its procedures as set out in the flowchart detailed on its website. The Commissioner acknowledges that disclosure of this information could enhance confidence in ACOBA's system of operation.

27. The Commissioner has deliberated on the significance of this request focussing on Mr Blair rather than on any other government minister. To some extent, information relating to Mr Blair as a former prime minister is a special case. As referenced in paragraph 23 there has been, and continues to be, public interest in Mr Blair's appointments which continue to attract controversy and media attention.

28. The Commissioner has concluded that there is significant weight both in favour of disclosure and in favour of withholding the requested information. On balance he is satisfied that the public interest is best served by withholding the requested information. He considers that the public interest in ensuring that former ministers are able to be confident that they have a safe space to hold free and frank discussions with ACOBA and therefore to enable ACOBA to advise them appropriately, aids transparency and maintains a degree of control. The information subsequently published on ACOBA's website provides access to information which would be otherwise unavailable. The Commissioner has therefore decided that the exemptions at section 36(2)(b) and (c) have been correctly applied and the public interest favours maintaining the exemptions.

29. Having found that the withheld information is exempt under sections 36(2)(b) and (c), the Commissioner has not gone on to consider the additional application of section 40(2)."

F. The appeal

15. The appellant appealed against the respondent's decision notice. In his grounds of appeal to the Tribunal, the appellant referred to the "business activities of Tony Blair". After serving as prime minister from May 1997 to June 2007, Mr Blair was said to have "earned a significant amount of money through post-office commercial activities", including by means of a consultancy business known as Tony Blair Associates. The appellant contended that Mr Blair's post-office commercial activities have attracted "widespread public interest, comment and concern". The *Daily Telegraph* in September 2011 described Mr Blair's work as "an extraordinary confusion of public duty and private interest". The grounds stated there had also been a Channel 4 documentary broadcast entitled "*The Wonderful World of Tony Blair*".

16. Clients of Tony Blair's Associates were said by the appellant to have included "an oil company founded by a senior member of the Saudi Royal Family; the autocratic president of Kazakhstan and other organisations linked to national governments". During his

international travel, Mr Blair was said to be accompanied by several police officers, paid for by the British Taxpayer at an estimated cost of £14,000 to £16,000 a week.

17. Calls for transparency in relation of Mr Blair's business interests had come from, amongst others, MPs and non-governmental organisations, as well as from the press. The grounds noted that ACOBA had approved a number of appointments in respect of Mr Blair, two which had been on the basis that "for one year after leaving office he should not be personally involved in lobbying UK Government ministers or officials on behalf of his new employer or its clients". It was said to be unclear why ACOBA had subjected Mr Blair to a shorter period than the normal two years after leaving office.

18. Also of concern to the appellant was the approved appointment of Mr Blair as a "governance advisor" to the Kuwaiti Government. Here, the publication of ACOBA's advice had been delayed "due to market sensitivities" and also because it had become "difficult to obtain information from Mr Blair's office".

19. The grounds contended that section 36(2) had not been complied with in the present case because there was no "reasonable" opinion of a qualified person. In any event the appellant submitted that the public interest in maintaining the exemption did not, on the facts, outweigh the public interest in disclosing the information. In this regard, the appellant noted, amongst other matters, that the respondent had acknowledged that the case of Mr Blair was a "special" one.

G. The respondent's case

20. At the appeal hearing on 21 September 2016, the respondent neither appeared nor was represented. The respondent had, however, filed a written response on 14 March 2016, settled by Mr Lockley of Counsel. In the response, the respondent submitted that the appeal:

> "raises no difficult issues of law. The only issue of any difficulty in the case is balancing the public interest for and against disclosure - an exercise for which the applicable legal principles are not in doubt and which the Tribunal will decide *de novo*".

21. So far as concerned the reasonableness of the qualified person's opinion, the response drew attention to the findings of the Information Tribunal in Guardian Newspapers Ltd and H Brooke v The Information Commissioner and the BBC (EA/2006/0011, EA/2006/0013), where it was held that:-

> "The first condition for the application of the exemption is not the Commissioner's or the Tribunal's opinion of the likelihood of inhibition, but the qualified person's 'reasonable opinion'. If the opinion is reasonable, the Commissioner should not under s.36 substitute his own view for that of the qualified person. Nor should the Tribunal" (paragraph 54).

22. In this regard, we consider it is also necessary to note what the Information Tribunal said at paragraph 64:-

"64. ... in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at ... the provision that the exemption has only engaged where a qualified person is of the reasonable opinion required by s.36 is a protection which relies on the good faith and proper exercise of judgment of that person. That protection would be reduced if the qualified person were not required by law to give proper rational consideration to the formulation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the opinion of qualified persons, they should be expected at least to direct their minds appropriately to the right matters and disregard irrelevant matters. Moreover, precisely because the opinion is essentially a judgment call on what might happen in the future, on which people may disagree, if the process were not taken into account, in many cases the reasonableness of the opinion would be effectively unchallengeable; we cannot think that that was the Parliamentary intention."

23. As for the required risk in section 36(2), the response agreed with the grounds of appeal that, following DWP v Information Commissioner and Zola [2014] UKUT 0334 (AAC), the prejudice "must be real and significant", as must the risk of its occurring. The qualified person must have a *"Wednesbury"* (i.e. rational) justification for considering that such a risk exists.

24. As for the balancing exercise required by section 2, the response contended that the qualified person's opinion was itself "an important piece of evidence", to be given weight by the respondent and the Tribunal, albeit that both should form their own view of the extent and severity of the prejudice.

25. Although the respondent accepted that there would be pressure on former ministers to seek and act on the advice of ACOBA, as a result of the requirements of the Ministerial Code and "by virtue of public scrutiny of their activities", the respondent considered such pressure to be:

"in effect, to be seen to be complying with the letter of the requirement. There is room for applicants to cooperate more or less fully, by being more or less frank in what they choose to put before ACOBA".

26. The respondent also considered that if applicants were to come to the view:

"that they would only be making a rod for their own backs if they were to disclose more than the bare minimum necessary to ACOBA, because all information could be released under FOIA, it would be less likely to supply full information".

27. The respondent felt it to be in the public interest that ACOBA should proceed on the basis of having "the fullest possible information before it".

28. Cases where a former Minister is faced with a formal ACOBA recommendation against appointment are, according to the respondent, likely to be rare because ACOBA is usually able to recommend informally changes that could render the appointment

acceptable; or else the application might simply be withdrawn. Such cases were, according to the respondent, "inherently more likely to be sensitive or confidential than straightforward approvals, meaning there is a greater need for a safe space in which discussions can be conducted and advice given". The frankness of ACOBA's informal advice "would be inhibited in cases of this kind if they were an expectation concern that its correspondence with applicants was disclosable under FOIA".

29. The respondent questioned the appellant's stance regarding the significance of the requested information, concerning Mr Blair. The appellant's submissions appeared to the respondent to mandate disclosure in all cases, irrespective of the former minister in question. If disclosure took place in the present case, the respondent questioned:

> "... how other applicants would know that release of the Disputed Information was a one-off, applicable only to Mr Blair. At the very least disclosure is likely to raise a concern that their information might be disclosed, which is enough to trigger inhibition".

30. Finally, the respondent questioned the strength of the public interest in disclosure of the disputed information, given that so much about Mr Blair's activities was in the public domain. Although there was legitimate public interest in knowing more about the process by which Mr Blair's appointments were approved, the response submitted that the disputed information did not enhance the public knowledge of these issues to any significant extent.

H. Discussion

(a) Documentation

31. In reaching our unanimous decision in this case, we have had regard to the oral and written submissions and to the open and closed materials before us. The open materials include a number of documents recently submitted by the appellant, which we considered to be in the interests of the overriding objective to admit. In particular, they comprise a transcript of the oral evidence of the House of Commons Public Administration Constitutional Affairs Committee ("PACA") hearing on 19 April 2016, when Baroness Browning gave evidence in respect of ACOBA and its activities. There was also a *Daily Mail Online* report of 3 May 2016, commenting on this hearing and quoting Parliamentarians as pointing to what they see as the shortcomings of ACOBA.

(b) Appellant's submissions

32. Mr Waterman QC and Mr Bunting's submissions on behalf of the appellant can be summarised as follows. First, Baroness Browning's opinion was not a "reasonable" one because the process involved in its making was flawed, in public law terms. She failed to have regard to relevant considerations in reaching it. Secondly, even if that were not so, the balance of the public interest plainly requires disclosure of the disputed information. As regards ACOBA, the submissions were to the effect that Mr Blair's case is the *non plus*

ultra of section 2(2)(b) and section 36(2): in other words, if the public interest in withholding the information on section 36(2) grounds outweighs the public interest in learning about Mr Blair's dealings with ACOBA, then the exemption is, effectively, being operated by the respondent as an absolute exemption, contrary to Parliament's intentions.

33. We agree with both of these submissions. Our reasons for doing so are as follows.

(c) Qualified person's opinion not "reasonable"

34. In the open bundle, there is a copy of Baroness Browning's signed opinion of 24 March 2015. The following passages are relevant:-

"9. Arguments put forward as to why prejudice/ inhibition would/would be likely to occur	Information and advice would be less open and honest if there was a risk that it would be released publicly; and applicants would not feel confident about approaching ACOBA and might feel inhibited from cooperating fully if they thought that the full details of their applications and correspondence about them would be disclosed.
10. Counter arguments put forward	The strong public interest in knowing that the business appointments process is transparent and accountable, as well as the importance of maintaining public confidence in the integrity of the system.
11. Any other factors taken into account	That the public interest as regards accountability and transparency might be sufficiently met by publication of details of the Committee's processes and details of the advice about appointments taken up on its website and in its annual reports.

.....

x36(2)(b)(i)

- Would occur x would be likely to occur for the following reasons(s): see response at section 9 above. Put another way, ACOBA and applicants (or applicants' representatives) need a safe space to discuss prospective outside appointments in advance of any public announcement in the knowledge that this discussion (although not the detail of any appointment subsequently taken up, which will be published) is and will remain confidential.

.....

x36(2)(c)

- Would occur x would be likely to occur for the following reasons(s) if applicants did not feel confident about approaching ACOBA, this would make it less likely for applicants to cooperate with the Committee in future, thereby hindering the Committee's ability to function effectively. This would have a negative impact on effective public administration more widely. ACOBA supports the implementation of the relevant rules on accepting outside appointments in a range of public authorities. It also provides advice directly to former Ministers in the UK, Scottish and Welsh Government. If the Committee were unable to fulfil its role effectively, the outside appointments of former Ministers and Crown servants would not be subject to the necessary degree of independent scrutiny and the appointments would be subject to more public concern, criticism or misinterpretation."

35. Mr Waterman submitted that this opinion contained no evidence, or reference to any evidence, to support its conclusions. He suggested that the testimony of an ex-Minister could have been obtained, in order to show what he or she would have felt about their discussions with ACOBA being potentially open to public scrutiny.

36. We do not consider that this failure constitutes a fatal flaw in the opinion. We can see that it may be difficult, at best, for ACOBA to persuade a former Minister to provide such evidence. It must be open to the public authority in question to draw on its own knowledge and experience in this regard.

37. Mr Waterman's better point is that there is no indication in the opinion or elsewhere that Baroness Browning had regard to matters of key significance, concerning the workings of ACOBA and, in particular, its relationship with the "Fourth Estate"; that is to say, journalism.

38. We have already made reference to Baroness Browning's appearance before the PACA Committee in April 2016. We will return to that appearance in due course. First, however, reference must be made to the transcript of evidence of the hearing of PACA on 8 February 2011, when Lord Lang of Monkton, Baroness Browning's predecessor, gave evidence to the Committee in respect of ACOBA. This transcript is to be found at p124 *et seq* of the open bundle.

39. The following exchange is, we consider, significant:-

Q40 Robert Halfon: But the individual is free to ignore [ACOBA's advice].

Lord Lang of Monkton: The individual is free to ignore it. We do not have policing powers or enforcement powers. The Ministers are directed within the terms of the Ministerial Code to abide by it. If they chose to ignore it, they are flouting our recommendation and they face the court of public opinion.

Robert Halfon: That's it?

Lord Lang of Monkton: That's it. I have to say that in most cases that has been sufficient; however, we have had some fairly abrasive confrontations at some of these meetings. It is not a cosy chat. Some of them fight their corner very hard and we are equally robust where we think that it is necessary to protect them as much to protect the public interest. In one or two cases, the individual has come back after a time and confirmed that we were right to reach the view that we did, having argued fiercely against it.

Q41 Robert Halfon: In essence, an individual, if he is not concerned about the court of public opinion, he can worry about a few articles in the *Daily Mail* or whatever it might be and then brave it out, and then carry on doing whatever he is doing.

Lord Lang of Monkton: In essence that is theoretically true.

Robert Halfon: You could say you are a toothless committee.

Lord Lang of Monkton: We have no enforcement powers, investigative powers or policing powers. We do not think it is right that we should have them. There are Committees of this House; there is the media who take quite a close interest in these matters as you will have seen.

Q42 Paul Flynn: It is absolutely right. How can you be robust when you are not a watchdog? You are a pussycat without any teeth or claws. There is nothing you can do if Ministers decide to disregard your advice and carry on lobbying. That is a highly unsatisfactory situation.

Lord Lang of Monkton: You may consider it unsatisfactory Mr Flynn, but the fact is that on past experience it seems to work.

Q43 Paul Flynn: When has it worked? When has someone come before public opinion for disregarding your advice to them?

Lord Lang of Monkton: I cannot think of any case where ...

Paul Flynn: Because there has not been a case.

Lord Lang of Monkton: I cannot think of a case where anybody has disregarded our advice.

Paul Flynn: How would you know?

Lord Lang of Monkton: Because public opinion would reveal the fact."

40. It is plain from this exchange that an important element in the workings of ACOBA is the belief of ex-Ministers and others that, if they do not engage appropriately with ACOBA, then they face "the court of public opinion". It is, ultimately, public opinion which provides the incentive to comply with the Ministerial Code. This important aspect is, we find, entirely missing from Baroness Browning's opinion in the present case. This is particularly surprising given that, in her own evidence of April 2016, she made plain the

importance of journalism in facilitating public opinion to provide the requisite enforcement machinery:

"Q7 **Chair**: How much is the credibility of ACOBA in the process you oversee one of the main challenges you face?

Baroness Browning: It is a very big challenge.

Chair: But you did not mention it in your first answer.

Baroness Browning: No I did not because, frankly, I see it as an almost indigenous challenge that is with us all of the time. We have been subject in the last year to quite considerable press coverage, not just the Committee but also many of the individuals who have applied to us in the last year or so, and that has created some quite negative publicity. What I think is interesting about it is that despite that coverage there have been very few examples found of people who have failed to apply to ACOBA in the appropriate way to seek our advice, nor have they found any significant areas where applicants have then flouted the rules or the advice that they were given.

Q8 **Chair**: Why is the credibility of ACOBA such a big challenge?

Baroness Browning: I suspect because there is a public view across the piece not just over ACOBA but of people who have held public office going on and doing other things. There has been an awful lot of focus on the amount of money people earn when they leave office, and all of that is part of the lack of confidence that I think the public has in probity and public life overall.

.....

Q13 Paul Flynn: Right, but doesn't this go to the heart of the futility of the body, that you are not a watchdog; you are a pussycat without teeth or claws? If Mr Davey says "fine I will be a good boy. I shan't use my inside knowledge", what can you do about it?

Baroness Browning: We have to work within the rules we are given, as you will know.

Paul Flynn: So what can you do about it?

Baroness Browning: I think one of the main influences once we have given our advice is that if somebody breaks that advice or flouts it, the press pick it up and publish it. I think the reputation -

Q14 Paul Flynn: How would you know that he has flouted your advice? He is not going to advertise his relationship with these four customers.

Baroness Browning: We would not. We have neither the resources nor the remit to -

Paul Flynn: How would the press know?

Baroness Browning: Well, that I do not know. They would presumably engage in some -

Paul Flynn: But you are -

Baroness Browning: Can I just answer the previous question?

Paul Flynn: Yes.

Baroness Browning: They would engage in some form of investigative journalism, which is something that we follow with great interest because we are very keen to see, but we have no remit or no resources to police the advice that we give. That is our remit. If you are saying that we should be given that resource and that remit, it is obviously a matter that we would take very seriously."

41. This evidence puts beyond doubt the inadequacy of the opinion purported to be given under section 36(2) in the present case. The same person who gave that opinion was, here, recognising the importance of investigative journalism as an enforcement mechanism, which serves to underpin the purpose of ACOBA. But, having acknowledged both the important contributions that can be made by investigative journalism to supporting ACOBA's work and the difficulties that such journalism currently faces in undertaking that role, Baroness Browning failed to have regard to these matters in giving her qualified person's opinion.

42. What the PACA transcripts therefore make clear is that there is at the very least a case for permitting journalists (and by extension the public) to know - by asking ACOBA - whether ACOBA's advice has been disregarded. Viewed in this light, arguments based on "safe space" need to be carefully examined, since the obvious response to any "safe space" argument against disclosure in this scenario is that a person may very well be *less* likely to disregard ACOBA's advice if he or she knows that this fact could be disclosed in response to a freedom of information request. By the same token, a "safe space" argument is difficult to deploy as a generic reason for refusing to disclose whether an ex-Minister, who accepts a potentially controversial outside appointment, has approached ACOBA at all for its advice on that appointment.

43. Where the request concerns a person who has, in fact, consulted ACOBA about a proposed appointment and who has heeded ACOBA's advice not to accept it, there is a somewhat different but nevertheless important public interest case for disclosure that needs to be addressed; namely, that the public has a legitimate interest in knowing whether those who have been Ministers have exhibited poor judgment in contemplating taking a job that is plainly inappropriate.

44. The fact that none of these important considerations found any expression in the opinion of March 2015 or in any materials underpinning it means that the qualified person gave the opinion without having regard to relevant considerations. Her opinion was, accordingly, not "reasonable" in public law terms. The respondent was, as a result, wrong in law to treat it as reasonable. Although the respondent probed the matter a little further with ACOBA, the upshot was that the respondent effectively chose to accept the opinion at face value. The decision notice is, thus, not in accordance with the law because section 36(2) was not engaged.

(d) Public interest in maintaining the section 36 exemption does not outweigh public interest in disclosure

45. That finding is sufficient to dispose of the appeal. We have, nevertheless, considered whether, even if section 36(2) were engaged, the balance of the public interest lies in favour of withholding the requested information. We begin by considering the strength of the public interest in withholding the information.

46. On the basis of the evidence and submissions provided, we are not satisfied that there is any material weight in generic contentions of the kind described in paragraph 42 and 43 above, that "safe space" requires information concerning the dealings between ACOBA and ex-Ministers and others to be indefinitely withheld, on the basis that such persons would otherwise not engage with ACOBA or would merely do so on a "lip service" basis. On the contrary, the views publicly expressed by both the present and previous Chair of ACOBA point clearly towards the opposite conclusion.

47. We do, however, accept that there is a role for "safe space" whilst any discussions are ongoing between the ex-Minister etc. and of ACOBA. How much weight would fall to be given to such a consideration is likely to be case-specific. In the present case, of course, no such consideration arises since the discussions covered by the appellant's request a long past.

48. We pressed Mr Waterman on whether the logic of the submissions he was advancing meant that the balance of the public interest would routinely favour disclosure in ACOBA cases. Rightly, Mr Waterman did not seek to proceed so far. He acknowledged that, in certain cases, such as those involving security issues, disclosure may well be inapt. Each case will, ultimately, turn on its own facts. Notwithstanding what we have said about the relationship between ACOBA and public opinion/journalism, there may well be instances where the public interest in withholding the information is a strong one.

49. We are fully satisfied the present case is not such an instance. We find that there is a strong public interest in knowing about the exchanges between ACOBA and Mr Blair and his office, within the period covered by the terms of the request. The strength of that interest is not diminished by the fact that the period ended over seven years ago. Mr Blair's post-prime ministerial activities have attracted a degree of public interest which is of a quite different nature from the desire that the public might have to know about the lives of persons whom it considers to be "celebrities". In particular, Mr Blair's business and commercial interests have spawned a wider, important debate about the interface between political life and the world of business and commerce.

50. For these reasons, we find there is force in the appellant's contention that if, Mr Blair's dealings with ACOBA cannot be disclosed pursuant to sections 2 and 36 of FOIA because of what the respondent identifies as the public interest in withholding the information, then ACOBA effectively enjoys an absolute exemption under FOIA.

51. We have examined the withheld information. The respondent contends that it does not add anything of significance to what is already in the public domain. We disagree. In any event, it is certainly not plain from the material that it is of no legitimate journalistic interest, or interest to those who wish to know how ACOBA operates.

52. The balance of the public interest, accordingly, falls decisively in favour of disclosure. The arguments advanced in favour of withholding, based on "safe space" and the risk of less than full and frank engagement with ACOBA, are weak. Conversely, the arguments in favour of disclosure are, in this particular case, extremely strong. They are not materially diminished by the passage of time or by what is in the public domain.

53. In paragraph 5 above, we mentioned that ACOBA relied on section 40(2) in addition to section 36. The respondent's decision notice was concerned entirely with section 36. Accordingly, the respondent did not go on to consider the possible application of section 40(2). At the hearing, Mr Waterman accepted that section 40(2) was not in play in the present appeal.

(e) Decision

54. The respondent's decision notice, based as it is on section 36(2), is not in accordance with the law. The respondent will therefore need to issue a new decision notice, which does rely upon that provision.

55. This appeal is accordingly allowed.

Judge Peter Lane

3 November 2016