First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0055

Heard at Field House on 19 September 2018

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Roger Creedon
and
Mr Michael Jones

Between

Edward Malnick

Appellant

And

The Information Commissioner

1st Respondent

And

Advisory Committee on Business Appointments

2nd Respondent

The Appellant was represented by Mr Jude Bunting

The Information Commissioner was represented by Mr Peter Lockley

ACOBA were represented by Ms Holly Stout

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against the Commissioner's decision notice dated 3 February 2016. It is a case with a history: a differently constituted Tribunal panel heard this case on 21 September 2016 and issued its decision on 3 November 2016, upholding the Appellant's appeal.

2. However, that decision was subject to an appeal to the Upper Tribunal by the Information Commissioner, joined by the now 2nd Respondent, the Advisory Committee on Business Appointments (ACOBA)(who had not taken part in the initial hearing before the FTT), and on 1 March 2018 the Upper Tribunal allowed the Commissioner's appeal: *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC).

3. In summary, the Upper Tribunal decided:-

   (a) The FTT erred in law by taking into account matters of public interest when deciding whether an opinion of the qualified person was reasonable for the purpose of section 36(2) FOIA. Moreover, the FTT's decision that the qualified person's opinion was not reasonable was irrational. Section 36(2) is concerned with substantive but not procedural reasonableness.
   (b) In considering the public interest balancing test the FTT failed to ascribe any or appropriate weight to the qualified person's opinion.

4. The Upper Tribunal decided that it was not in a position to re-make the decision under the appeal and therefore the case was remitted to be re-heard by a differently constituted FTT (judge and members). We are that differently

constituted Tribunal and we heard the case on 19 September 2018, this time with ACOBA joined as a second Respondent.

BACKGROUND AND DECISION MAKING PROCESS

5. We are able to take the initial factual summary of the case as presented by the Upper Tribunal in its decision as follows:-

> 1. The *Ministerial Code* (The Cabinet Office, latest edition December 2016) provides that, on leaving office, Ministers (and senior civil servants) must seek advice from the Advisory Committee on Business Appointments (ACOBA) about any appointments or employment which they wish to take up within two years of leaving office, and that they must abide by that advice. ACOBA is a non-departmental public body, sponsored by the Cabinet Office. The Code is characterised as a code of honour. Thus, ACOBA has no power to compel former Ministers either to seek advice before taking up appointments or to accept the advice given.
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> 2. The Government's *Business Appointments Rules for Former Ministers* explain the process for making applications to ACOBA and the tests adopted by ACOBA in considering applications. The Rules also stipulate that approaches to the Committee are handled in confidence and remain confidential until an appointment or employment is publicly announced or taken up, at which time ACOBA publishes its advice (whether or not the advice was followed). ACOBA's policy is also to confirm whether or not its advice has been sought in relation to any specified appointment.
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> 3. Mr Malnick is a journalist. On 19 February 2015 he wrote to ACOBA requesting:
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> > "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."
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> 4. There cannot be many reading this decision who need to be reminded that the Rt Hon Tony Blair was the United Kingdom's Prime Minister until June 2007. According to Mr Malnick's skeleton argument, Mr Blair's "case has come to exemplify public concern at former Ministers obtaining lucrative post-office appointments. If ever there was a case for transparency, it is this one".
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> 5. On 30 March 2015 ACOBA refused to disclose the information requested by Mr Malnick, relying on the exemptions in section 36(2)(b)(i) and (ii),

section 36(2)(c) and section 40(2) of the Freedom of Information Act 2000 (FOIA).

6. Mr Malnick then complained to the Information Commissioner. The Commissioner concluded that the information was exempt from disclosure under both section 36(2)(b) and (c) (prejudice to effective conduct of public affairs) and so did not go on to consider the application of section 40(2) (personal information).

6. We will return to the decision of the Information Commissioner (the Commissioner) below. However, it is appropriate at this stage to set out the relevant parts of section 36 of FOIA. Section 36 reads materially in this case: -

36.— Prejudice to effective conduct of public affairs.
(1) This section applies to—
(a) information which is held by a government department… and is not exempt information by virtue of section 35, and
(b) …
(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—
(a) …
(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.

(3) …
(4) …
(5) In subsections (2) and (3) *"qualified person"* —
…

(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—
...
(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

7. The relevant part of section 36 FOIA is not one of the exemptions excluded from the 'public interest' test, and therefore, by section 2 FOIA:-

(1)..
(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) [the right to have information communicated] does not apply if or to the extent that—
(a) …
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

8. We have the advantage of being able to draw on the Upper Tribunal's analysis of s36 and its applicability as it directly relates to the circumstances of this case. At paragraphs 28 and 29 of the UT's judgment is this:-

> 28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.
>
> 29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):
>
> > "It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates."

9. The UT then continues to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31:-

> 31…..first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the

public interest in maintaining the exemption outweighs the public interest in disclosing it.

10. The UT then emphasises that the 'QP is not called on to consider the public interest for and against disclosure…the QP is only concerned with the occurrence or likely occurrence of prejudice' (paragraph 32). Going on, the UP explains:-

> 32…The threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).
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> 33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

11. The UT also decided that when considering whether the QPs opinion was reasonable 'we conclude that "reasonable" in section 36(2) FOIA means substantively reasonable and not procedurally reasonable' (paragraph 57).

THE QP's OPINION AND THE APPLICABILITY OF S32(2)(b) AND (c).

12. At the time the request was responded to, Baroness Browning, the Chair of ACOBA, was authorised under section 36(5)(o)(iii) FOIA as the QP and there is now no dispute before us that this was the case.

13. Her opinion under section 36(2) FOIA was that the prejudice in section 36(2)(b)(i) and (ii) FOIA would be likely to occur because:-

> "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"

14. She also said that :-

> "ACOBA and applicants (or applicants' representative) 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."

15. Baroness Browning's opinion was that prejudice under section 36(2)(c) was also likely to occur because:-

> "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 Governments. 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."

16. As the UT identified at paragraph 21 the issues which Baroness Browning identified under section 36(2)(b) and (c) FOIA are frequently described as concerning a "safe space" and a "chilling effect" respectively.

The Commissioner's approach to the QP's opinion

17. In the decision notice, the Commissioner notes that Baroness Browning had read all the information in the scope of the request before reaching her opinion. The Commissioner reviewed the withheld material and concluded that it was reasonable for the QP to form the opinion that section 32(2)(b) and

(c) FOIA applied to it. The sum of the Commissioner's reasoning on the issue in the decision notice is as follows:-

> 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 co-operation would be likely to prejudice the function of ACOBA and the transparency of the activities of former Ministers.

18. In the skeleton argument for this hearing, the Commissioner confirms this view and also suggest that disclosure in this case may discourage ACOBA itself to make records of external exchanges with ex-ministers, and may make ex-ministers more circumspect in providing detailed information to ACOBA. However, we note that ACOBA, in its skeleton argument, and in the witness statement of Catriona Marshall (discussed below) does not suggest that disclosure in this case would make it less likely that its officers would record external exchanges with ex-ministers, and we would be surprised if this was in fact the case. The Appellant's approach to the QP's opinion is that questioning its reasonableness, applying the approach in the UT *Malnick* decision, is difficult, but that the Tribunal should view the opinion for the purpose of the public interest balancing test.

19. We agree with the Commissioner that the QP's opinion was reasonable in public law terms and that the exemptions in s36(2)(b) and (c) FOIA apply. We have not at this stage carried out any assessment of what level of likelihood we think there is that prejudice will be caused by the disclosure of the withheld information considered by the QP, nor any assessment of the seriousness of the prejudice caused. Those are assessments, as the UT in this case and Lloyd Jones LJ in the *Department of Work and Pensions* case tell us, to be carried out during the public interest part of the analysis.

PUBLIC INTEREST

20. In considering the public interest aspect of the case, we note that we must take into account the QP's reasonable opinion as to the occurrence or likely occurrence of prejudice if the material is disclosed. We also note the QP in reaching her opinion was not called on to consider the public interest for and against disclosure (see paragraph 32 of the UT decision). Further, we note that Lloyd Jones LJ in the *Department of Work and Pensions* case states that 'appropriate consideration' should be given to the QP's opinion 'at some point' in the process of balancing competing public interests.

21. That raises the question as to when exactly we should take the QP's opinion into account. It seems to us that a sensible approach is for the Tribunal to consider first of all, whether provisionally, absent the QP's opinion, the public interest balance favours disclosure. Once that provisional view has been reached, the Tribunal can then take into account the QP's opinion and see if that changes the provisional view.

22. If the provisional view of the Tribunal is that the public interest balance does not favour disclosure, then it is very likely that 'appropriate consideration' of the QP's opinion will reinforce that view. However, if we form the provisional view that the public interest favours disclosure, then we should give 'appropriate consideration' to the QP's opinion to see if that consideration changes the provisional view. In carrying out this exercise we bear in mind that Lloyd Jones LJ stated that '…the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates'.

The Commissioner's approach

23. The Commissioner approached the task by setting a somewhat different test to that now promulgated by the UT. She stated in the decision notice that the

test is whether 'the public interest in disclosure is equal to or outweighs the concerns identified in the opinion of the qualified person'. As the UT has now stated that it is not task of the QP to consider the public interest in her opinion, then this does not seem to be the right test. In addition, the Commissioner's approach does not involve forming her 'own assessment of the matters to which the opinion relates'. There is a real danger, then, that the Commissioner's approach in the decision notice would mean accepting the QP's opinion at face value, but also not considering additional public interest points not raised by the QP.

24. The Commissioner sets out briefly the arguments in favour of disclosing and withholding the information. In favour of disclosure was the public interest 'in transparency thereby ensuring public confidence in public authorities' operations'. The Commissioner noted that ACOBA publishes 'its final advice on applications made to it, including the factors taken into account'.

25. In favour of withholding the information, the Commissioner largely repeats the views of the QP and ACOBA about the benefits of a safe space, and the need to encourage voluntary compliance from former ministers.

26. The Commissioner accepts the approach put forward by ACOBA, highlighting the fact that applicants to ACOBA 'may choose not seek its advice or [will] restrict their discussions resulting in less transparency' if disclosure is made outside the routine disclosures on ACOBA's website. Therefore, the Commissioner thinks there is a 'strong public interest in ACOBA having the ability to perform its function effectively' as, essentially, it is the only mechanism available to hold former ministers and crown servants to 'independent scrutiny'.

27. The Commissioner accepts that the controversy surrounding Mr Blair's work since leaving office 'carries weight in favour of disclosing', but this appears to be tempered by the fact that the information still held by ACOBA 'covers

limited activities' and some material has been destroyed (before the request was made). Although ACOBA is 'proactively' publishing the advice it gives, the Commissioner acknowledges that disclosure of the information 'could enhance confidence in ACOBA's system of operation'. The Commissioner accepts that information about Mr Blair is to some extent 'a special case' as a former prime minister.

28. Concluding that there is significant weight both in favour of disclosure and in favour of withholding the requested information, the Commissioner decides that the 'safe space' argument, and the fact that ACOBA publishes information on its website is enough to tip the balance in favour of withholding the information.

29. The Commissioner's skeleton argument for this hearing, and oral submissions at the hearing, re-iterate these points. It is accepted that the risk of prejudice is lessened by the age of the information requested in this case, although the Commissioner wonders if applicants in the future would realise that this could be a factor that favoured disclosure. The non-binding nature of the Ministerial Code is referred to. The effective exercise of ACOBA's functions as a public good and in the public interest is emphasised. The fact that ACOBA's standard publication practice provides a good level of transparency is highlighted.

30. The Commissioner again emphasises the significant public interest in knowing about the business dealings of a former prime minister, and that the controversy about the activities of Mr Blair 'in particular' enhances that public interest. However, in the Commissioner's view this is outweighed by need to avoid prejudicing the operation of ACOBA, especially as the withheld material will add little to public knowledge.

31. This Tribunal has the benefit of evidence (written and oral) from ACOBA. Catriona Marshall is a principal adviser at the ACOBA secretariat and has

been in post since September 2016 (after the date of the request in this case (July 2015)). Ms Marshall provided the Tribunal with a helpful overview of the history and work of ACOBA. She emphasised that former ministers were subject to the requirement to consult with ACOBA under the Ministerial Code, but described this as a 'code of honour'. She explained that ACOBA will provide informal advice on appointments in confidence, and that final advice will be published if a post is taken up by a former minister. Some posts are taken up with conditions attached. It is very unusual for a minister to take up a post in the face of negative advice from ACOBA (and Ms Marshall was not aware of circumstances where this had happened). There may well be a number of exchanges between a minister and ACOBA before a final position is taken by ACOBA and advice provided. There have been a number of changes to the Rules over the years since 2008-2009 (the period in question in this case), but the essential requirement to consult with ACOBA has remained a constant. The Rules state that approaches to ACOBA are dealt with in confidence, although Ms Marshall accepted that this was explicitly subject to FOIA and the DPA. What ACOBA has published has become more detailed over the years. Former ministers will know that if they do not seek, or do not follow, ACOBA's advice, and subsequently take up an appointment, this will be made public. As Ms Marshall says 'Such exposure would be embarrassing and therefore the publication policy encourages compliance with the Rules'.

32. In relation to the present request Ms Marshall confirms that ACOBA's usual practice is to delete casework related emails after four years, and that the withheld information in this case is therefore the information which seems to have been not caught by that practice, and which was still available in 2015.

33. Thereafter, Ms Marshall reiterates the arguments of the QP as to the risk of prejudice if disclosure of the withheld information is made. One additional argument, unsupported by any other evidence, is that government

departments may be less likely to share information with ACOBA if it was thought that it might be disclosed.

34. In relation specifically to the public interest Ms Marshall accepts the strength of the public interest in the post ministerial activities of Mr Blair and that the withheld information 'provides some insight into the relationship between the Office of Tony Blair and ACOBA, what information the [OTB] provided to ACOBA, and how ACOBA responded', but emphasises the safe space and chilling effect arguments already made. There is also emphasis on the partial nature of the information held.

35. Ms Marshall made it clear in her statement and in oral evidence that ACOBA would not wish to suggest that there would never be a case where correspondence between ACOBA and an applicant might be released under FOIA, although she was unable to provide examples of when that might be appropriate.

36. Finally, we were provided with a copy of disclosure made in another 2015 FOIA case relating to a request for correspondence between Mr Blair and ACOBA. The disclosure consisted of a 2010 letter from the then Chair of ACOBA to Mr Blair advising him that it was proposed to publish details of ACOBA's advice on two potential appointment. This shows at least that some disclosure has been made in addition to that published by ACOBA in its reports and on its website, without the loss of confidence in the system envisaged by ACOBA in this case (although we note that other information was withheld in response to this other 2015 request).

37. ACOBA's skeleton argument and oral submissions underlined the points made by Ms Marshall in evidence. It also argued that there was information in the public domain already about many of the matters referred to in the withheld information which could lower the public interest in disclosure. The skeleton argument sought to draw an analogy between the provision of legal advice and the protection afforded to it from disclosure, and the kind of

advice provided by ACOBA to former ministers (essentially another way of protecting the safe space).

38. The Appellant has made submissions to the effect that evidence by two of the Chairs of ACOBA (Baroness Browning and her predecessor Lord Lang) given to the House of Commons Public Administration Constitutional Affairs Committee (PACAC) in 2011 and 2016 is important. This is because the Chairs made it clear, in effect, that investigative journalism has a role to play in uncovering former ministers who might have sought to avoid scrutiny by ACOBA, and that the media in general has a role to play in publicising the findings of ACOBA, and so those who would flout advice from ACOBA would have to face the 'court of public opinion'. The relevant extracts from PACAC's proceedings are set out in paragraph 24 of the UT judgment and we do not repeat them here. The point of these submissions, it seems, is to give weight to the argument that there is an important public interest in disclosing information in response to requests by journalists such as the Appellant, as public scrutiny is accepted to assist ACOBA achieve its goals.

39. The Appellant also noted that the Business Appointment Rules for Former Ministers state that although the process is a confidential one (other than the publication policies of ACOBA), this is specifically made subject to potential disclosure under FOIA. The Appellant argued that any former minister in the future would be aware that Mr Blair had been dealt with as a special case, and it is unrealistic to think that if disclosure is made in this case, future applicants will think that the same approach will be taken to the information they share with ACOBA. This is especially the case as the material is now historic. In addition, trust should be put on former ministers in general to comply with the Ministerial Code, even if ACOBA has no enforcement powers. We were invited to consider that concerns about the prejudice likely to be caused by disclosure were overblown and overstated.

40. The Appellant emphasised the special nature of Mr Blair's case and the important issues raised by his post- ministerial activities. The Appellant addressed the arguments that the material was incomplete and would add little to what is already known, by pointing out that ACOBA and Ms Marshal are not investigative journalists, and are not in a good position to judge whether the material will be of journalistic importance or not.

The Tribunal's assessment of public interest

41. The Tribunal agrees with the Commissioner that there is 'significant weight' in favour of disclosure in this case, and that this comes from 'controversy surrounding Mr Blair's work since leaving office'. The debate about the interface between political life and the world of business and commerce is one that continues, and it does not seem to us that the passage of time between the creation of the information and the request is of such a length to diminish the public interest in disclosure. All concerned in this case appear to recognise that Mr Blair's case is special, at least because of the focus that has been placed on his activities since he left office.

42. Conversely, the Tribunal is far less convinced about the 'safe-space' and 'chilling effect' arguments put forward by the QP and accepted by the Commissioner as part of the public interest balance. We note first of all that we are considering these issues in relation to a very particular request for information relating to Tony Blair's dealings with ACOBA. Anything we say about disclosure in this case will be strictly limited to the circumstances of this case and will certainly not mean that disclosure of correspondence with ACOBA by other former ministers would be routinely expected: the public interest factors would need to be balanced in each case. In addition, although we have said that the passage of time does not diminish the public interest in disclosure, the fact is that any disclosure in this case would relate to historical material from 2007-2009 in response to a request made in 2015, and that is a

relevant factor for us to have regard to when considering whether the public interest is against disclosure for the reasons expressed by the Commissioner and ACOBA.

43. Thus, we do not accept that if historical information of this nature about Tony Blair's dealings with ACOBA is disclosed then there will be a 'chilling effect' in the future on free and frank discussions between ACOBA and its applicants. In our view future applicants, aware of this judgment, will be able to recognise both the high-profile nature of Mr Blair's case, and the time lapse between the information sought and the request for information.

44. Although it is not enforceable, we note that the *Ministerial Code* (The Cabinet Office, latest edition December 2016) provides that, on leaving office, Ministers (and senior civil servants) **must** seek advice ACOBA about any appointments or employment which they wish to take up within two years of leaving office (**emphasis added**). It seems to us unlikely that ex-ministers will seek to avoid this duty, simply because they become aware that historical information in a case as particular as that of Tony Blair has been disclosed on the basis that it is in the public interest to do so.

45. As Ms Marshall sets out in her statement any failure to engage with ACOBA will lead to embarrassment for former ministers if they take up a post not discussed with ACOBA (and of course if this is discovered), as this will be published on the ACOBA website. It seems to us that this is a strong impetus to comply, which will not be significantly affected by disclosure in the present case. It would seem to us to be a high risk strategy for former ministers to take up appointments in the hope that ACOBA will not become aware of their activities (unless of course the particular former minister simply does not care about the potential embarrassment that may ensue). Although Ms Marshall states that some cases come to light every year, there is no analysis as to why some former ministers have not contacted ACOBA. We should say that although we recognise that Chairs of ACOBA have made statements about

the 'court of public opinion' and how the media can assist ACOBA in its work, we do not see these comments as supporting a conclusion that disclosure of the withheld material in this case as in the public interest.

46. It is the case, of course, that any information shared with ACOBA will be subject to possible FOIA applications. Although we give weight to the fact that former ministers are told that the process is confidential, the Rules explicitly make reference to possible disclosure under FOIA. Ms Marshall in evidence made it clear that ACOBA is not claiming a blanket exemption from disclosure for the information that ACOBA holds and therefore every ex-minister will be aware that there will be something of a risk that information will be disclosed.

47. We would also disagree with the Commissioner and ACOBA that as the material that is available is now limited (because some has been destroyed), then that diminishes significantly the public interest in disclosure. It seems to us that the material may well be of considerable journalistic interest, even if it does not reflect a complete record of dealings between Mr Blair (and his office) and ACOBA.

48. In summary then, we recognise the significant public interest in disclosure in this case, as does the Commissioner. Where we differ from the Commissioner and ACOBA is in the assessment of the public interest in non-disclosure. We agree with the Commissioner and ACOBA that it is important and in the public interest that ACOBA's role is not undermined or made less effective. We agree that it is important for ACOBA not to lose the safe space to discuss matters with former ministers, or for there to be a chilling effect on applicants approaching ACOBA. However, we disagree, for the reasons discussed above, that disclosure of this information in the particular case of Mr Blair, will have those outcomes, and we find that the views expressed to the contrary have been overstated.

49. Thus, our provisional view, prior to taking into account the QP's opinion on prejudice is that the public interest is in favour of disclosure. We now must take the QP's opinion into account and decide if it tips the balance in favour of non-disclosure.

50. In considering this exercise, we note that the UT (and Lloyd Jones LJ in the *DWP* case) appear to envisage that the QP's opinion on likelihood of prejudice and the consideration of the public interest will involve the assessment of two different sets of factors. However, in this case the issues relied upon when considering prejudice (the need for a safe-space and the risk of a chilling effect), are in fact more or less coterminous with the public interest factors which are said to support withholding the information.

51. In considering these factors as part of the public interest balance, the Tribunal has differed from the opinion of ACOBA and the Commissioner as to the weight that should be given to the risk to the 'safe space' and the risk of the 'chilling effect' if the requested material is disclosed.

52. Our views on these issues, therefore, are also applicable to our consideration of the QP's opinion on the likelihood of prejudice if the withheld information is disclosed. Although we accept that the prejudice feared by the QP is significant, we would differ from the QP's opinion that such prejudice is likely. The QP's opinion on likelihood is not unreasonable, but, as we make clear above, it is not one which this Tribunal would have reached on the evidence available.

53. Thus, even having given appropriate weight to the QP's opinion on the likelihood of prejudice, the Tribunal is of the view that the public interest in this case is in favour of disclosure of the information.

SECTION 40

54. Having reached that conclusion on section 36(2) FOIA, we now must consider the reliance of ACOBA on s40(2) FOIA. The Commissioner did not consider s40(2) FOIA in her decision notice because she upheld ACOBA's reliance on s36(2) FOIA. The first FTT (which sat in September 2016) disagreed with the Commissioner on the application of s36(2) FOIA (as do we), and purported to remit the case to the Commissioner to issue a new decision notice which dealt with s40(2) FOIA. After hearing detailed argument on whether this was the correct procedure, the UT decided that it was not. The UT explained as follows at paragraph 109:-

> 109. We summarise the effect of our analysis on the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies. However, it would be open to the FTT to consider whether E2 applies… On the other hand, where the FTT disagrees with the Commissioner's conclusion on E1 it must consider whether E2 applies and substitute a decision notice accordingly.

55. Having been alerted to the possibility (at least) that the Tribunal would need to consider the exemption in s40(2) FOIA, all parties addressed the issue in written submissions and in oral submissions at the hearing.

56. Section 40 FOIA, materially, reads as follows:-

> **40.— Personal information.**
> (1) …
> **(2) Any information to which a request for information relates is also exempt information if—**
> **(a) it constitutes personal data which do not fall within subsection (1), and**
> **(b) either the first or the second condition below is satisfied.**
> (3) The first condition is—
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section

1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

57. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly. Section 10 of the DPA 1989 (as referred to in s40(3)(a)(ii)) refers to damage or distress caused by disclosure.

58. Additionally, in relation to interpreting the first principle, the disclosure must also not breach the material conditions in Sch 2 to the DPA 1998 'relevant for purposes of the first principle'. Processing is permitted if the data subject has consented to it (Sch 2, first condition), but if not (as in this case) then for the purposes of the sixth condition in Sch 2 (which appears to be the only condition relevant in the present case) it must be established that the disclosure is necessary in order to meet the legitimate interests of the Appellant.

59. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as necessary for the purposes of the Appellant's legitimate interests. Thus, that exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Submissions of the parties on s40(2)

60. All parties agreed that the personal data of third parties (that is, persons other than Mr Blair) should not be disclosed, and we will return to this point later.

61. In relation to Mr Blair, the Commissioner's arguments can be summarised as follows:-

(a) The withheld information contains the personal information of Mr Blair (and others).

(b) Mr Blair was given specific assurances of confidentiality, and was told that ACOBA's advice would only be published if proposed posts were taken up.

(c) Mr Blair would have a reasonable expectation that his proposals and ensuing correspondence would otherwise remain confidential, even though he had been the most prominent public official in the UK.

(d) This was because the personal data 'do not concern his dealings as a public figure but as a private individual, after he left office; they do therefore engage his right to personal privacy'.

(e) There is no overriding public interest in disclosure (for the reasons set out in the public interest balancing exercise conducted by the Commissioner).

(f) Disclosure would therefore be unfair and a breach of the first data protection principle.

(g) Alternatively, although the Appellant has a legitimate interest in disclosure, that interest is overridden by the prejudice to the privacy rights of Mr Blair.

62. ACOBA essentially supported the Commissioner's approach while arguing that the specific assurance of confidentiality went some way to allaying the possibility that disclosure would be made under FOIA: 'Anyone reading the assurance given by ACOBA, who has an understanding of FOIA will appreciate that it is unlikely that information covered by the assurance will be disclosed under FOIA…'. It is suggested that there would need to be a particularly strong public interest in such circumstances before disclosure would be made.

63. The Appellant disputed that Mr Blair was given any particular assurance of confidentiality when he contacted ACOBA, and says there is no evidence of this. It was pointed out that the Business Appointment Rules for Former Ministers state that ACOBA can be required to publish information in accordance with FOIA. Ministers are not guaranteed confidentiality in relation to positions which are then taken up (but we note that ACOBA does not publish information when posts are not taken up), and ACOBA states that in relation to posts taken up, it will now make public 'as much detail as it is able'.

64. The Appellant argued that, as a former prime minister, Mr Blair must have known that the information he provided to ACOBA 'raised strong issues of transparency and accountability and that there was a high public interest in its disclosure'. If disclosure is made, the Appellant says, the consequences are unlikely to be serious for Mr Blair as he is well-used to public criticism.

65. The Appellant also argued that in any consideration of fairness it is necessary to consider the legitimate interest of the public or the Appellant having access to the information and the balance between this and the rights and freedoms of the data subject; and that in this case that interest is very strong, and related to public confidence in the operation of the democratic system.

The Tribunal's assessment

66. We accept that the ACOBA Guidelines contain a section headed 'Publicising the Advisory Committee's Advice', which states that 'all approaches to [ACOBA] will be handled in strictest confidence', and this would have been available to Mr Blair when he made his approach to ACOBA. Whether or not Mr Blair actually had this drawn to his attention by ACOBA (or was otherwise aware of it) is something that Ms Marshall, in evidence, could not tell us: but the statement is contained in the Guidance and sets out what ex-ministers can expect from ACOBA. However, in the Business Appointments Rules themselves, there is a footnote to the confidentiality section, which makes refences to possible disclosure under FOIA, so ex-ministers would also have known that if FOIA requests were made and exemptions not made out, then their information would be disclosed. We also note that, by virtue of ACOBA's publication policy, personal data is routinely disclosed, other than where an appointment is not taken up.

67. In relation to Mr Blair, then, we find that he would have had some expectation that disclosure of his information would not be disclosed, but perhaps if he had paused to consider this at the time, he may have realised that, of all the ex-ministers making approaches to ACOBA, then he was one of the most likely candidates for disclosure under FOIA if a request for information was made (in particular because of the important place given to public interest factors when considering disclosure).

68. We also consider that, when considering Mr Blair's status at the time he made the approach, that it is not correct to view him simply as a private citizen. As the Commissioner submitted orally at the hearing, Mr Blair, in the two years after he left office, during which time he was subject to the auspices of ACOBA and the Ministerial Code provisions set out above, was at best in a transitional stage between public figure and private citizen. That is also

something we take into account when considering his expectation that personal data would not be disclosed.

69. In our view, therefore, Mr Blair's reasonable expectation in relation to disclosure of information to ACOBA was very much at the lower end of the scale of expectation, and we should take that into account when considering whether disclosure would be fair.

70. We have set out our reasons why we think there are strong public interest factors in favour of disclosure (essentially agreeing with the Commissioner on this issue), and why such factors, when applied in the context of s36(2) FOIA, led to our conclusion that application of the provisions in s36(2) FOIA do not exempt the information from disclosure.

71. We take those same factors into account when considering whether disclosure is fair for the purposes of s40(2) FOIA. Although most of the argument in this case has been about the applicability of s36(2) FOIA, in fact we have found it more difficult to reach a conclusion when considering the application of s40(2) FOIA. However, on balance, using the formulation set out in the Commissioner's skeleton argument, and applying the reasoning when considering the public interest earlier in this judgment, we find:-

    (a) That there is an overriding public interest in breaching any expectation that Mr Blair would have that information provided to ACOBA would not be disclosed and therefore disclosure would be fair and not a breach of the first data protection principle; and/or

    (b) Any prejudice caused to the privacy rights of Mr Blair, do not override the legitimate interest of the Appellant in disclosure, when applying condition 6(1) in Sch 2.

72. For the reasons stated this appeal is allowed and this judgment is substituted for the Commissioner's decision notice.

73. Finally, we confirm that it would not be fair for the personal data of other individuals to be disclosed as part of the material now to be disclosed. The next step is for ACOBA to make the relevant redactions, before disclosure to the Appellant is made.

74. Our decision is unanimous

Signed:

Stephen Cragg QC

Judge of the First-tier Tribunal

Date of Decision: 4 November 2018

Dated Promulgated: 5 November 2018