Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **23 August 2022**

Public Authority: **Department for International Trade**
Address: **Old Admiralty Building**
London SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested information relating to the Advisory Committee on Business Appointments (ACOBA) regarding a job taken up by former Department for International Trade (DIT) Secretary of State, Rt Hon Dr Liam Fox MP. DIT refused to provide it, citing section 40 (personal information), section 43 (commercial interests) and section 36 (prejudice to the conduct of public affairs) as its basis for doing so. It upheld this at internal review. It introduced an additional provision of section 36 as its basis for withholding the information in correspondence with the Commissioner.

2. The Commissioner's decision is that DIT is entitled to rely on section 36(2)(b)(i) & (ii) and section 36(2)(c) as its basis for withholding the requested information. However, the Commissioner also found that DIT contravened its obligations under section 10 in failing to respond within 20 working days.

3. No steps are required.

Request and response

4. On 29 June 2020, the complainant requested information of the following description:

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

5. On 28 September 2020, following a number of delays, DIT responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: - section 40 (personal information) - section 43 (commercial interests) - section 36 (prejudice to conduct of public affairs). It drew the complainant's attention to published advice from the Permanent Secretary.

6. The complainant requested an internal review on 11 October 2020. He said:

   "As the DIT press office wrote to me on 30 June 2020: 'We update our records database on an ongoing basis. When we wrote to ACOBA in March there were no records of Liam Fox or DIT officials meeting with Oxford Nanopore. Teams in the Department have now updated the records database and we have found evidence of DIT officials meeting with Oxford Nanopore before 2019, however there is no record of Dr Fox meeting with them and this has been confirmed with his private office.' As the records analysed by the team putting the response together was, by the department's own admission, out of date, the statement provided was factually incorrect. There is a clear case for transparency in the circumstance of this case, in order for the public to be able to see the decision-making process that led to the publication of the department's factually incorrect statement to Acoba, which was not corrected until enquiries were made."

7. DIT sent him the outcome of its internal review on 14 December 2020. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 13 January 2021 to complain about the way his request for information had been handled. He complained about DIT's use of exemptions and its delays in handling his request.

9. The Commissioner has considered both the delays in handling the request and DIT's reliance on exemptions.

10. In correspondence with the Commissioner, DIT confirmed that it had applied section 36 to all the withheld information. Where the Commissioner is satisfied that this exemption does not apply, the Commissioner will consider its reliance on section 40 and section 43 to elements of the withheld information where they have been applied.

Reasons for decision

11. Section 36(2) of FOIA states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of that information:

    (a) would, or would be likely to, prejudice—

    (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

    (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

    (iii) the work of the Cabinet of the Welsh Assembly Government.

    (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.

12. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the "Qualified Person" or "QP") within the public

authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the QP; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

13. In this case, there are two QP opinions. The first, provided by a Minister of the Crown, in this case Greg Hands MP then Minister of State for Trade Policy, was provided on 21 September 2020[1] in respect of section 36(2)(b)(i) & (ii). Greg Hands MP reviewed his decision as part of DIT's internal review. He confirmed that his opinion remained unchanged on 9 November 2020. DIT provided the Commissioner with a copy of the submissions given to Greg Hands MP on which his opinion was based. For ease of future reference, this is the "first opinion".

14. Following the Commissioner's contact with DIT about this complaint, it also sought the opinion of the person who was, at that time, in the role of Minister of State for Trade, Penny Mordaunt MP regarding an additional provision of section 36, namely section 36(2)(c). Penny Mordaunt MP provided her opinion on 28 January 2022. The correspondence documents that she reviewed DIT's submissions to her and agreed that section 36(2)(c) was engaged on 28 January 2022. DIT provided the Commissioner with a copy of this submission. For ease of future reference, this is the "second opinion".

15. The Commissioner is satisfied that both Greg Hands MP and Penny Mordaunt MP were entitled to act as the qualified person for the purposes of section 36 of FOIA in their respective turns.

What were the opinions and were they reasonable?

16. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The intention of the exemptions reflects the position that a Qualified Person is best placed to know the circumstances of their organisation and the significance of the information concerned.

[1] There is a typo in DIT's submission to the Commissioner which gives this date as 2021 although it then goes on to refer to the Minister's internal review of his previous decision being given in 2020.

It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.

17. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the application of the exemption or if the information is already in the public domain.

18. The Commissioner notes that both these opinions were not obtained within the 20 working days required by FOIA to provide a response to a request. While public authorities are obliged to comply with the timeliness obligations of FOIA, the Commissioner does not think that this, of itself, renders the opinions unreasonable. The Commissioner has made further comment about DIT's compliance with its FOIA timeliness obligations later in this notice.

19. The key point made in the submissions of the first opinion is that ACOBA does not have a legal mechanism for compelling people to respond. It relies on offering assurances of confidentiality. As such, were the information to be disclosed, this means that cooperation from relevant parties would be unlikely in the future. Disclosure would undermine the free and frank provision of advice or exchange of views. The quality of what would be provided would be undermined.

20. The second opinion reiterated the position set out in the first opinion but sought to emphasise further that ACOBA would be unable to carry out its work such that disclosure would also be contrary to the effective conduct of public affairs.

21. The Commissioner also notes that both opinions assert that the prejudicial outcomes envisaged in the exemptions "would" arise rather than "would be likely to" arise. This is the higher bar of prejudice.

22. Having considered the withheld information and both opinions, the Commissioner is satisfied that these are both reasonable opinions. The Commissioner recognises that this position was reached by DIT following consultation with ACOBA but does not consider that this means the opinion is unreasonable. He has no evidence which leads him to conclude that these are not the opinions of the QPs.

23. As the Commissioner considers that the first and second opinions are reasonable in the context of the exemptions relied upon, it follows that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA are all engaged.

Public interest test

24. Even where the Qualified Person has identified that disclosure of information would or would be likely to cause prejudice, a public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.

25. Given that the Commissioner has accepted that disclosure of the withheld information would cause prejudice, there will always be an inherent public interest in preventing that prejudice from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.

Public interest in favour of maintaining the exemption

26. As noted above, the Commissioner has accepted as reasonable that the higher bar of prejudice is engaged – this is where prejudice "would" arise. This means that the weight to be attached to that prejudice is also greater.

27. In support of its arguments for maintaining the exemption, DIT stressed the prejudicial outcomes it had identified. Specifically, it said that undermining the voluntary flow of information would have a negative impact on the operation of ACOBA going forward. It recognised the importance of transparency and said that ACOBA publishes its advice letters as part of its commitment to transparency.[2] A statement about that process includes the following:

    "If an appointment is not listed here, it does not necessarily mean that advice has not been sought or provided. Until the point at which an appointment or employment is taken up, it remains in confidence. The Advisory Committee on Business Appointments publish advice only when it is informed that an appointment has been taken up or announced."

28. This adds some weight to DIT's arguments about the importance in ACOBA's processes of confidentiality, particularly with regard to section 36(2)(c).

[2] Appointments taken up by former ministers (2019-2020) - GOV.UK (www.gov.uk)

29. It further argued that where the public interest was best served by disclosure, that information is put into the public domain.[3] The Commissioner notes that, according to the webpage, the advice letter in question was published on 22 June 2020 and updated on 19 July 2021 following the discovery of records at DIT that officials at DIT had met with Oxford Nanopore Technologies Ltd but those records show no reference to Liam Fox meeting with that company (see updates on the webpage linked at Note 3). The update was made some time after the request although the complainant appeared to have confirmation from DIT on 30 June 2020 that it knew a further update to ACOBA was needed for its further consideration.

Public interest in disclosure

30. DIT set out the following points in favour of disclosure:

"- there is a public interest in knowing that a former Secretary of State has properly complied with the duty under the Ministerial Code to seek ACOBA's advice

- there is a public interest in the public knowing that there was a comprehensive gathering of facts by DIT and that the Department provided ACOBA with considered relevant information to enable them to come to a reasoned decision.

- there is a public interest in knowing the reason a further update was provided to ACOBA by DIT."

31. The complainant asserted the following:

"The Department's press office admitted the advice was incorrect and based upon out of date information[4]. DIT refused my initial request and following internal review concluded some information could not be released under section 40(2) - fair enough as it concerns junior civil servants; section 43(2) as an involved company's commercial interests could be harmed; and for the bulk, section 36[5]. … There is clear public

[3] Fox, Liam - Secretary of State for International Trade, Department for International Trade - ACOBA advice - GOV.UK (www.gov.uk)

[4] See paragraph 6 above.

[5] As noted above, it subsequently changed this position and applied section 36 to all the requested information

interest in knowing how incorrect advice led to a former secretary of state getting a new job.

It is important to know how it is that the department came to giving their advice based on records that had not been updated in 4 years. Is this standard practice? … There is no public interest in preserving a system of vetting ex-ministers' jobs which can't get such elementary matters right. The only response to such an extraordinary blunder is to reveal how it happened.'

Balance of public interest

32. The Commissioner must consider the circumstances prevailing at the time of the request and notes that the update to ACOBA's advice to Liam Fox (see Note 3) was not published at the time of the request. DIT's argument that the public interest in transparency in this case was served by the publication of that advice does not carry weight because that publication came considerably after the request. There was a compelling public interest at the time of the request in knowing more about the advice on which ACOBA's earlier position was based, given that further information was discovered shortly after the request.

33. The complainant has asserted that DIT's press office admitted that the advice was incorrect and based on out of date information. The Commissioner has no reason to doubt the veracity of this. The complainant is a person in regular contact with government press offices as part of their work. The quote they provide from the press office shows that DIT were aware at the time of the request that further factual information needed to be provided to ACOBA.

34. The Commissioner has issued a number of decision notices surrounding correspondence with ACOBA.[6] His view has always been that there is a strong public interest in ensuring that individuals are not discouraged from approaching ACOBA and that preserving a certain degree of confidentiality is necessary for that purpose. In the Commissioner's view there is a strong public interest in individuals engaging pro-actively and wholeheartedly with ACOBA and in ACOBA feeling able to provide advice or discuss sensitive matters freely and frankly. That approach was one

[6] fs_50591296.pdf (ico.org.uk) , fs50605349.pdf (ico.org.uk), fs 50689319.pdf (ico.org.uk), fs 50795901.pdf (ico.org.uk) and ic-110311-s6m2.pdf (ico.org.uk)

approved by the Upper Tribunal in Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC)[7].

35. The Commissioner recognises that the public authority here is DIT and not ACOBA. There is an additional public interest in understanding how DIT, a separate public authority, interacted with ACOBA, particularly given that ACOBA needed to publish an update to its advice when further information came to light from DIT.

36. Taking all the above into account, including his assessment of the withheld information itself, the Commissioner has concluded the public interest in maintaining the section 36 exemptions cited is stronger than the public interest in disclosure. He has reached this view by a narrow margin given that disclosure at the time of the request would have contributed to the public interest in knowing more about DIT's submissions to ACOBA on this subject. While that public interest may have been served by the publication of ACOBA's update, this did not occur until some time after the request.

37. The Commissioner has taken into account the fact that the opinions of the QPs in this case asserted that disclosure would give rise to the prejudicial outcomes described in the section 36 exemptions cited.

38. Given his view on the application of section 36 – which DIT applied to all the requested information - the Commissioner has not gone on to consider the application of other exemptions that DIT sought to rely on.

Delay

39. Section 10 of the FOIA requires public authorities to provide a response within 20 working days.[8] In this instance, DIT failed to do this by a considerable length of time. The Commissioner recognises that the Covid-19 pandemic may have impacted to an extent on DIT's ability to provide a timely response.

40. However, in failing to respond within 20 working days, DIT contravened its obligations under section 10 of the FOIA.

[7] Information Commissioner v Malnick and the Advisory Committee on Business Appointments: [2018] UKUT 72 (AAC): [2018] AACR 29 - GOV.UK (www.gov.uk)

[8] Freedom of Information Act 2000 - section 10 (legislation.gov.uk)

Other matters

41. The Commissioner notes that there was a delay in responding to the complainant's request for an internal review in respect of his request.

42. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.

43. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances, it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

44. In this case, the request for an internal review was made on 11 October 2020 and the response was issued on 14 December 2020. The Commissioner notes that in this case, the time taken to respond was 46 working days. The Commissioner recognises that this coincided with Covid-19 lockdown restrictions. However, he would note that this far exceeded the 20 working days recommended in the section 45 Code of Practice.[9]

[9] Request handling, Freedom of Information – Frequently Asked Questions | ICO

Right of appeal

45. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.

47. 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 .....

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