

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2016

Public Authority: Advisory Committee on Business Appointments

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

Decision (including any steps ordered)

1. The complainant has requested information concerning applications made to the Advisory Committee on Business Appointments (ACOBA) by Mr David Hartnett and Mr Rupert Harrison. ACOBA withheld the requested information under Sections 36(2)(b) and (c) and 40(2) of the FOIA. The Commissioner is satisfied that the requested information is exempt from disclosure under Section 36 of the FOIA and that the balance of the public interest supports maintaining the exemption.

Background

2. The Advisory Committee on Business Appointments (ACOBA) was established in 1975 and is an independent, advisory, non-departmental public body, whose sponsoring Department is the Cabinet Office.
3. ACOBA advises on the application of the Government's Business Appointments Rules on outside appointments (the Rules), which apply to both Crown servants and Ministers after they leave office. ACOBA provides independent advice on the application of the Rules in relation to the most senior Crown servants (civil servants at Director-level and above, and their equivalents), and to all former Ministers of the UK, Scottish and Welsh Governments.¹

¹ Details in Background section taken from ACOBA's Seventeenth Annual Report 2015-2016

4. The Business Appointments Rules are set by the Government, and as ACOBA's Seventeenth Annual Report 2015-2016 states:

'It has been the view of successive Governments that it is in the public interest for people with experience of public administration to be able to move into business or other bodies outside central government, and to be able to start a new career or resume a former one. However, it is important that when a former public servant takes up an appointment there should be no cause for public concern about the propriety of that appointment'.

5. The aim of the Rules is to avoid any reasonable concerns that:

a) an individual might be influenced in carrying out his or her official duties by the hope or expectation of future employment with a particular firm or organisation, or in a specific sector; or

b) on leaving Crown service, an individual might improperly exploit privileged access to contacts in Government or sensitive information; or

c) a particular firm or organisation might gain an improper advantage by employing someone who, in the course of their official duties, has had access to:

i. information relating to unannounced or proposed developments in Government policy, knowledge of which may affect the prospective employer or any competitors; or

ii. commercially valuable or sensitive information about any competitors.

6. ACOBA publishes its advice on all appointments it has considered that are subsequently taken up or announced (with the exception of appointments of a small number of individuals from the intelligence agencies, where information may be withheld for security reasons) and states in its Annual Report that *'it makes public as much detail as it is able to, after taking into account its responsibilities under data protection and freedom of information legislation'.*

7. ACOBA explains (at paragraph 37 of its Annual Report) that:

'It is through this transparency, as recommended by the Committee on Standards in Public Life, that all those involved in the business appointments process (including applicants, government Departments, outside employers and the Committee itself) are accountable to the public. Equally, if approached about an individual who has not submitted an application to the Committee when he or she should have

done under the Rules, the Committee will also make clear that no application has been received'.

8. ACOBA's advice, and the other material it publishes about how it operates, are available on its website. Since March 2010 the minutes of all Committee meetings have been published.
9. Applicants (such as the two individuals with which the complainant's request is concerned), must complete a standard application form which is available on ACOBA's website. The form requests details of their current and previous posts as well as information on the proposed appointment, including whether or not it was advertised and if it will involve dealings with their former Department or government more generally. Applicants must also state if they have had any contractual or official dealings with their prospective employer, competitors of their prospective employer or the sector in which the employer operates over the previous two years; and if they have been involved in policy development or the award of grants that could affect either the prospective employer or its competitors.
10. Applicants must submit the application to both their countersigning officer and the Department's HR division for them to provide their assessments. The Department then sends the completed application to the Committee's secretariat. The Committee relies on the information provided by the Department and countersigning officer to inform its consideration of the application. The Committee considers each case individually against the Rules. ACOBA collects wider evidence where necessary, for example, the views of other Departments, including the Cabinet Office, as "owner" of the Rules. In some instances the Committee will meet applicants to discuss the proposed appointment further.
11. The Committee proceeds to reach a view on whether there should be any restrictions on the applicant taking up the proposed appointment, and once its advice has been agreed, ACOBA writes to the relevant final decision-maker (whether Minister or Permanent Secretary), who then considers the application and the Committee's recommendation. Once he or she has made the decision ACOBA is informed, along with the Department and the applicant.
12. Mr Dave Hartnett CB, former Permanent Secretary for Tax at HM Revenue & Customs, retired from Crown service in July 2012. He subsequently sought approval to accept a part-time appointment as Adviser to HSBC Holdings plc Board Committee on Financial Systems Vulnerabilities, and a part-time role with Deloitte, involving providing advice to overseas tax administrations and governments.

13. Mr Rupert Harrison left his role as Special Adviser in HM Treasury in March 2015. He sought approval for a role as Managing Director in the Dynamic Diversified Growth Team at US based multinational investment management corporation, Blackrock.

14. The Business Appointments Rules state that:

'For those applications considered by the Advisory Committee, their advice, alongside summary details of the applicant's last Civil Service post, will usually be made public once the appointment or employment has been taken up by the applicant or announced'

ACOBA recommended that the applications from both the above individuals be approved, subject to conditions, and the Committee's advice and summary details were subsequently made public.

Request and response

15. On 1 April 2015, the complainant wrote to the Advisory Committee on Business Appointments (ACOBA) and requested information in the following terms:

'Copies of the applications made by Dave Hartnett, former permanent secretary for tax at HMRC, in respect of appointments with Deloitte and with HSBC'

16. ACOBA responded on 30 April 2015 and confirmed that it held the requested information but that it was being withheld under Section 36(2)(c) (prejudice the effective conduct of public affairs) and Section 40(2) (personal data).

17. Following an internal review ACOBA wrote to the complainant on 22 September 2015. The review upheld the exemptions and added Section 36(2)(b)(i) and (ii). The review concluded that some of the information previously withheld could be disclosed without compromising the Committee's ability to fulfil its role and this information was provided in an Annex A. The review also found that some of the information previously withheld could be disclosed without breaching the first data protection principle and this was also provided in Annex A.

18. In submissions to the Commissioner, ACOBA explained that most of the information disclosed in Annex A had not originally been considered to be in scope of the original request, as it had been provided by Mr Hartnett separately and not on the business appointments application form. However, the internal review concluded that the information effectively formed part of the application and was therefore in scope. In

reviewing the information requested by the complainant, ACOBA had particular regard to the reasonable expectation of Mr Hartnett when he provided the information and concluded that some of it (Annex A) could be disclosed. This was because it related to the general responsibilities of a Board Member of HSBC's Committee on Financial System Vulnerabilities and Mr Hartnett's general duties as Acting Permanent Secretary, then Permanent Secretary for Tax, at HMRC. ACOBA considered that as this information was likely to be in the public domain already, Mr Hartnett could not have a reasonable expectation that it would be withheld. ACOBA stated that, *'there is a clear distinction between this information (Annex A) and the residual (withheld) information, which goes into detail about operational matters within HMRC and the department's assessment of Mr Hartnett's proposed appointments'*.

19. On 23 June 2015, the complainant requested the following further information from ACOBA:

'Copies of the applications made by Rupert Harrison, former special adviser at HM Treasury, in respect of his appointments with Blackrock, as referred to in the approval letter on your website'.

20. ACOBA responded to the request on 21 July 2015 and confirmed that the application form which it held was exempt from disclosure under Section 36(2)(b) and (c) and Section 40(2) of the FOIA. However, ACOBA informed the complainant that, *'Mr Harrison did declare that he had previously met with senior members of Blackrock. This formed part of the information that was provided to the Committee in order to help inform their decision'*.
21. Following an internal review ACOBA wrote to the complainant on 5 October 2015. The review concluded that *'with one exception'*, the information requested was either already available to the complainant (in the form of the relevant letter on the ACOBA website or the additional information provided in the initial request response of 21 July 2015) or had been correctly withheld under Sections 36 and 40(2) of the FOIA. The one exception was Blackrock's postal address, which was set out in the application form and which was already in the public domain.

Scope of the case

22. The complainant contacted the Commissioner on 12 November 2015 to complain about the way his requests for information had been handled.
23. Given the similarity of the two requests and the exemptions applied by ACOBA, the Commissioner conducted a joint investigation into both

responses provided by ACOBA. The Commissioner had sight of the withheld information and submissions from both parties.

24. The Commissioner considers that the scope of her investigation is to determine whether ACOBA is entitled to rely on sections 36 and 40 as a basis for refusing to provide the withheld information.

Reasons for decision

25. Section 36(2) provides that –

'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'.

26. Section 36 can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out in section 36(2) of the Act.
27. ACOBA provided the Commissioner with copies of the submissions which were provided to Baroness Browning, the Chair of the Committee, in her capacity as the qualified person. The submissions included the draft responses to the complainant. ACOBA provided the Commissioner with Baroness Browning's written confirmation of her opinion. The Commissioner is satisfied that Baroness Browning was the appropriate qualified person for the purposes of the exemptions at sections 36(2)(b) and (c).
28. 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.
29. 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 information requested by the complainant. Baroness Browning agreed with the reasoning set out in the response to the complainant which reflected legal advice taken by ACOBA. Such reasoning being that disclosure of the requested information (provided voluntarily to ACOBA by the applicants and in confidence) would be likely to inhibit the free and frank provision of advice and exchange of views between ACOBA and its applicants. Applicants would not feel confident about approaching the Committee and might feel inhibited from cooperating fully if they thought that the full details of their applications and correspondence about them would be disclosed. This would lead to a system that could not function effectively.

30. It is important to note that what the requester is seeking in the present case is the information that was provided to ACOBA by Mr Hartnett and Mr Harrison in their respective application forms, and not information as to what discussions took place either within the Committee or between the Committee and the two individuals with regard to their applications.
31. However, the Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. The issue is whether disclosure of the information would inhibit the processes of providing advice or exchanging views (section 36(2)(b)) or would otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).
32. Having reviewed 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 that the Committee's 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. It is reasonable to conclude that any disclosure which may limit the voluntary cooperation of applicants with ACOBA would be likely to prejudice its function and the transparency of the activities of former Ministers and Crown servants.
33. As a qualified exemption, section 36 is subject to a public interest test. Having accepted the opinion of the qualified person that prejudice would be likely to result from disclosure of the information, the Commissioner must then consider whether the public interest in disclosure is equal to or outweighs the concerns identified in the opinion of the qualified person.

Public Interest Test

Arguments in favour of disclosure

Applications made by Mr Dave Hartnett

34. In his request of 1 April 2015, the complainant noted that ACOBA issued approval letters for the two aforementioned appointments with HSBC and Deloitte in January and March 2013 respectively. He stated that:

'These indicate that Mr Hartnett's explanations of his involvement with these firms while he was at HMRC could have been significantly understated. It is clear, for example, that from early 2010 he had several meetings with HSBC on the highly sensitive matter of leaked details from its Swiss private banking operations, almost certainly making his direct involvement with this bank more significant than with others'.

35. In his subsequent request for an internal review, the complainant contended that there is a strong *'and in cases like this, overwhelming'* public interest in ensuring that information provided by applicants is true and complete. The complainant explained that:

'There is no public notification of a business appointment until after ACOBA's guidance is given and the job is taken. So there is no opportunity for anyone other than the applicant to provide relevant information concerning, for example, an applicant's involvement with a proposed employer. Applicants therefore need to be aware that, should their application give less than a full picture, it might become known. There do appear, from ACOBA's approval letter to Mr Hartnett, to be serious questions over the completeness and veracity of the information provided in this case and there is accordingly a very strong public interest in disclosing the evidence given in the application'.

Application made by Mr Rupert Harrison

36. In his request of 23 June 2015, the complainant noted that in previously announcing the approval of Mr Harrison's proposed position with Blackrock, ACOBA stated that whilst at HM Treasury, Mr Harrison's work was, *'focused on the nature of the structure of the financial sector in general and did not specifically relate to asset management'*. There was no mention of any direct involvement with Blackrock by Mr Harrison. The complainant stated that, *'in fact, published records of hospitality received by Mr Harrison show that he had lunch with the company in March 2013 and April 2014. As the company's business is asset management it is hard to believe the discussions did not cover this subject, and there may have been other meetings not involving hospitality'.*

37. The complainant noted that in a similar application for which ACOBA had recently provided advice (that of Ms Julia Church, who left her role as a Special Adviser at HM Treasury in March 2014), the published advice expressly referred to two previous meetings which Ms Church had had with her prospective employer (PwC). The complainant stated that, *'this begs the question of why Mr Harrison's meetings were not considered and indeed whether he declared them. In the circumstances there is a very strong public interest in seeing the application itself'*.
38. In its initial request response of 21 July 2015, ACOBA confirmed that Mr Harrison *'did declare that he had previously met with senior members of Blackrock. This formed part of the information that was provided to the Committee in order to help inform their decision'*. That is to say, ACOBA provided the complainant with information which it had not previously published. In his request for an internal review, the complainant stated that, *'you implicitly acknowledge it is in the public interest to know this, but did not disclose it before my request. The process self-evidently falls well short of providing the public the information it is entitled to'*. The complainant contended that the disclosure *'further illustrates the need for full transparency'*.
39. Addressing the wider argument that disclosure might inhibit applicants from cooperating fully with ACOBA and providing it with the necessary information to consider proposed appointments, the complainant stated in his request correspondence with ACOBA that, *'it is very hard to see how anybody making a legitimate application would have anything to fear from the central elements of their application being made public (obviously with personal information such as address redacted)'*. The complainant stated that, *'if, for example, their previous involvement with a company provides no bar to a job with it then there can't be any embarrassment – or certainly shouldn't be – about disclosing it'*.
40. The complainant contended that those wishing to take up legitimate appointments who failed to comply with the Rules *'would risk considerable reputational damage'*. He noted that *'those thinking about making misleading applications might be so inhibited but this would undoubtedly be a good thing'*.
41. In his complaint to the ICO the complainant contended that there are serious doubts about the probity and effectiveness of the business appointments approval process. *'It appears in Mr Hartnett's case that disclosures were not fully accurate and, in Mr Harrison's case, the Committee's public notice failed to disclose what was clearly embarrassing information'*.
42. In his submissions to the Commissioner, the complainant stated that he strongly disagreed with ACOBA's public interest argument against

disclosure that such disclosures *'might lead to officials not cooperating'*. He asserted that ACOBA takes a *'dim view'* of non-disclosure, and referred by way of support to page 3 of ACOBA's Annual Report 2015-16, where Baroness Browning stated that:

'When we do receive an application retrospectively, we make public our concerns by publishing our letter to the individual concerned or his or her former Department. Likewise, the Committee expresses its concerns publically when it comes to our attention that individuals have failed to submit applications before accepting appointments'.

43. The complainant contended that an individual who failed to comply with the system would receive a strong public rebuke, almost certainly reported in the press, and thus sustain reputational damage. He stated that, *'even if they knew that the part of their application related to prior involvement with a potential employer would be disclosed, they would still comply. In a small number of cases where the details risked embarrassment, perhaps because they revealed significant prior dealings, they would decide not to pursue the application. But this would still be the system working properly. In any case, ACOBA releases in its approvals notices what should be – but under the current system sometimes isn't – an accurate summary of these matters'*.
44. More importantly, the complainant contended that if an applicant went ahead with an application, he or she would know it needed to be accurate and materially complete as it could be seen by others who would know the truth. *'At the moment it appears there is a huge amount of fudging going on; prior involvements being played down and convenient omissions without actual lies being told. Opening up the relevant parts of an application would go a long way to preventing this'*.
45. In his complaint to the Commissioner the complainant stated that:

'I contend that the process needs to be open in order for there to be any public confidence in it. Of course personal details can be redacted, but the remaining information concerns matters of major public interest and it is very hard to see how details such as involvement with companies in the course of government business need to be secret. The knowledge that the substance of applications would be disclosed would, I submit, encourage more complete and honest disclosure from applicants and prevent applications for inappropriate appointments (where, for example, there were serious conflicts of interest). The Committee contends that disclosure would inhibit disclosures but I fail to see how this would happen or, if it would, that it should be taken into account. In other instances, the fact that individuals would be less than honest if they knew the information would be public is not allowed as a reason for refusing a request'.

Arguments in favour of maintaining the exemption

46. In its internal review of 22 September 2015, ACOBA advised the complainant that:

'There is clearly a public interest in bodies being as transparent as possible and thereby ensuring there is public confidence in their operations. This is why the Committee publishes, on its website and in its annual reports, its final advice on applications and the factors it has taken into account. It did so for the two applications from Mr Hartnett that are the subject of your request. It also publishes information about its processes and about the way applications are dealt with. This information makes clear that, for each prospective appointment, the Committee routinely elicits a counter-signing officer's assessment of the proposed appointment, which includes requiring the counter-signing officer to confirm whether the relevant particulars provided by the applicant are accurate and complete; and a separate departmental assessment of the application provided by someone else in the applicant's former department'.

47. ACOBA agreed with the complainant's point that it is very hard to see how anybody making a legitimate application would have anything to fear from the central elements of their application being made public, but considered that it had already published the central elements of the two applications from Mr Hartnett, and the Committee's consideration of the same.
48. The internal review stated that ACOBA's work relies on individuals, and the departments it consults, *'continuing to be open and honest, and providing the fullest amount of information possible to enable the Committee to consider applications'*. It stated that this depends on all those involved being confident that certain relevant information about applications might remain confidential, while accepting that other details about the appointment and the Committee's deliberations will be put in the public domain.
49. ACOBA contended that if departments and applicants could not feel confident that the Committee would respect the confidentiality of their information, it would impact on future applicants' and departments' willingness to consult and cooperate with the Committee in future. It stated that it is important to note that ACOBA's role and remit is that of an advisory body. It is not a statutory authority and does not have the power to compel applicants or departments to cooperate with it. ACOBA stated that, *'releasing information that is considered to be confidential would reduce the Committee's ability to fulfil its role and would, therefore, have a negative impact on effective public administration more widely'*.

50. In submissions to the Commissioner, ACOBA explained that Mr Hartnett and Mr Harrison (and their respective former departments, HMRC and HM Treasury) provided the withheld information voluntarily to ACOBA in order to enable it to properly advise on the suitability of the proposed appointments. ACOBA contended that releasing the information would make it less likely for government departments and individuals who are subject to the business appointment rules to cooperate *'fully'* with the Committee in future, thereby hindering the Committee's ability to function effectively, with the negative impact noted above.
51. ACOBA stated that if it 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 (whether justified or unjustified).
52. ACOBA highlighted the Commissioner's previous decision notice FS50591296 (dating from February 2016 and involving a request for correspondence between ACOBA and the former Prime Minister Mr Tony Blair and his representatives. In that case the Commissioner found² that *'it is reasonable to conclude that any disclosure which may limit that cooperation (between applicants and ACOBA) would be likely to prejudice the function of ACOBA and the transparency of the activities of former Ministers'* (or former Crown servants).
53. ACOBA acknowledged that, *'clearly, it is extremely important that applicants and departments provide true and complete information'*. It emphasised *'and departments'* in the context of the specific withheld information, explaining (in the case of Mr Hartnett) that the information he provided *'relates mainly to his activities while acting on behalf of HMRC, and HMRC's interaction with its clients, the veracity of which has been confirmed elsewhere on the application forms by other HMRC officials'*. With regard to the complainant's contention that *'the elements'* of applications should be made public, ACOBA contended that it had already done this with the information contained on its website.
54. In the course of providing submissions to the Commissioner, ACOBA advised that it had consulted with both HMRC (for the information pertaining to Mr Hartnett) and HM Treasury (for the information pertaining to Mr Harrison).

² At paragraph 15 of FS50591296

55. HMRC recognised that disclosure would aid transparency and public understanding of the role of the Permanent Secretary of Tax and the appropriateness of post-Civil Service appointments, as well as providing scrutiny and accountability of senior officials. However, HMRC were of the view that disclosure would be likely to inhibit the frankness and detail provided in applications if individuals were to anticipate that such disclosure would enter the public domain. They contended that this is particularly true where the individuals would be detailing their dealings with named persons against the backdrop of taxpayer confidentiality that governed their HMRC work. If the applicant thought that detail about their dealings with named taxpayers would enter the public domain, they would be more cautious about the amount they disclose, particularly given the Committee's non-statutory role. HMRC considered that this would have a detrimental effect on decisions made by ACOBA and it was crucial that applicants can openly and fully describe any contact with the prospective employer in order for the Committee to make a reasoned decision. HMRC considered that the public interest in disclosure was met by the fact that ACOBA publishes its decisions online.
56. HM Treasury were also of the view that the information should be withheld, because disclosure would make it more difficult for the department to implement the business appointments rules amongst its employees. They considered that the information already in the public domain on ACOBA's website helped satisfy the public interest that Mr Harrison's appointment was properly scrutinised.
57. In common with the views of HMRC and HM Treasury, ACOBA contended that *'the greater public interest in this case is in the applicant and department being able to share protected information with the Committee in the knowledge that it will remain confidential. If they could not feel confident that the Committee would respect the confidentiality of their information, it would impact on subsequent applicants' and departments' willingness to consult and cooperate with the Committee in future'*. The effect of not maintaining the exemption in this case would, contended ACOBA, *'be that in future the Committee would have less information available to it when considering the propriety of outside appointments'* and that would clearly be detrimental to the public interest.

Balance of the public interest

58. The Commissioner recognises that there is a significant amount of public interest surrounding the two individuals who are the subject of the complainant's requests. Mr Hartnett was strongly criticised by the House of Commons Public Accounts Committee in December 2011 and the Guardian newspaper reported on 27 May 2013 that he had *'a close*

relationship with Deloitte during his time at HMRC and met senior British partner David Cruickshank 48 times between 2007 and 2011, including meetings about Vodaphone, one of Deloitte's clients'. The Commissioner notes that Deloitte had faced tax avoidance allegations during Mr Hartnett's time as Permanent Secretary of HMRC³, and in 2012 HSBC were fined \$1.9bn (£1.2bn) by US authorities for laundering drug money⁴.

59. In its submissions to the Commissioner, ACOBA noted that the level of public interest surrounding Mr Hartnett's appointments in particular was taken into account during its consideration of the same, with the Committee stating publicly in 2013 in respect of the Deloitte appointment:

'The Committee also noted that Deloitte represented a number of companies within HMRC's High Risk Corporate Programme to tackle tax avoidance; and as a Tax Commissioner, he (Mr Hartnett) approved many of the largest settlements in that programme. However, he always did so acting in partnership with another HMRC Commissioner. The National Audit Office has concluded, on the basis of a review by a former High Court tax judge, of five large tax settlements, that all five were reasonable and the overall outcome for the Exchequer was good'.

59. Whilst employed at HM Treasury as a Special Adviser (acting as chief economic adviser to the former Chancellor of the Exchequer, George Osborne), Mr Harrison was described by the Telegraph newspaper on 16 March 2012 as *'the most powerful man you've never heard of'*⁵. On 11 June 2015 the Financial Times reported that Mr Harrison, *'architect of the government's pension reforms, has taken up a job at a US fund management group where his tasks will include developing its 'retirement proposition' – prompting accusations of revolving doors between Whitehall and the City'*. At the time of Mr Harrison's appointment, Blackrock stated that, *'given his experience shaping the recent pension reforms in the UK, he is uniquely placed to help develop our retirement proposition'*.

³ <https://www.theguardian.com/business/2013/may/27/deloitte-appoints-dave-hartnett-tax>

⁴ <https://www.theguardian.com/business/2012/dec/11/hsbc-bank-us-money-laundering>

⁵ <http://www.telegraph.co.uk/news/politics/georgeosborne/9148687/Ever-wondered-how-George-Osborne-can-be-a-part-time-Chancellor.html>

60. The complainant has strongly criticised the operation of ACOBA in terms of its openness and has contended that the process needs to be open in order for there to be any public confidence in it. The Commissioner recognises that ACOBA has been subject to criticism in some quarters for not identifying what some could consider conflicts of interest in the proposed appointments which are referred to it for advice.

61. For example, in its editorial of 28 May 2013, the Guardian newspaper argued that:

'Provision must be made for top public servants to move on to other jobs, but the current system is not robust enough at detecting possible conflicts of interest. In its emphasis on avoiding personal lobbying of ministers and advisers by former colleagues, the Advisory Committee on Business Appointments pays too little attention to how they might otherwise massage relations between a company and Whitehall. It is thus worryingly narrow in how it interprets possible overlaps of corporate interest. The system must be recast to adopt a precautionary principle in looking for possible dangers of abusing insider expertise.'

Private Eye magazine has also reported that since 2010, ACOBA has not advised that a single proposed appointment, out of more than 750, should not be made⁶.

62. However, it is not the role or remit of the Commissioner to critically assess (as the complainant and others have done) ACOBA's effectiveness (save for how that effectiveness may be affected by disclosure of the requested information). Like any organisation, ACOBA can only be as effective as the powers available to it allow. The important reality, central to this case, is that being an advisory body, rather than a statutory authority, ACOBA does not have the power to compel applicants to cooperate with it and is very much dependent upon the voluntary provision of information to enable it to fulfil its role. Therefore, any action, such as the disclosure of the information requested by the complainant, which would inhibit applicants from providing ACOBA with sufficient information for it to provide informed advice on an appointment(s) would have a negative impact on transparency and accountability and not be in the public interest.

63. However, in respect of the applications which form the subject of the complainant's requests, the Commissioner considers that he has made some important and legitimate public interest arguments. In its internal

⁶ Issue 1407 (as recently reiterated in Issue 1426)

review of 5 October 2015, ACOBA agreed that it was *'arguable'* that the information relating to Mr Harrison's meetings with senior members of Blackrock could have been included in the Committee's published letter. In submissions to the Commissioner, ACOBA stated that, *'this information was not considered to be central to the Committee's consideration of this application'* otherwise it would have been published proactively. ACOBA contended that acknowledging that it was arguable whether the information ought to have been included in the information published on the Committee's website was *'very different from concluding that there was a clear public interest in doing so'*.

64. The Commissioner does not agree with this contention. Whether Mr Harrison had had any previous involvement with Blackrock (the prospective appointment) whilst employed as a Special Adviser at HM Treasury should clearly have been of significant importance to the Committee's consideration of his application, so as to warrant a mention in the information published by ACOBA. As the complainant notes, similar meeting information was proactively disclosed in the comparable case of Ms Church (see paragraph 37). There is clearly a public interest in such information, as recognised by ACOBA in providing it to the complainant in response to his information request. It is a matter of legitimate concern that had it not been for the complainant's request, this key information would not have been placed in the public domain, with the consequential shortfall in public interest transparency.
65. In respect of Mr Hartnett's application for the HSBC position, ACOBA's published advice noted that whilst working in Government, Mr Hartnett had official dealings with HSBC over a number of years, *'but that these contacts were no more significant than the contacts he had with other banks operating in the UK'*. The complainant has disputed this statement and suggested that the information provided to the Committee by Mr Hartnett may not have been *'fully accurate'*.
66. Whilst the Commissioner cannot reveal the withheld information, having had sight of the same, she is satisfied that the information provided to ACOBA by Mr Hartnett was more detailed and HSBC contact specific than the published advice might suggest. This does not mean that the published advice was wrong or inaccurate, but rather that it was only a summary of the information provided to ACOBA. The Commissioner would also note that as can be seen on the standard application forms available on ACOBA's website, whilst applicants are asked to *'state the nature and frequency of the contact'* (with the prospective employer) this request is not as precise or interrogative as it could be. That is to say, it allows for the provision of more generalised (rather than contact or meeting specific) information by the applicant, subject of course to ACOBA being able to request further details if considered necessary.

67. Another factor which the Commissioner considers to be important in this case is that ACOBA were not solely reliant on the information provided by Mr Hartnett (or Mr Harrison). Applications include both a Countersigning Officer's Assessment and a Departmental Assessment. The information provided by these other individuals clearly reduces the scope for the Committee being given inaccurate or misleading information by an applicant. Such information also provides ACOBA with important background and contextual information.
68. In submissions to the Commissioner the complainant asserted that this is *'an incredibly unrealistic view'*. He stated that the countersigning officer does not have the information and in most cases would not want to stand in a former colleague's way. He has contended that *'he or she is neither informed nor objective'*. The Commissioner does not agree with the complainant's contentions. Having had sight of the completed assessments noted above, the Commissioner is satisfied that these were informed and provided ACOBA with relevant information to the applications before them. It is therefore not correct to state, as the complainant has, that there is no opportunity for anyone other than the applicant to provide ACOBA with relevant information concerning an applicant's previous involvement with a proposed employer.
69. Whilst the Commissioner recognises that such provision of information from an applicant's former department does not imbue the same with an ideal degree of independence (from the applicant), it cannot be stated as a general proposition that such information lacks any objectivity. On the contrary, one would reasonably expect a relevant department to be very careful, where potentially controversial appointments are concerned, to ensure that ACOBA were provided with appropriate background and contextual information.
70. As previously stated in FS50591296, 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.
71. The Commissioner acknowledges the complainant's point that ACOBA has previously expressed concern or criticism where an individual has applied for advice retrospectively or has failed to submit an application before accepting an appointment. He has suggested that the potential for such comment by ACOBA would ensure the cooperation of applicants with the process, so as to avoid reputational damage. However, the Commissioner considers that the reality of the process as it currently operates is not as simple as the complainant contends.

72. Whilst it is possible that the disclosure of applicant information provided in confidence to ACOBA would not necessarily stop future applicants from cooperating with the Committee, the Commissioner considers that the level and degree of such cooperation would almost certainly be reduced, with applicants not providing as much information and detail as at present. As an advisory body and not a statutory authority, ACOBA would have no power to compel applicants to provide further or more detailed information and even requests for the same would not be resource or time effective. Were ACOBA to have less information available to it when considering the propriety of outside appointments then this would clearly constrain and negatively impact upon the Committee's ability to discharge its role effectively. This would not be in the public interest.
73. The Commissioner considers that, given the constraints upon ACOBA as it is configured, the important public interest in transparency and accountability is proportionately and appropriately met by the publication of the Committee's final advice on its website and in its annual reports. In the Commissioner's view this strikes the best and most realistic public interest balance between keeping the public informed about the advice provided by ACOBA whilst not taking any action (such as full disclosure of applicant provided information) which would undermine or compromise the ability of the Committee to carry out its role and function.
74. The Commissioner does not consider that the specific applications (the withheld information) in the present case carry a sufficiently strong public interest so as to equal or outweigh the wider public interest in maintaining the exemptions. The Commissioner is satisfied that there is no evidence to question the veracity of the information provided to ACOBA by Mr Hartnett⁷, and it is now clear (as it was not prior to the complainant's request) that Mr Harrison did disclose his previous meetings with Blackrock in his application, ACOBA having retrospectively recognised the public interest in this information by disclosing it in response to the complainant's request.
75. For the reasons given above, the Commissioner considers that the public interest in ensuring that ACOBA is afforded the maximum scope for discharging its role and function as effectively as possible, outweighs the public interest in disclosure of the specific information requested. The Commissioner is therefore satisfied that the exemptions at sections

⁷ See paragraph 66 for the Commissioner's observations on the level of detail required of applicants by the standard application forms

36(2)(b) and (c) have been correctly applied and the public interest favours maintaining the same.

76. 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).

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

78. 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.

79. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
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Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF