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

ON APPEAL FROM A DECISION OF INFORMATION COMMISSIONER

BETWEEN:

DEPARTMENT FOR WORK AND PENSIONS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

APPELLANT'S GROUNDS OF APPEAL

INTRODUCTION

1. This is an appeal under section 57 of the Freedom of Information Act 2000 ("FOIA") by the Department for Work and Pensions ("DWP") against a decision of the Information Commissioner's Office ("the ICO") contained in a Decision Notice dated 30 August 2012 (reference FS50438037 - "the Decision Notice").

2. These submissions are structured as follows:
   (1) Grounds of Appeal (paragraph 3);
   (2) Factual Background and Original Request (paragraphs 4 to 29);
   (3) Legal Framework (paragraphs 30 to 36);
   (4) Submissions (paragraphs 37 to 46);
   (5) Conclusion (paragraph 47).

(1) GROUNDS OF APPEAL

3. The Appellant submits that in issuing the Decision Notice, the ICO erred in:
   (1) Concluding that section 43(2) of FOIA was not engaged.
   (2) Concluding that the public interest weighed in favour of disclosing the withheld documents, notwithstanding that they were subject to the exemption contained in 36(2)(c) of FOIA. In particular, the ICO overestimated the public interest in

favour of disclosure and/or underestimated the public interest in favour of maintaining the exemption.

(2) FACTUAL BACKGROUND AND THE REQUEST FOR INFORMATION

General Background

4. It is helpful to understand the general background to this request. For that purpose, a brief account is set out of:
   (1) Mandatory Work Activity;
   (2) Work Experience;
   (3) The Work Programme; and
   (4) The Controversy.

Mandatory Work Activity

5. Mandatory Work Activity ("MWA") was first introduced in May 2011 and continues to this day. The descriptions of MWA that follow are phrased in the present tense, as the MWA is ongoing, but (save where expressly stated otherwise) those descriptions were equally true at the time of the request. MWA is designed to give extra support to a small number of Jobseeker's Allowance claimants who would benefit from a short period of activity. Typically, these are people who have been out of work for a long time. The purpose is to help them re-engage with the system, refocus their job search and gain valuable work-related disciplines, such as attending on time and regularly, carrying out specific tasks and working under supervision.

6. A MWA placement arises when a Jobcentre Plus adviser considers it appropriate for a particular Jobseeker's Allowance claimant. Jobseeker's Allowance claimants who are participating in the Work Programme or other contracted provision (see below) are not referred to MWA.

7. Whilst participating in MWA, claimants continue to receive Jobseeker's Allowance and are subject to the normal conditionality for receipt of Jobseeker's Allowance. Failure to complete a MWA placement without good cause can result in the sanction

of Jobseeker's Allowance for three months. This can rise to six months for a second breach.

8. MWA placements last 4 weeks, at up to 30 hours a week, and deliver a contribution to the local community. As placements must be of benefit to the local community, they tend to be with charitable organisations. They are not intended to displace other jobs in the economy or host organisations. Some claimants agree with their Jobcentre Plus adviser that they are only seeking work for a small number of hours. These claimants are referred to an MWA placement that, combined with time to look for work, is equivalent to 30 hours a week.

9. MWA is available in all areas of Great Britain. For these purposes, Great Britain is divided into eleven Contract Package Areas ("CPAs") – e.g. CPA 1 is the South East (not including London) and CPA 2 is the South West. The DWP has entered into contracts with contract providers for each CPA.

10. These contract providers then source the placement from a local placement provider. The DWP does not specify what the placement should be, but does expect that every placement will offer people the opportunity to gain fundamental work disciplines, as well as being of benefit to local communities. Contract providers are paid under the terms of their individual MWA contracts, and any monetary arrangement between contract providers and their placement providers is a commercial matter between themselves. Contract providers are responsible for reasonable travel, childcare and additional support costs while the claimant was undertaking a placement. Contract providers complete a reference for everyone that has completed MWA, showing what they have done and the progress they have made, so prospective employers would have an applicant who could demonstrate that they possess work-related disciplines.

11. At the time of the request, there were approximately 19,000 places available for MWA, at a cost to the tax payer of £8 million a year. The figures relied on by the ICO at §47(iii) of its decision were wildly inaccurate – quoting sums that were more than 20 times higher than the actual costs of the MWA programme. It is not clear where the ICO got these figures from but it did not check them with the DWP.

12. From May 2011 up to and including February 2012 there have been 49,640 referrals to MWA placements. Of those that were referred, 16,790 people started on MWA during the same period.

Work Experience

13. The Work Experience ("WE") programme was launched on 24 January 2011 for 18 to 21 year-old Jobseeker's Allowance claimants who had been on benefit for 13 weeks. Originally funded for 20,000 work experience places over two years, the Budget 2011 announced the national rollout of work experience for young people between 18 and 24 years-old, with an additional 80,000 placements for young people to March 2013. This created 100,000 placements in total. A further 250,000 places were announced on 25 November 2011 as part of the Youth Contract package of measures, to be delivered by March 2015.

14. The purpose of WE was, and is, to help young unemployed people, with little or no work experience, get valuable work-based skills through a placement with a local business. WE also provides young unemployed people with a potential new route to getting onto an apprenticeship.

15. Like MWA, work experience is something that a Jobcentre Plus advisor can recommend for a particular Jobseeker's Allowance claimant. WE is targeted at the younger and more inexperienced Jobseeker's Allowance claimant (typically under 25), whereas MWA is targeted at older claimants who may have been out of work for a long time.

16. The Prime Minister and Deputy Prime Minister announced on 12 May 2011 that the WE programme would be opened to young people who are 16 or 17 years-old who are receiving Jobseeker's Allowance in recognition that further support is required for this particular age group.

17. WE offers eligible unemployed people between two and eight weeks work experience, with an optional extension to up to 12 weeks if the host business decides they would like to offer the participant an apprenticeship and that offer is accepted.

18. At the time of the request, if someone accepted a place on the WE programme and failed to attend or withdrew after completing the first week, without good reason, they could receive a sanction in relation to their Jobseeker's Allowance. On 1 March 2012, sanctions in relation to attendance were removed and participation in WE is now entirely voluntary. However, a sanction may still be applied where a person is asked to leave a WE placement due to gross misconduct.

The Work Programme

19. The Work Programme was launched on 10 June 2011. Its purpose is to help those in danger of becoming long term unemployed. The Work Programme replaced much of the complex range of employment support previously on offer including the New Deals, Employment Zones and Pathways to Work.

20. Work Programme providers are given the freedom to design support based on individual and local need. They are paid primarily for supporting claimants into employment and helping them stay there for longer than ever before, with higher payments for supporting the hardest to help. Providers are paid partly out of the benefit savings they help to realise when they support claimants into sustained employment.

21. Jobseeker's Allowance claimants are referred to the Work Programme by Jobcentre Plus advisors. Once referred, claimants remain on the Work Programme for two years or until the provider had claimed all available payments. Any claimant who completes two years on the Work Programme without finding employment returns to Jobcentre Plus for further support.

Controversy and 'Workfare'

22. At the time of the relevant request for information, a number of campaign groups were actively seeking to stop MWA, WE and the Work Programme - which they often referred to collectively as 'workfare'. Although MWA, WE and the Work Programme were quite separate programmes, with different aims and serving different

kinds of claimants, campaign groups and the media have often failed to distinguish between them. These campaign groups obtained the names of employers participating in these schemes (often through FOIA requests) and then used that information to target those employers and coerce them into leaving the scheme (be it MWA, WE, or the Work Programme), e.g. by boycotting their stores, organising protests, writing articles and blogs criticising them in vehement terms and (in the case of charities) pressurising donors to withdraw their donations.

23. By the time the request for information in this case was being considered, this controversy had reached the mainstream press. Some newspapers published articles which criticised organisations that participated in the MWA, WE and the Work Programmes. For example:

(1) On 16 November 2011 the Guardian published an article entitled '*Young jobseekers told to work without pay or lose unemployment benefits*'.[1] The article described Britain's jobless as being sent to work for supermarkets and budget stores 'for up to two months for no pay and no guarantee of a job'. The article went on to identify Tesco's as one of the placement providers and point out that Tesco's had made pre-tax profits of £3.5bn. The article indicated that a legal challenge was being brought against the MWA programme on the grounds that it was 'forced or compulsory labour'. Sainsbury's and Poundland were also identified.

(2) On 3 February 2012 the Guardian published an article entitled '*Waterstones ends unpaid work placements after investigation*'[2] Waterstones were quoted as saying that they had ended their participation after the Guardian had 'highlighted the practice'. Other employers were identified and participants were quoted as saying that they had done 'grunt work' and that 'The real benefactors of this scheme are the companies who receive millions of pounds worth of labour absolutely free of charge'.

(3) On 16 February 2012, the Guardian published an article entitled '*Tesco under pressure to withdraw from unpaid work experience schemes*'.[3] The article spoke of Tesco coming 'under increasing pressure from customers to stop participating

[1] http://www.guardian.co.uk/society/2011/nov/16/young-jobseekers-work-pay-unemployment
[2] http://www.guardian.co.uk/society/2012/feb/03/waterstones-ends-unpaid-work-placements
[3] http://www.guardian.co.uk/business/2012/feb/16/tesco-unpaid-work-experience-scheme

in government unemployment schemes which allow the company to take jobseekers to stack and clean shelves for up to eight weeks without paying them'. The article went on to identify a private employer that had made 'over £3.5bn in profit last April' and had 'taken on 1,400 such claimants in the last four months' amounting to '168,000 hours of unpaid work if all participants in the scheme work for 30 hours a week'. The article referred to web pages being set up for 'outraged customers', to the condemnation of unions, and quoted Boycott Workfare as describing the programmes and 'modern-day slave labour'. The article noted that Sainsbury's had recently pulled out of all mandatory work programmes and Tesco's had pulled out of MWA.

(4) Later on 16 February 2012 the Guardian published another article entitled '*TK Maxx joins retailers quitting unpaid work scheme for jobseekers*'.[4] The article included a quotation from TK Maxx that they did not support compulsory non-paid work experience'. The article also pointed out that Sainbury's and Waterstone's had pulled out from such schemes.

(5) On 22 February 2012 Polly Toynbee wrote an article in the Guardian entitled '*Protest really does work – just look at Tesco and workfare*'.[5] The subheading was '*Get behind a precise, winnable issue such as workfare and protesters can give the government the bloody nose it deserves*'. It was accompanied by a photograph of campaigners outside Tesco's. The article pointed out that 'companies are highly sensitive about their image' and said 'what a joy to see the rapid retreat of others from workfare – Sainsbury's, Waterstones and Matalan among the fastest to escape'. Ms Toynbee went on to say 'Workfare is transparently unfair to most people, substituting slave labour for big companies.'

24. It was the assessment of the DWP, at the time it was considering the request, and conducting the internal review, that the commercial pressure from the campaign groups and the negative publicity in some sections of the mainstream media would be likely to cause existing placement providers to withdraw from the MWA scheme and to deter other placement providers from joining. Previous targeted campaigns had resulted in the withdrawal of providers from MWA and WE. Further, the DWP considered that, of all the workfare programmes being described externally as "work

[4] http://www.guardian.co.uk/society/2012/feb/16/stores-quit-unpaid-work-schemes
[5] http://www.guardian.co.uk/commentisfree/2012/feb/22/protest-tesco-workfare

fare schemes", the MWA programme was the most likely to be influenced by pressure from campaign groups and negative publicity, given that MWA programmes were generally provided by charitable organisations, some of them small and local, and the placements were mandatory.

25. This assessment was borne out by what happened, both at the time when the DWP was considering the request, and later- see the articles above. Although some of these organisations may have offered alternative explanations for their actions, it is the assessment of the DWP (and the media) that most of the organisations withdrawing from the MWA and WE programmes did so as a direct result of the pressure put on those organisations by campaign groups and the mainstream media.

The Request

26. On 25 January 2012 Mr Zola requested the following information from the DWP:

> *"the names of the placement providers for [MWA] during 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."*

27. In a letter dated 8 February 2012, the DWP refused to provide the information in reliance on section 43 of FOIA. Mr Zola requested an internal review and on 29 February 2012 the DWP confirmed its original decision.

28. Mr Zola complained to the ICO. In the course of the investigation, the DWP obtained the opinion of Mr Grayling MP, the Minister for Employment, that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs. As a result, on 1 May 2012 the DWP indicated that it would also be relying on s. 36(2)(c) of FOIA.

29. In the Decision Notice the ICO held that:

(1) Section 43 of FOIA was not engaged because the ICO could not 'verify' that the organisations which had withdrawn from the various programmes above had done

so as a result of the negative publicity and as a result the DWP's arguments in relation to prejudice were 'speculative'.

(2) Section 36(2)(c) of FOIA was engaged but the public interest in favour of disclosure outweighed the public interest in maintaining the exemption. Further detail of the reasoning is set out below.

(3) LEGAL FRAMEWORK

30. Section 1 of FOIA provides as follows:

> ***"1.— General right of access to information held by public authorities.***
>
> *(1) Any person making a request for information to a public authority is entitled—*
>
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
>
> *(b) if that is the case, to have that information communicated to him.*
>
> *(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."*

31. Section 2 of FOIA provides as follows:

> ***"Effect of the exemptions in Part II***
>
> *...(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
>
> > *(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
> >
> > (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information..."

32. Section 36 of FOIA provides:

> ***"36.— Prejudice to effective conduct of public affairs.***
> *(1) This section applies to—*
> *(a) information which is held by a government department ... and is not exempt information by virtue of section 35...*
> *(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—*
> ...

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

33. Section 43(2) of FOIA provides:

"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)."

34. Neither of the material parts of sections 36 and 42 confers an absolute exemption (cf. 2(3) of FOIA).

35. Any person has the right, under section 50 of FOIA, to apply to the ICO for a decision as to whether their request for information has been dealt with in accordance with the requirements of Part I of FOIA. Such a person has a right, under section 57 of FOIA, to appeal the ICO's decision notice to the FTT.

36. The FTT's powers on appeal are set out in section 58 of FOIA:

*"58.— **Determination of appeals.***
(1) If on an appeal under section 57 the Tribunal considers—
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

(4) SUBMISSIONS

(1) Section 43(2)

37. The ICO erred in:

(1) Drawing a false distinction between 'commercial' and 'financial' interests;

(2) placing the burden of proof, for demonstrating a likelihood of prejudice, too high; and

(3) ignoring important evidence.

38. Further and in any event, the Tribunal can and should review the findings of fact made by the ICO in light of the new evidence which the DWP intends to present.

(1) Drawing a false distinction between financial and commercial interests

39. The ICO wrongly held, in §20 of their decision, that higher welfare costs would not prejudice the commercial interests of the DWP, on the grounds that such costs were a 'financial' rather than a 'commercial' interest. This is a distinction without a difference. It is impossible to understand why one sort of expense (i.e. paying more to contract providers) should be classed as a 'commercial' interest, but another form of expense (i.e. paying more to Jobseeker's Allowance claimants) should not be classed as a 'commercial' interest.

(2) The burden of proof

40. The DWP does not take issue with the general statement of principle in *John Connor Press Associates Ltd v Information Commissioner* (EA/2005/0005) cited in paragraph 28 of the ICO's decision – i.e. that the chance of prejudice being suffered must be 'more than a hypothetical possibility' and must be a 'real and significant risk'.

41. However, the ICO erred in its purported application of that principle:

(1) The ICO wrongly concluded that it was necessary to have direct evidence from the companies concerned (see §§29 and 33 of the ICO's decision). There is no reason in law why evidence from campaign groups' websites and mainstream media should not, in itself, be sufficient to demonstrate a real and significant risk of prejudice.

(2) The ICO wrongly concluded that the evidence of prejudice should go into a very high level of detail. In §28(i) and (ii) the ICO stated that it, in order to meet the test in s. 43 of FOIA, 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 payments the DWP would need to make as a result. There is no basis in law for demanding such detail. It is sufficient if the DWP can demonstrate that there was a real risk of some organisations withdrawing and there being an effect on

payments it had to make. There is no need to go through the speculative process of estimating the precise amount of organisations that would withdraw or the precise amount of money that would be lost. The DWP considers that the withdrawal of organisations as a result of negative campaigns/press is sufficient to indicate that the MWA programme will be affected by such campaigns, particularly given MWA is most susceptible due to nature of providers. Negative publicity on any of the schemes would probably affect the others.

(3) Ignoring relevant evidence

42. The ICO refused to take into account media reports that post-dated the request for information. That was an error of law. Some of the reports pre-dated the DWP's response to the request and were obviously relevant as a result. Even the reports that post-dated the DWP's consideration of the request were still relevant - those reports were evidence to support the DWP's assessment that publication of the names of MWA placement providers would lead to several placement providers' withdrawing. In other words, they were evidence to show that the risks that the DWP had identified, in its response to the request, were in fact 'real and significant'– these reports relate to all the so called 'workfare' programmes, not just MWA and, for the reasons given above, MWA was probably the most vulnerable to campaigning and media pressure.

(4) Review findings of fact

43. Further and in any event, the Tribunal can review the findings of fact made by the ICO. The DWP intends to produce new evidence to demonstrate that it was right to apply section 43(2) of FOIA.

<u>(2) Section 36(2)(c)</u>

44. The ICO correctly accepted that the exemption under section 36(2)(c) of FOIA was engaged in relation to the withheld information. The key issue was, and is, whether or not, at the material time, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

45. The ICO greatly underestimated the public interest in maintaining the exemption because, for the reasons given above, it ignored relevant evidence and placed the burden of proving prejudice too high. When all the relevant evidence is considered, it will be clear that the public interest in maintaining the exemption was very great indeed – put simply, disclosure would have been likely to have led to the collapse of the MWA scheme, with incalculable losses to the taxpayer and many thousands of persons in long-term unemployment who are supported by the scheme.

46. On the other side of the balance, the ICO greatly overestimated the public interest in disclosure for the following reasons:

(1) The kinds of employers and organisations who were participating in the MWA, WE and placements arranged by Work Programme providers were already in the public domain at the time of the request. The 'Boycott Workfare' website already provided a list of the companies and organisations whose participation in these schemes/programmes they had uncovered. It was clear from that list that charities, supermarkets, fast food restaurants, drug stores and other such high street stores were participating.

(2) It is not significantly in the public interest to know which particular organisations were participating in each area. Such identifying information does not significantly enhance the transparency of the MWA scheme or add to the public debate around mandatory or even voluntary placements. Instead, it allows campaign groups to target those employers and pressurise them into withdrawing from MWA or other schemes/programmes like WE.

(3) Because MWA placements have to be of benefit to the local community, MWA placement providers tend to be charitable organisations, some of which could be small and local and therefore be particularly vulnerable to pressurisation from aggressive campaign groups.

(4) The ICO's understanding of the public expenditure on MWA (at §47(iii) of their decision) was wildly inaccurate, for the reasons given above. As a result, it grossly over-estimated the level of funding at stake. In any event, providing the

names of placement providers gives little or no information about how that public funding is spent – none of the public expenditure on MWA is given to the placement providers: they are not paid for providing placements.

(5) Disclosure of the names of placement providers will provide no information about 'the shortfall and differences in performance between contract providers'. The names of placement providers tells the public nothing about the performance of contract providers.

(6) It is extraordinary and ironic that, in §47(vii)[6] and (vii) [sic], the ICO places the 'costs to society of unemployment' as a factor weighing in favour of disclosure. For the reasons given above, disclosure of the requested information is likely to seriously harm, if not completely undermine, one of the Government's key proposals to tackle unemployment. The costs to society of unemployment should be a heavy (even decisive) factor weighing <u>against</u> disclosure.

(5) CONCLUSION

47. Accordingly, for any or all of the reasons set out above, the Appellant submits that the ICO did not act in accordance with the law, and/or wrongly exercised his discretion, in ordering the disclosure of the withheld documents.

RORY DUNLOP

27 SEPTEMBER 2012

[6] It is notable that the ICO misunderstood the nature of MWA in the first §47(vii) – the ICO wrongly thought that MWA was concerned with 16-24 year olds when in fact MWA aims to help all jobseekers who may benefit from re-engagement with the labour market and through obtaining the work disciplines required.