



**IN THE FIRST-TIER TRIBUNAL GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

**AND**

**IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal Nos. EA/2012/0207, 0232 & 0233**

**ON APPEAL FROM A DECISION OF THE INFORMATION COMMISSIONER**

**BETWEEN:**

**DEPARTMENT FOR WORK AND PENSIONS**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**and**

**FRANK ZOLA**

**Respondents**

**Heard on Friday 3<sup>rd</sup> May 2013 at the Competition Appeal Tribunal, Victoria House, Kingsway, London**

**BEFORE**

**DAVID MARKS QC**  
**Tribunal Judge**

**ALISON LOWTON**

**PIETER de WAAL**

**Counsel:** Rory Dunlop (for the Appellant)  
Robin Hopkins (for the Information Commissioner)  
The Second Respondent was not represented and did not appear

**Subject Matter:**

Freedom of Information Act 2000 section 43(2) (Commercial Interests) and section 36(2)(c) (Public Affairs); meaning of commercial interests; public interests balance

**Cases Cited:**

*John Connor Press Associates Ltd v IC* (EA/2005/0005)

*R (Ofcom) v IC* [2010] UKSC 3

*OGC v IC* [2010] QB 98

*R (on the application of Reilly) v Secretary of State for Work and Pensions* [2012] EWHC 2292; [2013] EWCA Civ 66

*R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin)

*IC v HMRC and Gaskell* [2011] UKUT 296

*Hogan v IC* (EA/2005/0026 and 0030)  
*Chichester DC v IC* GIA/1253/2011; [2013] 1 Info LR 38

### **Decision**

The Tribunal dismisses the Appellant's appeals and upholds the Decision Notices of the Information Commissioner (the Commissioner) in all three appeals.

### **Reasons for Decision**

#### **Introduction**

1. These consolidated appeals concern two important qualified exemptions set out in the Freedom of Information Act 2000 (FOIA). The public authority, which is the Department of Work and Pensions (the DWP) in general terms claims that the issues raised in the three Decision Notices which are the subject of this appeal involve an error in law by the Information Commissioner (the Commissioner) in finding that section 43(2) of FOIA which deals with commercial interests was not engaged. The DWP also claims that with regard to section 36(2)(c) of FOIA which deals with the effective conduct of public affairs, the Commissioner also erred in concluding that the public interest balance weighed in favour of disclosure.
2. In the three appeals which are the subject of this judgment the requests in very general terms sought the identities and/or the names of organisations and other entities who provide the various benefits which are being offered and are the subject of the three programmes or schemes operated under the aegis of the DWP which are described in the following parts of this judgment.
3. It is convenient however to set out at this point the relevant statutory provisions in full before turning to the factual background.
4. Section 43(2) states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)”.
5. Section 36(2)(c) provides that information is exempt if:

“... in the reasonable opinion of a qualified person, disclosure of the information under this Act:

- (a) would, or would be likely to, inhibit –
  - (i) the full and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or

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- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Factual background: the relevant DWP programmes

6. All three appeals concern various employment related programmes run by or under the general supervision of the DWP. Three such programmes are involved in these appeals. They are respectively Mandatory Work Activity (MWA), Work Experience (WE) and the Work Programme (WP). These will each be briefly described in turn.
7. MWA was introduced in May 2011. It remains in operation and was in place at the date of the relevant request in these appeals. In general terms, MWA is intended to give support to a small number of jobseekers, being Job Allowance claimants, who would benefit from a short period of activity such as those claimants who had been unemployed for a lengthy period. MWA is therefore designed to help such individuals re-establish themselves in employed work.
8. MWA placement arises whenever a Jobcentre Plus adviser considers that this is appropriate for a particular claimant seeking Jobseeker's Allowance. However, such claimants who are participants in WP or other contractual programmes will not be so referred.
9. Participation in MWA does not disentitle a claimant from receiving Jobseeker's Allowance. Failure to complete a MWA placement without good reason can result in a three month sanction of Jobseeker's Allowance which can rise to 6 months for a second breach.
10. A placement under MWA can last for 4 weeks and up to 30 hours per week. The activity takes place in the local community, usually in the context of a charitable organisation. Some claimants reach an agreement with their Jobcentre Plus adviser that they seek work only for a small number of hours.
11. MWA is available throughout the country. Great Britain is divided into 11 contract Package Areas known as CPAs. The DWP has contracts with contract providers for each CPA.

12. A contract provider sources the placement from a local placement provider. The DWP plays no part in that respect. However, the DWP expects that every placement will offer people the opportunity to acquire work-related disciplines as well as resultant benefits to particular local communities. Contract providers are paid pursuant to the terms of their own MWA contract. The DWP in its grounds of appeal describes the monetary arrangements between the contract provider and the placement providers as “a commercial matter between themselves”. Contract providers are responsible for reasonable travel, child care and additional support costs during the time the claimant seeks a placement. Contract providers also report on the terms and effect of MWA as a means of assisting future employers.
13. In its grounds of appeal, the DWP also points out that there is a minor error in one of the Decision Notices, namely the Notice relating to what will be called the Naysmith request. At paragraph 47(vii) the Commissioner characterises MWA as being applicable to 16-24 year olds. MWA as is clear from what has already been said aims to help all jobseekers. The Tribunal finds that nothing material turns on this misdescription.
14. When the relevant requests relating to these appeals were made there were approximately 19,000 places available for MWA. According to the DWP, that cost the taxpayer £8m per year and as will be seen below, this estimate is at variance with the terms of the appropriate Commissioner's Decision Notice where sums some 20 times higher are quoted and referred to.
15. The Commissioner in his Response to the grounds of appeal notes that by the time of the request, nearly 50,000 claimants had been referred to Job Centre Plus advisers for placements on MWA.
16. WE was launched in January 2010 for 18-21 year old Jobseeker's Allowance claimants who have been on benefit for 13 weeks. WE was originally funded for 20,000 work experience places over 2 years. After the Budget in 2011, there were created an additional 80,000 placements yielding a total of 100,000 placements. A further 250,000 places were announced in November 2011.
17. WE was, and remains, designed to help young unemployed people who have little or no work experience. It seeks to enable them to acquire work and employment-based skills by means of a placement with a local business or employer. In practice, it seeks to facilitate entry into an apprenticeship.
18. WE can be recommended by a Jobcentre Plus adviser. It is aimed at younger and more inexperienced Jobseeker's Allowance claimants. It seeks to expose them to a short period of work activity. Unlike MWA, WE is not mandatory. MWA's primary aim is

not to promote work experience. As the DWP puts it in its grounds of appeal, MWA helps the claimant to re-engage within the system and gain valuable work-related disciplines.

19. By the time of the relevant requests which are material to these appeals, the Government had budgeted to fund 100,000 places in the WE, coupled with an intention to fund a further 250,000.
20. At that time , as the DWP sought to claim, leaving a WE placement without good reason after the first week resulted in sanctions reflected in the loss of Jobseeker's Allowances.
21. Since the requests in these appeals, participation has been put on a voluntary basis and sanctions have been withdrawn, except in cases of gross misconduct.
22. WP was launched in June 2011. It is described as helping those who are in danger of becoming long-term unemployed. WP replaced many of the similar pre-existing employment schemes.
23. A contract provider of WP is given the freedom to design suitable support based on both individual and local needs. WP creates work experience. Contract providers are paid primarily for supporting claimants into employment. It helps claimants stay longer and in general terms it means that higher payments are made according to whether the hardest are being helped. According to the DWP, providers are paid partly out of the benefit savings which they help to realise whenever they support claimants by putting them into sustained employment.
24. As with the previous two programmes described briefly above, a Jobseeker's Allowance claimant will be referred to WP by a Job Centre Plus adviser. Once referred, they will stay in WP for 2 years or until the provider has claimed all available payment.

Background: underlying controversy

25. In its grounds of appeal, the DWP has usefully set out a number of facts and matters designed to show that the three programmes described above often collectively referred to as "workfare" have been, and are, the subject of criticism by various entities including campaign groups and the media. According to the DWP, such criticisms fail to draw a proper distinction between the three distinct programmes.
26. Various entities such as campaign groups obtained the names of participating employers and this has resulted in the use of that information to "target" those employers in order to "coerce" them into leaving the relevant scheme.

27. The DWP therefore cited and quoted from a number of newspaper articles at the end of 2011 and at the beginning of 2012 which in effect claimed that the real beneficiaries of the various schemes were those commercial organisations which participated in the schemes such as well known supermarkets and book seller chains. These articles relate to a number of case studies which will be referred to below.
28. To paraphrase the relevant portions of the DWP's grounds of appeal, the DWP took the view that at the time of the requests considered in these appeals such negative publicity of the type or types mentioned above would be likely to cause placement providers to withdraw from WP and from MWA as well as to deter others from joining in at all. In all cases where the same placement providers might offer support across all three schemes, withdrawal of such providers would therefore affect all the schemes.
29. As will be explained in further detail below, the DWP claimed that in consequence of such negative publicity, placement organisations did in fact tender their withdrawal from all three schemes and programmes and did so in the words of the grounds of appeal at paragraph 25:

“... as a direct result of the pressure put on those organisations by campaign groups and the mainstream media.”

#### The Requests

30. The first request to be considered is that made by a Mr S Kelly on 23 January 2012. This last date is the one properly to be referred to, and not 11 January 2012, as recorded on the face of the relevant Decision Notice. Mr Kelly requested the following, namely:

“... the names of all organizations who have provided work boost claimants, work experience or other unpaid work activity to customers of Seetec within Contract Package Area 4 (East London) within the past 12 months. In cases where a sub-contractor to Seetec was involved please note which sub-contractor or sub-contractors were involved with each organisation ...”
31. By letter dated 6 February 2012, the DWP refused to provide the information relying upon section 43 of FOIA. The complainant asked for an internal review. On 1 March 2012 the DWP confirmed its original decision.
32. Although the request did not name a specific programme, the DWP interpreted the request as relating specifically to the WP scheme. This was because Seetec, being a contracted provider, was connected to the WP in the area described as CPA 4. Seetec will be referred to again below.

33. In due course, the DWP obtained the opinion of the Right Hon Mr Chris Grayling MP, the then Minister for Employment, to the effect that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs. On 11 May 2012, the DWP formally indicated that it would rely on section 36(2)(c) of FOIA.
34. In its subsequent exchanges with the Commissioner, the DWP provided details about all of its “workfare” programmes. It also provided details to the Commissioner of the impact of the type of negative publicity which has been referred to briefly above.
35. The second request was made on 11 January 2012 by a Mr D Naysmith who made the following request of the DWP. This will be called the Naysmith Request, the previous request being called for similar reasons, the Kelly Request. The Naysmith Request was put in the following terms, namely:

“Could you provide me with the names and locations of organisations which are participating in the Work Programme in the Scotland Contract Package Area, by providing mandatory work placements through the DWP’s prime providers Ingeus and Working Links, through JHP Group Ltd or any other relevant sub-contractors?”

36. The DWP sought clarification from the complainant as to whether the request was made in relation to the names and locations of organisations participating in the WP by providing work placements, or whether the request was directed to the names of organisations JHP Group was using or had used when delivering MWA in Scotland. The complainant confirmed that the latter was the case.
37. In a letter dated 14 February 2012, reliance was placed by the DWP on section 43(2) of FOIA. An internal review resulted in a confirmation of that response on 23 March 2012.
38. As in the case of the Kelly Request, in due course the DWP obtained the opinion of Mr Grayling and subsequent reliance was placed on section 36(2)(c).
39. The third request in issue in these appeals is that made on 25 January 2012 by a Mr Zola (the Zola Request). Mr Zola requested from the DWP the following, namely:

“... the names of the placement providers for [MWA] here in the last six months in: CPA 1, CPA 2 and CPA 3; and if within your fees for CPA 4, CPA 5 and CPA 6 if within your fees for CPA 7, CPA 8 and CPA 9; and if within your fees for CPA 10 and CPA 11 for your successful bidders.”

40. By letter dated 8 February 2012, the DWP refused to provide the information requested in reliance on section 43. An internal review confirmed that response and the DWP’s reliance on section 43(2) on 29 February 2012. As in the case of the previous two

requests, Mr Grayling MP again formally stated that in his opinion disclosure of the requested information would be likely to prejudice the effective conduct of public affairs. The DWP then formally placed reliance on section 36(2)(c).

#### The Decision Notices

41. The first request, i.e. the Kelly Request, is the subject of a Decision Notice dated 1 October 2012, reference no. FS50438502.
42. The Commissioner determined that section 43(2) was not engaged. In his Decision Notice, the Commissioner noted that in his exchanges with the DWP, the Commissioner had not accepted that the requisite degree of prejudice referred to and required by the subsection had been demonstrated. In any event, the Commissioner determined (see in particular paragraph 20 of the Notice) that any alleged prejudice, whether in the form of resultant higher welfare costs or otherwise constituted a financial, rather than a commercial interest.
43. The Commissioner also noted, in particular, in paragraph 26, that the DWP had been unable to verify the reasons for withdrawal of organisations from the programme. A number of other separate observations were made by the Commissioner in relation to section 43(2). In the Tribunal's judgment, they have been revisited in relation to the present appeal in the submissions made before the Tribunal. However, in the Notice, the Commissioner did accept that the prejudice relied upon by the DWP, or more particularly the prejudices which were pointed to, were in principle capable of being relevant to section 43(2) such as the risk of providers withdrawing from the scheme as a result of disclosure, albeit that on the evidence which the Commissioner then considered, the risks of such type of prejudice were, in the Commissioner's view, speculative. The Commissioner noted that any harm which could be said to be representative of a set of higher welfare costs related to a financial, rather than to a commercial interest and therefore again was not related to section 43(2).
44. The Commissioner also noted that the DWP had claimed that there was an appropriate degree of harm which could be characterised as constituting an appropriate degree of prejudice if it was harm that could be caused to the Government's ability to determine the MWA programme. However, the Commissioner stated that he did not consider the arguments about harm to be effective in the sense of impacting upon the delivery of the MWA programme such as to be relevant to section 43. As will be seen however, he did consider such arguments relevant to section 36(2)(c).
45. As for the illustrations of negative publicity to which reference has already been made, the Commissioner determined that what he called a "significant amount of the content" to which the DWP had referred him to reflected "circumstances after the date of the



request” (see paragraph 23). He did however recognise that the relevant campaign groups and websites appeared to have been established in 2010 and thus preceded the request with regard to the Kelly appeal.

46. However, the Commissioner disputed what he called the central message on the website to which he had been referred, namely that organisations involved in MWA were (or are) “profiting from unpaid labour”, coupled with the threat of punitive sanctions if jobseekers who were referred to MWA did not attend. The Commissioner noted that the DWP disputed the validity of the messages in question.
47. At paragraph 25, the Commissioner stated that in his view the extent to which the campaigns themselves had influenced withdrawals was “unclear”. He noted that other factors were also reported by the media as being instrumental to withdrawal such as “the reduced financial circumstances of organisations concerned, the realisation on the part of organisations that benefit sanctions were involved in the mandatory process and representations made to employers by trades unions”.
48. The DWP had, in the Commissioner’s view, therefore been unable to verify the reasons for withdrawal of organisations from the programme. The DWP has supplied a list of charities that had withdrawn. It had however not provided details about the reasons as to why they had done so.
49. As will be seen in further detail below, the Commissioner noted that the statutory expression in section 43(2) “would be likely to prejudice” had been characterised in other Tribunal decisions (see in particular *John Connor Press Associates Ltd v IC* (EA/2005/0005)) as meaning that the “chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk”.
50. In terms of the Kelly Request, it was therefore necessary for the DWP to indicate not only the number of companies and organisations that would be likely to withdraw from the scheme were disclosure to occur but also the expected increase in Government payments to the contract providers that would be likely to be necessary in order to source alternative work placements. The Commissioner claimed that neither category of the above types of evidence had been provided.
51. Again, as already indicated above, the Commissioner found that he had not been provided with evidence by the DWP which demonstrated a clear link between disclosure of the information that had been requested and any prejudice to commercial interests that might otherwise occur. This judgment will revisit the question of a need for a causal link below.

52. According to paragraph 31 of the Notice, the DWP had said that “two lists of organisations which had been placed in the public domain previously were being used by one of the campaign websites.” This, it had been said by the DWP, would be likely to cause financial cost and therefore “commercial risk for MWA placement providers”.
53. However, the Commissioner also determined at paragraph 32 that the DWP had not explained “how financial cost to the contract providers might be likely to arise or how the MWA placement providers might be subject to commercial risk”. In other words, the DWP’s case appeared to the Commissioner to have relied on the claims of the campaigners themselves and on a selection of press reportings within the media: see generally paragraph 33. The DWP had been unable to confirm or provide the Commissioner with the names of any companies which had actually withdrawn from MWA. In addition, while the names of charities who had withdrawn had been supplied “the reason for their withdrawal was not stated or explained” by the DWP: see again paragraph 33.
54. With regard to section 36(2)(c), the Commissioner paid due regard to the fact that Mr Grayling’s opinion had been given but noted in the Tribunal’s judgment quite correctly that it was open to the Commissioner to regard that opinion as unreasonable if it was one which no reasonable person in the position of the qualified person could otherwise hold. That exercise in turn demanded a consideration of the competing public interests.
55. The DWP had pointed to such factors as discouraging employers in participating in the relevant programmes and a possible disruption of such programmes as militating in favour of maintaining the exemption. Against that, the Commissioner noted other factors militating in favour of disclosure such as the existence of a body of opinion which questioned whether mandatory work programmes could improve a young person’s job prospects and the need for the revelation of where placements occurred, pointing to the accompanying benefits of disclosure generally. Ultimately, and in determining that the exemption should not be applied, the Commissioner pointed (see in particular paragraph 48) to the frequency, severity and extent of the harm identified by the DWP as compared to the “little” evidence that the relevant campaign websites were viewed by a significant number of people. There was, he said (see paragraph 49) “a need for greater public accountability and transparency in this case”.
56. In general terms in the Tribunal’s view, there is force subject to what is said below, in this judgment, in the contention made by the Commissioner in his initial written Response (see in particular paragraph 19) that in relation to section 36(2), the DWP relied on the same arguments as it had advanced with regard to section 43(2).
57. This is perhaps a convenient point to observe that in accordance with a concession made in his initial Response by the Commissioner, in its grounds of appeal, the DWP

stated that the figures cited in all three Decision Notices about the costs of the MWA scheme were wrong. Nevertheless, the Commissioner decided that the cost to the public purse was in any event “substantial” and the number of people affected to be “very substantial”. The Commissioner observed that nonetheless, the competing public interests still militated in favour of disclosure.

58. The second Decision Notice addresses the Naysmith Request and is dated 1 October 2012 bearing reference number FS50440818. The same arguments are considered by the Commissioner and the same determinations are reached by him as with regard to the Kelly Request. The third request resulted in a Decision Notice dated 30 August 2012 bearing the reference FS50439037. Again, the same arguments are considered and the same determinations reached by the Commissioner as were considered and reached in the two other Decision Notices which have been described above.

#### The main submissions by the DWP

59. With regard to section 43(2), the DWP makes three principal submissions. The Commissioner disputed only the proposition that the DWP’s interests in the context of these appeals were “commercial”. First, it claims that in all three Decision Notices, the Commissioner drew a false distinction between commercial matters which are expressly referred to in section 43(2) on the one hand, and financial matters on the other. Second, the DWP claims that the burden of proof in respect of the demonstration of a likelihood of prejudice for the purposes of the statutory requirements was placed “too high” by the Commissioner. Third, and the point will be examined more closely in connection with fresh evidence placed before and considered by this Tribunal, the Commissioner in any event ignored important evidence.
60. As to the first contention, it is claimed by the DWP that the Commissioner wrongly held that higher welfare and related costs would not prejudice the commercial interests of the DWP on the basis, according to the Commissioner, of the presence of “financial” rather than “commercial” interests. This is said by the DWP to represent a distinction without a difference. The DWP claims that it is important to understand that the relevant type of expense, i.e. monies paid to a contract provider, should be characterised as commercial while an analogous form of expense, such as the making of greater payments to Jobseeker’s Allowance claimants, should not be so characterised.
61. As to the second argument, the DWP did not take issue with the well known general statement of principle in *John Connor v IC* supra to the effect that the chance of prejudice being suffered must be “more than a hypothetical possibility” and must be a “real and significant risk”. It is claimed however that the Commissioner erred in two material respects in misapplying that principle.

62. First, the Commissioner wrongly concluded, so the DWP claimed, that it was necessary to have direct evidence from the companies and organisations involved. The DWP contended that there is no reason in law why evidence produced by campaign groups, whether on their websites or not, or through the media, should not be sufficient to demonstrate a real and significant risk of prejudice.
63. Second, it is claimed that the Commissioner was also wrong in principle to conclude that evidence of prejudice should go into a very high level of detail. In all three Decision Notices, the Commissioner stated that in order to meet the test prescribed by section 43, it would be “necessary” for the DWP to indicate the number of companies and organisations that would be likely to withdraw and the increase in payment the DWP would need to make in consequence.
64. The DWP contended that there is no justification for insisting on such detail. It is enough, so the DWP claims, for the DWP to demonstrate that there is a real risk of some organisations withdrawing and that there is in consequence a resultant effect on the payment they have to bear. The DWP adds that there is no necessity to go through what it calls “the speculative process” of estimating the precise amount and number of organisations that would withdraw or the precise amount that would be lost.
65. The third contention takes issue with the Commissioner’s apparent failure to take into account media reports that post-dated the particular requests. This issue has been referred to briefly above. The DWP claimed not only that reports that post-dated the requests were still relevant, being evidence to support the DWP’s assessment that publication of the names of MWA placement providers would lead to such providers withdrawing, but were also evidence to show the risks that the DWP had identified and in particular that such risks were in fact “real and significant”. The DWP claimed in other words that these reports related to all the so-called “workfare” programmes, including the WP and MWA but that MWA was probably the “most vulnerable to campaigning and media pressure”.
66. The grounds of appeal then turned to the Commissioner’s determination regarding section 36(2)(c). Although the DWP accepted that the Commissioner had in turn correctly accepted that the exemption under section 36(2)(c) was engaged, it took issue with the result of the public interest balancing test carried out by the Commissioner as already outlined above.
67. The DWP claimed first that, in the Decision Notices the Commissioner had “greatly underestimated” the public interest in maintaining the exemption. The DWP claimed that the Commissioner had “ignored relevant evidence and placed the burden of proving prejudice too high”. In summary, the DWP claimed that disclosure of the information sought “would have been likely to have led to the collapse of the MWA scheme” (at

least in relation to the Naysmith Request and, of necessity, also with regard to the Kelly Request). As it was put in paragraph 50 of the grounds of appeal, disclosure of the information in relation to the MWA scheme would have been likely to have led to the collapse of that scheme “with incalculable losses to the taxpayer and many thousands of persons in long term unemployment who are supported by the scheme”.

68. It was therefore claimed that disclosure of information in relation to the WP and by extension, MWA, “would have been likely to reduce the opportunities available for jobseekers, because there would be fewer placement providers”. It would be likely, it was claimed, to result in more people remaining in unemployment and on benefits which was damaging to the jobseekers themselves and to the economy on a more general basis.
69. Equally, the DWP claimed the Commissioner had “greatly over-estimated” the public interest in disclosure for six reasons.
70. First, the kinds of employers and organisations participating in the MWA, WE and placements arranged by Work Programme providers were, the DWP claimed, already in the public domain at the time of the requests. A website known as the “Boycott Workfare” website provided a list of the companies and organisations who participate in the schemes in question and which that website had uncovered. The DWP claimed that it was clear from that list that charities, supermarkets, fast food restaurants, drug stores and other such high street stores were participating.
71. Second, the DWP claimed that it is not “significantly” in the public interest to know which particular organisations were or are participating in any particular area. Such identifying information does nothing, it is said, or certainly does not significantly enhance the transparency of the Work Programme or MWA schemes, or indeed add to the public debate around mandatory or even voluntary placements. Instead, it is said, disclosure would simply allow campaign groups to target those employers and pressurise them into withdrawing from one or more schemes.
72. Third, it was claimed that since MWA placements have to represent a benefit to the local community, MWA placement providers “tend to be” charitable organisations, some of which it is claimed are small and local and therefore, as it was put by the DWP, “particularly vulnerable to pressurisation from aggressive campaign groups”.
73. Fourth, as indicated above, the DWP claimed that the Commissioner’s understanding of the public expenditure of MWA with particular reference to the observations made in paragraph 47 of the Kelly and Naysmith Decision Notices was “wildly inaccurate”. As a result, there was a gross “over-estimation” of the level of funding at stake. The DWP claimed that in relation to the Kelly Decision Notice, the Commissioner also quoted the

same MWA figures despite the fact that that decision as rendered in the relevant Decision Notice related to the Work Programme. In any event, the DWP added that the provision of the names of placement providers would give little or no information about how that public funding was spent. This was because it was claimed none of the public expenditure on the Work Programme or MWA is given to the placement providers: they are not paid by the DWP for providing placements.

74. Fifth, the DWP claimed that disclosure of the names of placement providers would provide no information about “the shortfall in difference in performances between contract providers”. In other words, the names of placement providers would provide the public with no information of any value regarding the performance of contract providers.
75. Sixth and finally, the DWP claimed that it was “extraordinary and ironic” that whereas for example in paragraph 47 of the Kelly and Naysmith Decision Notices the Commissioner had placed the “costs to society of unemployment” as a factor weighing in favour of disclosure, the DWP in its arguments showed that disclosure would, if anything, be likely to “seriously harm, if not completely undermine” one of the Government key proposals to tackle unemployment.

#### The Commissioner’s initial response to the grounds of appeal

76. The Commissioner began his initial written response by stressing that the distinction between “financial” and “commercial” for the purpose of section 43(2) is simple and easy to understand. An activity, he claims, is commercial if it involves selecting, negotiating with and entering into contracts with possible private sector firms: paying unemployment benefit is “very different”. The latter is merely a function of public administration.
77. The Commissioner also emphasises that as to the necessary evidence relating to prejudice, he required “something more than mere unparticularised assertion or speculation”. The DWP relied “very largely” on news reports and websites. The Commissioner added however he had taken those reports into account. As will be seen, the position has changed considerably since the date of this Response.
78. More particularly, the Commissioner stated that he found it “implausible” that any alleged collapse of the MWA scheme caused what was said to be incalculable losses to the taxpayer. The Commissioner said that he did not accept any contention that such losses could arise from the disclosure of the names of certain charities and private sector organisations who had chosen to participate and benefit from major national employment schemes. In any event, as to the competing public interest, the Commissioner continued to maintain that the disclosure of the disputed information

would make a major contribution to the desired transparency about the schemes in general. In particular, the public should be entitled to know the actual details of all the participants. The Commissioner was not persuaded that in the case of small charities said to be particularly vulnerable to pressure from aggressive campaign groups that any adverse reaction would apply. The Commissioner regarded the evidence in that regard as “unpersuasive” and the Grounds of Appeal as “speculative”.

79. The DWP has contended that none of the public expenditure on MWA was given to placement providers: they were not paid for providing placements. The Commissioner responded by saying that since public funds were being spent on contract providers the public needed to know how the funds were actually spent. Transparency was therefore a highly relevant consideration.
80. The Commissioner also refuted the argument that disclosure of the names of placement providers as distinct from contract providers told the public nothing about the performance of the latter. Disclosure of the names of placement providers would help the public scrutinise the contract provider’s effectiveness more closely.

The further evidence before the Tribunal

81. Before turning to the extensive further evidence placed before this Tribunal which greatly expanded on the evidence considered by the Commissioner in the various Decision Notices the Tribunal pauses to note a matter which is regarded by the DWP as a necessary consequence of the additional material having been placed prior to the appeals. Put shortly, the DWP claims that the focus of the appeal is therefore not so much on the flaws in the Decision Notices but is directed as to why the Tribunal should come to a different conclusion.
82. That focus is on two issues related to section 43(2), namely, first, a consideration as to whether section 43(2) is in fact engaged and secondly whether the public interest balance now weighs in favour of disclosure. In particular the DWP contends that the parties whose commercial interests would be, or would be likely to be, prejudiced are four in number and kind, namely the contractor providers, the sub-contractors, the placement hosts and the DWP itself.
83. The DWP accepts that what is critical to the appeal is a consideration of what would, or might have happened, if the name or names of those placement providers who had not been published had been disclosed in respect of the three requests. The DWP also claims that the best evidence of what would have been likely to happen to the unpublished hosts is what did in fact happen to the placement hosts when their details were published.

84. The further evidence designed to demonstrate this latter submission takes the form of the evidence presented by Clare Elliott, the Joint Head of the Work Programme Division at the DWP. She is Deputy Director on the DWP's Contracted Customer Service Directorate which includes responsibility for the MWA and for the WP. She has provided in the event two written statements, the first of which is by far the more significant. In the Tribunal, she was cross-examined during the appeal hearing.
85. The remainder of this section deals with the evidence provided by her in her first statement. It will be clear where her second statement is referred to, the same being extremely short in nature and content.
86. She confirmed that in October and November 2012 under her instructions, the DWP managers responsible for the MWA and the WP programmes or schemes were tasked with seeking information from a sample of contracted providers, their sub-contractors and placement hosts. Two separate exercises were undertaken, which provided what she called high level information with regard to the perception held by each of these types of parties just referred to of the impact, whether negative or positive, that the public awareness of their involvement in one or both programmes may have, or may have had, in fact. The methodology aims and objectives of each exercise were set out in an exhibit to her witness statement.
87. In order to avoid unnecessary duplication and because the Tribunal is of the view that this judgment should reflect the precise terms and ambit of those two exercises, the relevant exhibit being the document in question setting out the methodology, etc, is appended to this judgment and forms open Annex A to this judgment.
88. The two exercises in question sought to address the basic issues which underlie these appeals. In particular, they seek to address the determinations of the Commissioner in the three Decision Notices and the effect of those determinations.
89. Responses were duly received by the DWP. The actual results, albeit redacted as to the names of the relevant responders, and the summary set out in Ms Elliott's evidence will be described in sufficient detail below. Ms Elliott also confirmed that in March 2013 contracted providers were asked to consider whether they would provide further support to the DWP's stance of not releasing the names of the placement hosts. A number of responses were received: these too will be summarised below.
90. With regard to the two main exercises referred to above, the DWP received a total of 50 responses called "returns". These responses included information from contracted providers, information by or on behalf of sub-contractors and similar information in the case of work placement hosts. 10 of such returns entailed the responding party asking



that the reasons provided not be used for the purposes of the DWP survey. Of the remaining 40, 28 are attributable to MWA and 12 to WP.

91. As for the 28 attributable to MWA, they relate to 10 of the 11 CPAs, twelve coming from placement hosts and 16 from contracted providers and/or sub-contractors. As for the 12 WP responses, they are attributable to 11 of the 40 contracted providers with comments from 7 out of the 18 CPAs. Some of the responses are, what Ms Elliott calls, “composite” as they encompass a number of organisations and companies.
92. Ms Elliott confirms that with regard to MWA the majority of placement opportunities are provided by charities and other similar non-profit organisations with what she calls a “significant focus” on placements within those organisations’ “retail” outlets. As can be seen from Annex A, the two principal exercises conducted by the DWP expressly refer to the negative press campaign or campaigns against MWA which the DWP had relied on in connection with the original requests.
93. Ms Elliott confirms the results of the DWP survey to the effect that at least 8 national charitable organisations were named in these “returns” as having withdrawn prior to the date of the survey in October 2012 with 1 sub-contractor showing a total of a loss of over 100 placements per week in its area alone. One particular contracted provider had attempted to quantify the loss of placement opportunities in the wake of the negative press coverage stating that the adverse coverage had in turn caused there to be a corresponding effect on 15 delivery sites across the North East, each of which being able to offer 60 placements per 4 week period, meaning that over a year some 780 placement opportunities would be prejudiced.
94. The same provider later re-estimated the provisional loss to be as much as 1,200 lost opportunities.
95. Ms Elliott then claimed that a continued or further loss of placements would detrimentally affect Jobseeker’s Allowance claimants by not being provided with paid jobs at the end of the programme. She stated that while the volume of lost opportunities could be interpreted as the main adverse impact, it was often the help which the MWA programme could provide for and in favour of those who might otherwise be marginalised that caused further concern.
96. In her main witness statement, Ms Elliott accepted that there was a “clear indication” within some of the responses that with some organisations there had been little or no impact from the earlier negative coverage. Although she quoted from 5 responses submitted by 5 placement hosts in that respect, she added that since the time the 5 hosts in question had first responded to her, as she put it, 2 “had publicly withdrawn from the programme due to adverse, unwelcome pressures”; in addition, within the

returns she said there was a reasonable degree of “concern” or caution should any further direct or indirect press coverage or protest action occur.

97. With regard to WP, Ms Elliott pointed out that on account of what she called its multi-faceted nature, work experience placement within the WP forms only one avenue of support within the model that is actually delivered. She describes WP as “a considerably more expansive programme” than MWA. That in turn meant that since the tailoring of support related to individual needs, work experience within WP had to be “considerably wider” in its availability and scope and range of placement opportunities. This in turn meant great reliance on the support of all sector organisations, especially the larger ones.
98. In November 2012, information was therefore sought from WP providers to identify whether the previous negative press coverage had raised any issues or concerns for work experience placement provision.
99. Ms Elliott claimed that one item of information received as part of the DWP’s exercise pointed out that charitable organisations which had withdrawn their support from MWA placements were “reluctant” to provide placements due to what was called “the confusion” between MWA and WP placements. This has led she said to a limited number of opportunities for a further number of unemployed people participating in WP.
100. She then quoted from a number of responses from 5 contracted providers to claim that there were repeated comments as to the effect of the negative coverage in the national press and that adverse press comment had adversely affected the relationship between those delivering WP and its participants. Although the “returns” did not provide quantifiable information, the comments which were received did show that it was difficult to arrive at any figure, although there was a clear statement or statements at least from the 5 contracted providers which referred to the fact (?) that placements had been lost and were becoming more difficult to secure.
101. She also pointed out that two contracted providers in addition to the five referred to above, had expressed clear concerns relating to the commercial operations of employment related services and organisations as well as placement agencies. This was said to be because contracted providers and sub-contractors expend significant sums with such organisations and agencies as well as investing what she called “significant staffing resources” to support the sourcing of placements.
102. She also stated that any impact which resulted in a reduction in the volume of available placement opportunities would, in all likelihood, contribute to an increase in the level of spending on contracted employment programmes by the DWP.

103. Ms Elliott explained that since its inception in May 2011, the MWA has been expanded on two occasions to offer support to an increased number of jobseekers. This in turn has resulted not only in the contracted providers reassessing their initial business and marketing plans but also in an increase in spending with regard to the original average unit cost per placement by the DWP. Ms Elliott in effect claimed that because adverse publicity had a negative effect on third party involvement, MWA will be correspondingly more difficult to deliver: in particular, a contracted provider such as Seetec consequently had to pay more to reflect the decline in the number of third party placement providers.
104. Ms Elliott therefore claimed that were there to be disclosure of the names of placement providers, it was “highly likely” that this would directly contribute to a continuation of higher unit costs for the DWP with a corresponding negative financial and commercial effect on contracted providers and sub-contractors.
105. In particular, she referred to two specific responses provided by the WP survey to contend that to release the names of placement hosts would cause the latter not only to be exposed to adverse publicity, if not ridicule, but also to additional time and cost being devoted by those entities to addressing and dealing with any and all negative publicity.
106. Ms Elliott then turned to the question of transparency and what she perceived to be the competing public interest.
107. With regard to the first such topic, namely that of transparency, Ms Elliott stated that the DWP was and is committed to the transparency of both WP and MWA. The DWP published validated information for both programmes on a six monthly basis in compliance with the Code of Practice for Official Statistics. The Tribunal has seen these documents. With regard to WP, this included information as to referrals, attachments, job outcomes and sustainment payments. The results were also provided by reference to payment group, provider, contract, CPA, the relevant local authority and Parliamentary constituency and Job Centre Plus District.
108. Ms Elliott added that the DWP was at the date of the appeal at least preparing to expand the amount of information available for MWA to include what she described as a “focus” on the numbers of placement hosts, in which sector the hosts operate and the numbers of placements within given individual sectors. Ms Elliott was unable to provide a time frame for the revised publication.
109. She then turned to consider what she viewed as the competing public interests. With regard to the public interest relied on as justifying maintenance of the exemptions, she pointed first to the disruption that would be caused to both MWA and WP were disclosure of the requested information to be made. The activities of campaign groups and the results of negative publicity meant that what she called “a great many

placement organisations” had ceased to offer placements. That in turn reduced the numbers of opportunities available across both programmes with a loss of many placements and prospective new placements being at risk. She claimed that charitable organisations were particularly susceptible to adverse publicity and pressure. She also pointed to the possible commercial detriment suffered to third parties if details of WP placement hosts were to be disclosed. In addition, she said that in the opinion of at least one contracted provider, the release of organisations willing to offer work placements would impinge on the commercial aspects and intellectual property rights and interests of third persons who undertook such business on a “fees” basis.

110. Finally, she claimed that the need for transparency was already satisfied and that those participating companies and organisations whose names were released would then have to issue further and perhaps unnecessary rebuttals to the media.

111. In the short supplemental statement provided by Ms Elliott just prior to the appeal hearing (part of the exhibits of which have been suitably redacted), she exhibits various material exchanges that she says shows that such partial disclosure as has been made of the names of those companies and organisations that offer WP have attracted adverse reactions. She addresses particularly the goals of Boycott Workfare in not only “naming and shaming” organisations in question, but also in providing encouragement towards targeted protests and action designed adversely to affect those otherwise providing support to unemployed jobseekers. She refers in particular to the Sue Ryder organisation having been forced to withdraw from the schemes. One additional illustration of the prejudicial effect of disclosure is provided in relation to the Salvation Army: the actions conducted against the Salvation Army involved amongst other adverse activities the occupation of that company’s headquarters and web-based targeting. Similar targeting occurred with regard to the well-known pet charity PDSA.

112. Finally, Ms Elliott exhibits correspondence addressed to the DWP which seeks names in order to ensure “direct protest”.

#### The Appellant’s contentions

113. The Appellant’s main contentions on the appeals are addressed to both section 43(2) and section 36(2)(c) of FOIA. The first issue raised is whether section 43(2) is engaged, and if so, whether the public interest balance weighs in favour of disclosure notwithstanding that the withheld documents were subject to the qualified exemption in section 36(2)(c).

114. The critical question is whether the information requested at the relevant time would have been likely to prejudice the commercial interests of any of the contract providers, the sub-contractors, the placement hosts or the DWP itself.

115. As already indicated, the DWP lays stress on what would have been likely to happen had disclosure been made and in so doing it draws attention to what had already occurred.
116. As far as the placement hosts are concerned, the DWP points out that some are known to the relevant campaign groups as a result of previous FOIA requests: their names have been published on the internet. Others, however, were not known and were not published.
117. In accordance with its principal contention that the best evidence of what would have happened is what did happen, the DWP makes the following specific contentions. First, it claims that the “unpublished” placement hosts would have been added to those already published or maintained by campaign groups such as Boycott Workfare. Second, it is claimed that such publication would have resulted in the same pressure being applied as had occurred with hosts whose details were already published, e.g. by gathering outside store premises, by threatening to withdraw donations, by other demonstrations and even by threats of violence. Third, it is claimed that many of the unpublished placement hosts would have withdrawn from MWA and, where relevant, the WP. Ms Elliott claims that several of the published placement hosts had ceased to provide placements altogether. The DWP claimed that there is no reason to suppose that unpublished placement hosts would have been any more robust.
118. Ms Elliott’s evidence is also said to show that if the identity of the individual placement hosts had been disclosed at the relevant time, that would have been likely to lead to several more placement hosts withdrawing from both MWA and WP.
119. Fourth, it is claimed that many of the placement hosts which would have continued with the back-to-work programmes as well as many others that might have been willing to assist would have been more reluctant to participate or might have demanded higher fees in order to host placements.
120. Fifth, as a result of one or more of the above arguments, fewer placements would have been available for jobseekers.
121. The DWP then turns to consider the various alleged effects reflected in the above contentions by reference to the different commercial interests involved.
122. As for the contract providers and the sub-contractors, the DWP claims that the commercial interests of both these groups would have been prejudiced.
123. First, it is said that prejudice in those cases would have taken the form of withdrawal with the adverse impact on investment of significant sums in sourcing placements and

the loss and waste of such investments generally. Moreover, withdrawal would have caused there to be further investment in an attempt to source yet further placements.

124. Second, disclosure might have led to the placement hosts seeking further payments for additional participation to the commercial detriment of the same parties.
125. Third, since the lists of contract providers were confidential, disclosure caused there to be an impairment of intellectual property rights of those providers leading in turn to the possible failure of any business model used by those providers. Rival organisations who had not invested any time in sourcing placements could use the information to subvert and undermine the providers.
126. Fourth, disclosure would impair the relationships between contractors, sub-contractors and the placement hosts they worked with: disclosure could be viewed as a breach of trust.
127. All these elements, the DWP claims, reveal a real risk that disclosure could have what is said to be a “devastating” effect on the business of contractors and sub-contractors. The open evidence refers to Seetec, a contractor which has already been referred to. Ms Elliott’s evidence is that Seetec’s belief is that disclosure could put its organisation and the jobs of 53 employees at risk. Another, namely Ingeus, states its belief that disclosure would cause it to lose about £1m in revenue with resultant redundancies.
128. The DWP then turns to the placement hosts. Again, the DWP contends that disclosure of all as yet unknown placement hosts would result in their being targeted by campaign groups and potentially, if not actually, the mainstream media.
129. The DWP claims the risk of resultant commercial detriment would have arisen in at least two ways. First, the placement hosts would have been likely to lose customers and, in the case of charities, donations in the event of negative publicity. All that would be detrimental to all placement hosts. Second, any unpublished placement hosts who would have withdrawn from the scheme as a result of targeting would have lost an important volunteer resource. In the case of MWA, all placement hosts are charitable organisations or not-for-profit organisations. It is claimed their commercial operations could thereby have been severely affected.
130. The DWP again points to the effect that withdrawal has had on the published MWA placement hosts. One response referred to and addressed by Ms Elliott describes the effect of negative press as “high” because they are “desperate for helpers”. Another points expressly to inadequate staffing issues and the diminution in takings or donations.

131. The DWP then turns to its own position and the likely prejudice to its commercial interest.
132. First, as Ms Elliott contends, there was a real risk that the additional costs to contractors and sub-contractors of having to find new placements would have been passed on to the DWP itself. Second, there was a real risk that the DWP would have to expend more benefits in favour of jobseekers who would otherwise be unemployed for a longer period than otherwise would be the case in the event of fewer placement opportunities. The DWP contends that such prejudice is commercial in nature because the more it spends on benefits, the less money it will have to spend on commercial activities such as contracts with contractors to assist jobseekers going back to work.
133. Third, it is said that there is a real risk that disclosure could have led to the collapse of the MWA programme as a whole because of the severely adverse effect it would have had on contractors, sub-contractors and placement hosts generally.
134. As to the competing public interests and the balance that needs to be struck, the DWP makes the following submissions.
135. First, reliance is placed on the words “in all the circumstances of the case” to be found in section 2(2)(b) of FOIA in support of the general contention that it is permissible to take into account any factors weighing against disclosure, whether inherent to the particular exemption or exemptions in question or not.
136. Second, the DWP contends that if the Tribunal is constrained to consider the public interests against disclosure only inherent in the exemptions themselves, aggregation is permissible: see generally *R (Ofcom) v IC* [2010] UKSC 3.
137. Third, although the DWP accepts that the Tribunal has as a general proposition to consider that the public interest balance has to be struck at the time of a request, the DWP also contends that it can also consider how the balance is to be addressed when considering what remedy to grant: see generally *OGC v IC* [2010] QB 98, especially at para 98.
138. The DWP points to two major factors which it says militate in favour of maintaining the exemptions in the present case.
139. First, it points to the very “severe” detriment on the commercial interests of all the relevant parties who have been referred to above. Second, and said to be just as important, is the fact that withdrawal of placement hosts would have been likely to result in fewer opportunities for jobseekers. There is said to be “a very strong” public interest in schemes which help jobseekers find work and in their being allowed to operate as efficiently as possible. Reference is made to a research report issued by the DWP

(ISBN 9781 908523038: Research report 823: December 2012) showing what is said to be “some significant” “soft outcomes” for claimants who attended their placement with 75% saying that MWA had made them more attractive for potential employers and 72% of the participants saying that their personal covenants had increased since attending.

140. As has been noted, the Commissioner in the Decision Notices had determined that the cost of unemployment which lies at the core of the second contention by the DWP could not be taken into account on the basis that such costs relating to unemployment are properly “financial” rather than “commercial”.
141. The DWP responds to this by saying, first that interests other than those inherent in the particular exemption should be taken into account, a point referred to above. Second, and in any event, the cost of unemployment was “inherent within” the section 36(2)(c) exemption being part of the public interest otherwise adversely affected. Third, such cost was already also inherent in the section 43(2) exemption given the fact that it was said by the DWP to be detrimental to the DWP’s own commercial interest to have to pay more in Jobseeker’s allowances.
142. As for the factors militating in favour of disclosure, the relevant interest was said by the DWP not to be “great”.
143. First, although the DWP recognised that there is a “public debate” as to the extent to which the schemes assist jobseekers in finding work, there is already a great deal of information available in the public domain. The DWP contends that the information sought to be disclosed “does not significantly assist” the public to participate in that debate. It merely provides information relating to the names of the placement hosts, not as to how many of the jobseekers in question obtained employment as a result of any placements. This point will be revisited below when considering the Commissioner’s specific contentions.
144. Second, it is said that there is already transparency as to the identity of placement hosts for those most directly affected by the schemes: it is pointed out that the jobseekers themselves are given information as to their placement hosts.
145. Third, it is said that the information requested provides little or no information as to how the DWP’s money has been spent on the MWA scheme or on any related programme or as to how the contractors are performing in relation one another.
146. In short, in the DWP’s submission, the withheld information merely confirms what is already in the public domain, namely that the MWA placement hosts were organisations providing benefits to the community, usually through the use of charitable and not-for-profit organisations. In addition, the WE placement hosts within the WP were claimed



by the DWP to include large, and national organisations, such as supermarkets and pharmaceutical retailers, as well as small organisations.

147. Fourth, although the DWP recognises the rights of individuals to take part in peaceful political actions, Ms Elliott refers to the fact that the protests in question (what the DWP calls the self-styled Workfare protestors) at times involve physical intimidation and threats of violence. This is said to be confirmed by the contents of some of the responses described by Ms Elliott and exhibited as part of her witness statement. The DWP contends that it is not in the public interest to provide information that could assist such a campaign particularly where the recipients of such intimidation are small organisations and charities providing benefits to local communities.
148. The DWP draws particular attention to a letter from the Sue Ryder organisation where that organisation explains that they have withdrawn from the DWP mandatory Back-To-Work schemes “with a heavy heart”; despite that, it maintains its belief that the schemes benefit both them and the jobseekers who are hosted.

#### The Commissioner’s submissions

149. In overall terms the Commissioner, at least in his final written submissions, accepts that section 36(2)(c) is engaged but contends that the public interest in disclosure outweighs that in maintaining the exemption.
150. As for section 43(2), the Commissioner states in his final written submissions that he is, at least prior to the appeal hearing itself, unpersuaded by the DWP’s evidence or reasoning in support of its case as to section 43(2) and therefore continues to maintain that that exemption is not engaged. That is subject to the qualification that if at the appeal hearing, once the evidence has been tested and the Commissioner is in turn persuaded by what he has heard about section 43(2), he will inform the Tribunal accordingly.
151. However, despite that qualification, the Commissioner adds in his written submissions that he nonetheless remains “firmly” of the view that even if section 43(2) were found to be engaged, the public interest militates in favour of disclosure. At the heart of the Commissioner’s case lies the contention that there is no overriding public interest in support of the argument that the organisations benefiting from the scheme should be able to benefit anonymously from such schemes. In the words of the Commissioner’s written submissions, if those organisations are content to participate in the schemes or schemes, they should be content to have it known that they do so.
152. The Commissioner observes that in a very recent Court of Appeal decision, namely *R (on the application of Reilly) v Secretary of State for Work and Pensions* [2013] EWCA

Civ 66, the Court of Appeal ruled, in overturning a first instance decision, that the Jobseeker's Allowance (Employment Skill and Enterprise Scheme) Regulations 2011/917 (the Jobseeker Regulations) should be quashed as not satisfying the requirements of the Jobseeker's Act 1995, section 17A under which the Jobseeker Regulations had been made. The Court of Appeal held that the statutory requirements for the Regulations to make provision for schemes of a prescribed description had not been met.

153. It is only fair to observe that the Commissioner, rightly in the Tribunal's view, accepts that it is important to appreciate that the Court of Appeal's decision did not, and does not in any way, attack the three schemes featured in these appeals. The Commissioner points out that the Jobseeker Regulations were therefore unlawful from the outset, including at the time of the requests in these appeals. The Commissioner therefore contends these matters (by which the Tribunal infers that reference is thereby made to the issue of unlawfulness at the relevant time or times) are matters that this Tribunal should take into account.
154. The Commissioner draws particular attention to a specific reference made in the first instance decision to a report by the House of Lords' Committee entitled "Merits of Statutory Instruments' Committee" which had scrutinised the Regulations underlying the three schemes. In the first instance decision, the conclusion of that Committee is set out by the learned judge, citing in terms portions of the said report, namely:
- "We draw the attention of the House to DWP's failure to provide an adequate level of information in its Explanatory Memorandum which inhibits the House's ability to exercise its scrutiny function."
155. With great respect to the Commissioner, the Tribunal finds reference to the Court of Appeal's decision and to the House of Lords' report of little, if any, assistance in relation to the specific issues in these appeals.
156. First, the basis of the Court of Appeal's decision is one of pure statutory construction: see paragraph 27 and in particular, paragraphs 51 to 60 inclusive. The Court accepted that the relevant policy was stated as in the 1995 Act: what was required was that appropriate statements of the types of arrangements to be made were made publicly available and that an individual claimant was aware and was made aware of his or her obligations. The Court of Appeal accepted that the schemes had to be designed to assist claimants to obtain employment. In those circumstances and in the Tribunal's judgment, it is difficult to see how the judgment of the Court of Appeal can be said to throw any light, even as to the comments made by the House of Lords in its report as cited by the judge at first instance.

157. Second, even the quotation as set out above from the learned judge's judgment from the House of Lords' report is self-evidently not specific as to the precise ways in which the alleged inadequacies and the level of information were present. Consequently, the Tribunal finds it impossible to see how reports of any criticisms made by the House of Lords can be said in any way to be relevant to the specific requests considered in these appeals.
158. Third, and related to the above two issues, the Tribunal finds it impossible to see how the mere fact of unlawfulness as to those particular Jobseeker's Regulations as were specifically considered in the *Reilly* case bears upon the requirements and the application of the relevant exemptions in the present appeals. It is clear on any view that the enabling Act and its stated purpose were not impeached in any way in the Court of Appeal's decision. The Court of Appeal stressed in clear terms that the Act's policy was clear and unambiguous.
159. Fourth, the main issues in the present appeals concern the balance to be struck between the competing public interests relevant to the exemptions in play. Even if it was clear what policy the House of Lords Committee was considering, it is to be assumed they could to some extent at least be reflected in the type of negative publicity which the DWP has responded to and explained in relation to the present appeals.
160. Finally, the Commissioner confirmed that the *Reilly* scheme considered a different scheme to the ones considered in the present appeals. The schemes considered in *Reilly* were a sector-based works academy scheme and the Community Action Programme. It therefore follows that the House of Lords Committee was considering a different scheme or schemes from those which feature in these appeals.
161. For all the above reasons, the Tribunal in its judgment finds that the Court of Appeal decision in the *Reilly* case is of minimal relevance, if any.
162. The Commissioner then addressed the two main issues in the appeal being the subject of the DWP's main submissions summarised above.
163. In relation to whether section 43(2) is engaged, the Commissioner repeated his contentions reflected in his Decision Notices that overall the DWP's reading of "commercial" placed what the Commissioner called "unacceptable strain" on the ordinary meaning of that word. The Commissioner reiterated his earlier written contention that paying unemployment benefits is very different to commercial activity, such as selecting, negotiating or entering into contracts, at least as far as the DWP was concerned.

164. However, the Commissioner accepted the fact that so far as contract providers, sub-contractors and placement hosts are concerned, their “commercial” interests are, in principle, capable of being prejudiced. However, he maintained that the additional evidence put in on the appeals does not support the determination that any such prejudice does in fact exist.
165. The relevant approach in the Tribunal’s case law is well established. For present purposes, there must be a demonstration of the relevant causal relationship between the potential disclosure and the prejudice. Next, the likelihood of occurrence of the prejudice must be addressed. This risk is commonly called a real and significant risk, or more particularly as it was put in *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin), “A very significant and weighty chance of prejudice” or a showing that there “may well be” prejudice.
166. Measured against that standard, the Commissioner denies that any such risk in the present case exists at all. There are seven specific contentions made in this respect. First, the Commissioner takes issue with the scope of the surveys addressed by Ms Elliott and carried out by the DWP as compared, it is said, with the overall number of parties actually involved in the schemes.
167. Second, the Commissioner also takes issue with what he claims is the intended purpose of the survey, namely one carried out with a view to justifying what was in effect a preordained conclusion. The Commissioner regards the questions posed in the survey as “leading” and that the exercise had not been “conducive to open any representative feedback”.
168. Third, the Commissioner states that as the DWP itself admits, the feedback is “mixed”. The Commissioner points out that a number of those surveyed envisaged no problem with disclosure.
169. Fourth, the Commissioner also maintained that the arguments for section 43(2) being engaged rely on what he calls “a good number of “ifs””. So, for example, in the eyes of the Commissioner, it is only if disclosure were to be made and if regular donors or customers were to become aware of the criticism and if those organisations were unable to mount a defensible case for their ongoing participation, then some might suffer commercial prejudice, etc. In the Commissioner’s view, there were too many “ifs” between disclosure of the disputed information and the type of prejudice which was required in the present kind of case.
170. Fifth, the Commissioner stated that if the organisations felt comfortable with their participation in the schemes, then they would be well placed to defend such participation, e.g. through public statements.

171. Sixth, the Commissioner stated that he does not regard the type of criticism, if any, which the relevant organisations are likely to face as, at least in the Commissioner's words, "intolerably vitriolic". He claims that organisations, be they companies or charities, are not in most cases "strangers to criticism". Even the Boycott Workfare website representing the major campaign group is not regarded as being "unduly inflammatory" or even particularly severe.
172. The Commissioner then quotes an extract from the Boycott Workfare website in which it describes itself as being involved in the following, namely:
- "We expose and take action against companies and organisations profiting from workfare; encourage organisations to pledge to Boycott; and actively inform people of their rights."
173. Seventh, the Commissioner points out that none of the organisations involved in the schemes are subject to "any form of confidentiality restriction about their participation". The workers involved are able to tell whoever they please. Again, the Boycott Workfare website is said to list currently a large number of organisations participating in the schemes, illustrating that the real potential for such publicity existed at the time of the request in any event.
174. The Commissioner then turns to the general contentions put forward by the DWP as to the manner in which public interest issues are addressed.
175. First, he claims that the focus should be on the public interest expressed explicitly or implicitly in a particular exemption or exemptions in issue. Second, the Commissioner does not agree that the so-called aggregation principle applies to FOIA, as distinct from the Environmental Information Regulations 2004. Third, the Commissioner says that the relevant time for the purposes of determining an appeal is the time of the request. Any reference to the timing of any remedy was not, it was claimed, based on any proper reading of the *OGC* case.
176. As for section 36(2), the Commissioner accepts that that exemption is engaged. No challenge is made as to the Ministerial opinion. The Commissioner does however take issue with the manner in which the DWP has characterised its claim that prejudice would result at least as expressed in its grounds of appeal, namely that disclosure of the information which is sought "would have been likely to lead to the collapse of the MWA scheme, with incalculable losses to the taxpayers and many thousands of persons in long term unemployment who are supported by the scheme". The Commissioner further characterises the DWP's case as representing a claim that the scheme can only operate if identities of the participating organisations are kept secret.

177. The DWP takes issue with the characterisation of its case put forward in this way by the Commissioner.
178. The Tribunal regards the evidence and submissions now put in in the appeals as being targeted on the exemptions which are in issue. Consequently, the Tribunal is not minded to address the issue of aggregation, either in relation to the appeals or in any more general way. In addition, as will be seen, the Tribunal's conclusions relate to events that occurred at or around the time of the requests.
179. The Commissioner then points to seven particular factors which he says militate in favour of disclosure in terms of the relevant public interest.
180. First, the Commissioner claims that there is "unarguably" a strong public interest in the schemes. He places reliance on the media coverage, as well as the campaigning which has been referred to, although he also refers to the *Reilly* decision and the House of Lords Committee's observations.
181. Second, the Commissioner claims that the schemes involve private sector companies being paid "substantial sums from the public purse". He notes in particular that while the hosts are not paid by the Government, the providers are so paid.
182. Third, he claims that the Government imposes minimal oversight on the contract providers' choice of placements. Disclosure would therefore enhance transparency about placement decisions. Disclosure would in turn mean that the public could scrutinise more easily the relative effectiveness of performance by the contract providers.
183. Fourth he claims that disclosure would demonstrate where smaller local providers were being used and thus demonstrate how communities have benefitted, as this is one of the key rationales for the MWA.
184. Fifth, he claims that the fact that individual claimants can discuss their placements with Job Centre Advisers did not "meaningfully" contribute to public transparency. It is not enough, the Commissioner claims, for the public to know what kinds of employers and organisations participate in the schemes: it is important in other words to know which particular organisations are so participating.
185. Sixth, the Commissioner points to the media articles and campaigning websites as being lawful expressions of political views. The Commissioner claims that they appear to encourage peaceful consumer action and therefore there is public interest in the debates these campaigning groups foster.

186. Finally, the Commissioner reiterates the fact that there is a public interest in consumers and donors of charities being as informed as possible about the activities of the organisations they support.

The Tribunal's conclusions

187. The Tribunal's conclusions address the two exemptions which feature in these appeals. The Tribunal is entirely satisfied that on the evidence it has heard and seen and in the light of the parties' submissions, section 43(2) is not engaged. This is principally on the ground that the requisite threshold of the degree of prejudice has not been satisfied. The Tribunal however agrees that section 36(2) is engaged but finds that the public interest balance militates strongly in favour of disclosure. The Tribunal has also concluded that, even if section 43(2) were engaged, the public interest balance would again favour disclosure.

188. As for section 43(2), the Tribunal is satisfied that the burden to demonstrate the requisite degree of prejudice is borne by the DWP. In the Tribunal's judgment, this has not been contested by the DWP. The requisite standard has been set out above. On any view, the burden is to show that the risk of prejudice is real, actual or substantial.

189. In the case of the DWP, the Tribunal is equally satisfied that any prejudice that might be said to have suffered is of a financial rather than of a commercial nature. This issue has been addressed above. The Tribunal accepts the Commissioner's contentions on this point. Put shortly, the defraying of welfare payments is not a commercial activity.

190. As the Commissioner also stresses, and indeed as the DWP itself apparently accepts in these appeals, there has to be a comparison between the world as it stood prior to disclosure of some of the names into the public domain which are otherwise sought by the requests and the world as it stood in the wake of such disclosure.

191. The Tribunal is satisfied that on the evidence it has seen and heard, particularly in the form of the lists published by the Boycott Workfare website coupled with a review of a number of specific newspaper articles, it can quite properly be said that media coverage, and in particular media comment, were both inevitable. At the relevant times, and no doubt since, there was an inherent risk that a placement provider would be identified. At the time of the requests, there were 200 or so such names in the public domain. The fact that some of the disclosures were attributable to a prior FOIA request or number of requests, in the Tribunal's view, is totally immaterial.

192. It follows that the best way to judge whether there was the requisite degree of likely prejudice is therefore to analyse what actually happened in the particular cases that are put before the Tribunal. The critical question in the Tribunal's judgment is to see

whether the fact of being named had in any of such cases led to a withdrawal from the scheme or schemes. To ask who pulled out because of media coverage is to ask the wrong question. There has been reference to a number of Guardian articles, in particular two from 20 November 2011 and 3 February 2012. The first deals with the *Reilly* matter and the experiences of Ms Reilly at Poundland. There are a number of specific references to Tesco in that article. The second article deals with the case of Waterstones' involvement with unpaid work placement.

193. Both articles are entirely unremarkable. They involve no more and no less than standard criticism of a scheme or schemes that was or were controversial in any event. The same observation can be made about any and all other blogs such as the Boycott Workfare blog.
194. The Tribunal has seen nothing to justify any conclusion, either as contended for by the DWP or at all, that there has been anything at all which has arisen since the naming of the published entities to show any degree of what could be called media frenzy. In particular, the Tribunal has seen nothing in the evidence before it to show that even small charities involved in the schemes have come in for criticism. Tesco's position was described, rightly in the Tribunal's view by the Commissioner, as self-inflicted. In this respect, the Tribunal was shown a further article in The Guardian dated 18 February 2012 headed "Tesco under pressure to withdraw from unpaid work experience scheme" which clearly justified that analysis.
195. At most, only seven out of the 200-odd disclosed names in the public domain can be said to have come in for criticism which could arguably be said to have resulted in withdrawal. Two names stand out, namely TK Maxx and Sainsbury's. They are major institutions and there is no support for the contention that the fact of their being named resulted in any meaningful prejudice. Reference was also made to the case of Oxfam. However, in Oxfam's case, it is clear it reassessed its own position based on what it called ethical considerations or reconsiderations. The DWP attempted to suggest that this may not have been the real reason for Oxfam's withdrawal, referring to 'not knowing what went on in the Boardroom' but provided no evidence of any reasons for Oxfam's withdrawal other than its own publicly stated one.
196. Another three case studies within the seven referred to above involved three charitable organisations, namely PDSA, Sue Ryder and The Salvation Army. All three feature in the lists which are available in the public domain. In the year since the disclosure of the names of those three charities, The Salvation Army is still, as it was put in the appeal "holding the line". As for the other two, what needed to be shown was the critical causal link between the act of naming them and any consequential commercial prejudice or real risk of commercial prejudice. The Tribunal is not satisfied that the causal link has been demonstrated. The first two of the three charities referred to above can rightly be



termed as being, to some extent, vulnerable. It is to be expected that some charities find it difficult if not impossible to defend themselves against the actions of Boycott Workfare as robustly as the Tescos of this world. The Tribunal finds that even if it could be said that these two charitable entities did not otherwise address any media attention they attracted, there is no clear evidence that as a result of being named they suffered or were likely to suffer commercial prejudice.

197. The above observations are very compelling in the Tribunal's judgment and necessarily colour the manner in which the survey conducted by the DWP and described by Ms Elliott and summarised above should properly be viewed. Even the DWP accepted that the evidence did or should consist of an analysis of what has actually occurred after previous disclosures; it necessarily follows equally that the speculative views of contract providers cannot and should not be given the same weight as real case studies of previous disclosures. It is said above that only seven at most can be said to have come in for criticism out of the 200-odd names which have been disclosed. The major members of that group of seven have been dealt with in sufficient detail above. The Tribunal is particularly impressed by the submissions made by the Commissioner that it has not been provided with any evidence from those who could be called middle men with respect to any of the seven case studies which have been referred to. In other words, the DWP provided no evidence from those affected about why they had withdrawn.
198. In these circumstances, the Tribunal is not prepared to put anything like as much weight on the survey or surveys conducted by Ms Elliott as it does on the facts emanating from the case studies which reflect real events that occurred in the context of actual disclosure. In addition, it would make the following findings in relation to the surveys themselves.
199. First, the Tribunal is, on balance, satisfied that in the light of the questionnaire which was put out by the DWP and which is annexed to this judgment, it can be said with some force that the survey itself and the relevant questions it contained were at least prompted by a need felt by the DWP to bolster its own case. There are two paragraphs in the relevant briefing which justify that interpretation. The first is where in the first paragraph on the second page, there is a clear reference made to elicit evidence to show that release "may impact negatively upon the programme", and the second is a third bullet point from the end of that passage which repeats much the same intention.
200. Second, in the view of the Tribunal, the results of the survey represent responses which are, even on the basis of what is said in this judgment, distinctly unrepresentative and mixed.

201. The Tribunal would agree with the Commissioner that a significant number of responses are at most lukewarm. The Tribunal is not minded to revisit this in any detail at this point. However, it accepts the Commissioner's contention referred to above that most, if not all, of the answers provided pursuant to the surveys reflect a high degree of conditionality reflecting the various "ifs" which the Commissioner highlighted in his submissions. Those who do express themselves more forcefully constitute a very small number. They are referred to in that part of this judgment which sets out the contents of Ms Elliott's written evidence and are, in the Tribunal's view, necessarily selective. In particular, although there is the occasional reference to intimidation and threats of violence, no specific evidence is given as to the manner in which any such events might have occurred.
202. Third, as indicated above the prospective views of the responders cannot be afforded the same weight as the evidence which emerges from the case studies.
203. Fourth and as a necessary corollary, the Tribunal did not find the entirety of the survey as satisfying the need to demonstrate that the envisaged prejudice regarding commercial harm was real, actual or of substance.
204. Fifth, a number of responses involved a clear expression to the effect that publicity would if anything be welcome, albeit publicity primarily of a positive kind. In his closing submissions, Counsel for the DWP was at pains to urge the Tribunal to ensure that it accurately understood and appreciated the relevant evidence in respect of the number of organisations who had withdrawn as a result of previous public identification and to accept that there had been a significant number of withdrawals in addition to the small number which, it was felt by Counsel for the DWP, the Tribunal had appeared to focus on. The Tribunal heeds Counsel's caution and is satisfied that the evidence presented to it has been understood in its entirety. The observation made by the Tribunal at the hearing was that the fact of withdrawal of a significant number of organisations was not, in itself, proof that such withdrawal was necessarily caused by the naming of those organisations in public and that, in the absence of such proof, the total number of withdrawals was less relevant.
205. In the circumstances, the Tribunal is of the view that overall it could properly be said of the survey or surveys that only in the case of a few responses can it be contended that there is any real fear of adverse media attention. However, the essential question is the point already alluded to, namely whether the mere naming of the relevant parties is likely to cause risk of commercial prejudice which is claimed. Quite apart from what the Tribunal regards as a paucity of compelling economic evidence to such effect the Tribunal is of the view that overall there is insufficient evidence of the requisite degree of the prejudice referred to in section 43(2).

206. For all the above reasons, the Tribunal finds that the DWP has not discharged the burden of showing that section 43(2) is engaged in relation to any of the requests.
207. As indicated at the outset of this section dealing with its conclusions, the Tribunal now turns to a consideration of the competing public interest. The Tribunal is mindful of six principal considerations.
208. First, it is well established that the relevant time or times in this respect is the time or times of the requests. There may be some minor flexibility in appropriate cases, but the focal point remains the time of the relevant requests.
209. Second, and again in accordance with well established principle, the Tribunal must consider whether the Commissioner reached the right decision as at the above time or times. It is only in exceptional cases that this principle would not apply when the Commissioner may have a discretion to consider, on the basis of subsequent evidence, whether he should require disclosure: see generally *IC v HMRC and Gaskell* [2011] UKUT 296.
210. Third, insofar as any applicable exemption is concerned, the attention must always be directed to those public interests which are reflected in or exhibited by the specific exemption in question. This is not to say that in the case of the two exemptions here in question the same interest or interests may not apply to both. The question is whether both sets of interest properly relate to the exemption or exemptions in play: see generally *Hogan v IC* EA/2005/0026 and 0030 and *Chichester DC v IC* (GIA/1253/2011); [2013] Info LR 38.
211. Fourth, it is not conclusively established that the notion of aggregation applies to requests under FOIA. The Tribunal pauses to note that it sees no necessity in the present appeals to have regard to this notion or concept in any event.
212. Fifth, at least so far as section 36 is concerned, as it is often put, the scales stand empty at the outset of the analysis: see generally *OGC v IC* [2010] QB 98 which deals with section 35 of FOIA. In the Tribunal's judgment, the same approach applies to section 36.
213. Coupled with this consideration is the need to recognise that no account should or can be taken of what might be seen as private interests. Again, the Tribunal pauses here to note that in these appeals, the contractors' and placement hosts' interests are effectively private interests.
214. Sixth and finally, it follows from the above fifth consideration that even if the scales are evenly balanced, disclosure should be ordered. The Tribunal is firmly of the view that in these appeals the scales are weighed appreciably in favour of disclosure.

215. As for those elements which could be said to militate in favour of maintaining both exemptions and reflecting the considerations listed above, the Tribunal takes into account the following factors. First, it takes into account the relatively low weight which can be attributed to the survey or surveys conducted by the DWP as against what it regards as the far more persuasive evidence relating to the case studies. Second, it takes into account the fact that big commercial organisations such as Tesco can be expected to have a thick skin should their names be disclosed. In this connection it also takes into account the position of what have been called the smaller, more vulnerable charitable organisations. However, as to the latter, as has been said, the Tribunal finds there to be no evidence which compels a finding in favour of either exemption militating in favour of non-disclosure in these appeals. In the case of what are controversial programmes, again as has been pointed out, big firms can be expected to demonstrate suitable robustness, whilst smaller charities who are perhaps less immune to criticism will inevitably suffer economic uncertainty for a variety of reasons, including loss of donations and a variable workforce. However, at least one charity, namely The Salvation Army, has remained within the schemes.
216. As against the above considerations which could be said to militate in favour of maintaining the above exemptions, the following factors, in the Tribunal's judgment, justify the Tribunal's conclusions that there should be disclosure.
217. First, the existence and facts surrounding the case studies described earlier in this section show that no prejudice of any substance has been experienced.
218. Second, the schemes each and all involve a considerable amount of public money.
219. Third, in her witness statement, Ms Elliott, at paragraphs 7 and 8, confirms that the DWP does not specify what a placement should be or should consist of in any particular case, but that it does expect that every placement offers persons the opportunity to gain fundamental work disciplines, as well as benefiting the local communities. She adds that the Work Programme allows providers to deliver their support "without undue pressure" from the Government. Counsel for the Commissioner called that approach "a light touch", and the Tribunal agrees. In the Tribunal's judgment, it also increases the need for public scrutiny.
220. Fourth and related to the above issue is the need for the public to be in a position to make informed decisions about how a scheme operates, if only given the fact that there is a resultant community benefit.
221. Fifth, account should be taken of existing debate in the media, albeit an informal one, but one which is clearly addressing the allegedly controversial nature of the schemes.

222. Sixth, it is of importance for the public to see and examine how the schemes and those who participate in them (placement providers and contractors) perform.

Conclusion

223. For all the above reasons, the Tribunal dismisses the DWP's appeals and upholds the Decision Notices of the Commissioner.

Signed:

**David Marks QC**  
**Judge**

Dated: 17 May 2013