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 SKELETON ARGUMENT

- References in square brackets are to Open Bundle 1, save where they are preceded by 'CE' in which case they are references to exhibits and page numbers in Open Bundle 2

- Essential reading: the Decision Notices; and Clare Elliott's witness statement and exhibits CE3 and CE4

INTRODUCTION

1. These are three joined appeals under section 57 of the Freedom of Information Act 2000 ("FOIA") by the Department for Work and Pensions ("DWP") against decisions of the Information Commissioner's Office ("the ICO") contained in Decision Notices dated 30 August 2012 (reference FS50438037 - "the Zola Decision Notice"), 1 October 2012 (reference FS50438502 - "the Kelly Decision Notice") and 1 October 2012 (reference FS50441818 - "the Naysmith Decision Notice").

2. These submissions are structured as follows:

(1) Grounds of Appeal (paragraph 3);

(2) Factual Background and Original Requests (paragraphs 4 to 41);

(3) Legal Framework (paragraphs 42 to 49);

(4) Submissions (paragraphs 50 to 89);

(5) Conclusion (paragraph 90).

(1) GROUNDS OF APPEAL

3. The Appellant submits that in issuing the Decision Notices, the ICO erred in:

(1) Concluding that section 43(2) of FOIA was not engaged; and

(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, before moving on to the particular requests. 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 requests. 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.1

8. MWA placements last 4 weeks, at up to 30 hours a week, and deliver a contribution of community benefit. As placements must be of benefit to the local community, they tend to be with charitable or other not-for-profit organisations. It is a contractual obligations that the MWA placements do not displace other jobs in the economy or host organisations. They are not for supermarkets, pharmaceutical retailers or other such commercial organisations, who would otherwise need to employ someone. MWA placements can provide training and valuable work-related disciplines to jobseekers who would benefit from a short period of activity. They allow charitable or other not-for-profit organisations to supplement their other resources (e.g. public volunteers) in order to increase the contribution to the community that they otherwise might not be able to make.[2]

9. 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 Mandatory Work Activity that, with time to look for work, is equivalent to the same number of hours as required by their Job Seekers Agreement.

10. 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

[1] On 22 October 2012 a revised job seeker's allowance sanctions regime was introduced. The requirements placed on claimants have not changed but the duration of sanctions has. The revised sanctions regime has three tiers: high level sanctions will apply for non compliance with requirements directly linked to employment and this includes MWA For these failures the sanction periods will be: 13 weeks for the first failure; 26 weeks for a second failure within a year of the previous one; and 156 weeks (3 years) for a third (or further) failure within a year of a previous failure which resulted in a 26 (or 156) week sanction.

[2] For example, by assisting in retail outlets or community garden projects.

(not including London) and CPA 2 is the South West. The DWP has entered into contracts with contract providers for each CPA.

11. These contract providers then source the placement from local placement providers. 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 the community. 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 is 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.

12. At the time of the requests, 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.

13. 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.[3]

Work Experience

14. 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. 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. [4] Those aged 25 and over can also be referred on a discretionary basis.

15. 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

[3] From May 2011 up to and including to August 2012 there have been 90,470 referrals and 33,170 starts to Mandatory Work Activity.
[4] Initially, work experience (WE) was offered through the Get Britain Working (GBW) initiative from January 2011 – end March 2013, when the funding came to an end. GBW WE was available to 16/17 year olds, 18 – 24 year olds, and 25 plus claimants by discretion. From April 2013 funding for WE comes via the Youth Contract; only claimants aged 18 – 24 are eligible to participate in YC WE opportunities.

getting onto an apprenticeship. The placement hosts for WE are often national profit-making companies, such as supermarket chains – very different to the placement hosts for MWA.

16. Work experience is something that a Jobcentre Plus advisor can recommend to a particular Jobseeker's Allowance claimant. WE is targeted at the younger and more inexperienced Jobseeker's Allowance claimant (typically under 25) and aims to provide them with work experience. In contrast, MWA is targeted at claimants who would benefit from a short period of activity - it helps 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.

17. WE offers eligible unemployed people between two and eight weeks work experience, with an optional extension of up to 4 additional 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 on the first day of the placement 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 the long term unemployed, or those at risk 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 contract providers are given the freedom to design support based on individual and local need. An individual on the Work Programme may complete work experience (although not through the WE programme outlined above). Contract providers 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.

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.

22. Work Programme hosts included national profit-making companies, of the same kind as those who host WE placements, as well as smaller organisations. Most participants on the Work Programme do so on a mandatory basis. Some claimants, however, can volunteer for the Work Programme.

Controversy and 'Workfare'

23. At the time of the requests a number of campaign groups were actively seeking to stop MWA, WE and the Work Programme (which they often referred to collectively as 'workfare'). These groups obtained the names of several organisations who had hosted placements under the mandatory back-to-work schemes (often through FOIA requests) and then used that information to target those organisations and coerce them into leaving the scheme, e.g. by boycotting their stores, organising protests, criticising (in vehement terms) participating employers and (in the case of charities) pressurising donors to withdraw their donations [51.316; 18.170-171]. Some campaigners even threatened violence to staff at such organisations (see CE3:Item 20 [74]; Item 28 [84]; CE4: Item 2 [108]; CE4: Item 7 [145]).

24. These campaign groups did not distinguish between the profit-making organisations, that might host a placement under the Work Programme, and the non-profit-making organisations that might host a placement under the MWA. On the contrary, supporters were urged to boycott non-profit making organisations and withdraw donations [51.324].

25. By the time of the requests, this controversy had reached the mainstream press. The Guardian, in particular, published a series of articles, from 16 November 2011 to 22 February 2012, which criticised MWA, WE and the Work Programme (often referred to collectively as 'workfare') [52.338-56.351]. The Guardian articles tended to focus on the large profit-making organisations that were hosting WE placements. The

Guardian journalists argued that it was wrong for such profit-making organisations to benefit from 'free labour'. These articles highlighted the pressure which was being put on placement hosts to withdraw from the schemes and reported it, as a success, when placement hosts succumbed to this pressure. The articles were not always careful to distinguish between the different back-to-work schemes [339] and used the same collective term as the campaigners – 'workfare' [350]. There was no recognition, for example, that MWA does not benefit 'big companies'. Moreover, these articles referred, by name, to the Boycott Workfare campaign group and quoted their spokesperson, thus giving them a level of exposure they did not have before [346-350].

26. As a direct effect of this media attention, several placement hosts withdrew.[5] The Guardian reported on the big companies that withdrew from the WE programme, including TK Maxx, Sainsbury's, Waterstone's etc. However, it was not just profit-making companies that withdrew placements. It was also charities and non-profit making organisations who had hosted placements under the MWA scheme. It is clear that many of these organisations withdrew despite believing in the beneficial value of the MWA scheme and despite being desperately short of volunteers, simply because the attacks made by the campaigning groups were too damaging (see, for example, CE4: Item 8 [146]).

The Requests

Zola

[5] See Clare Elliott at §§31-39, 45-49 and CE3: Item 6 [56-57]; Item 7 [58-59]; Item 14 [67]; Item 26 [80-81]; Item 28 [84-86]; Item 30 [88]; Item 32 [91]; Item 33 [93].

27. On 25 January 2012 [10.125] 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."*

28. In a letter dated 7 February 2012 [11.127-128] the DWP refused to provide the information in reliance on section 43 of FOIA. Mr Zola requested an internal review [12.129-131] and on 20 February 2012 the DWP confirmed its original decision [13.133-134].

29. 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 at the time, that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs [20.181-193]. As a result, on 1 May 2012 the DWP indicated that it would also be relying on s. 36(2)(c) of FOIA [20.181-193].

30. In the Zola Decision Notice [1.1-12] 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.

Kelly

31. On 23 January 2012[6] Mr S. Kelly requested the following information from the DWP [33.221]:

> *"I would be grateful if you would provide the names of all organizations who have provided work boost placements, 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 subcontractor to Seetec was involved, please note which subcontractor or subcontractors were involved with each organization."*

32. In a letter dated 6 February 2012, the DWP refused to provide the information in reliance on section 43 of FOIA [34.223]. Mr Kelly requested an internal review [35.225] and on 1 March 2012 the DWP confirmed its original decision [36.227-8].

33. Mr Kelly's request, while not naming a specific programme, was interpreted by DWP to relate specifically to the Work Programme (rather than MWA or WE), on the basis that Seetec deliver the Work Programme (but not MWA) in the area described as Contract Package Area 4 (East London).

34. Mr Kelly complained to the ICO. In the course of the investigation, the DWP obtained the opinion of Mr Grayling MP, the Minister for Employment at the time, that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs [42.245-279]. As a result, on 11 May 2012 the DWP indicated that it would also be relying on s. 36(2)(c) of FOIA [42.245-279].

[6] In the ICO's decision notice, they recorded the date incorrectly as 11 January 2012.

35. In the Kelly Decision Notice [2.13-24] the ICO held, for essentially the same reasons as in the Zola Decision Notice, that:

(1) Section 43 of FOIA was not engaged; and

(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.

Naysmith

36. On 11 January 2012 [43.281] Mr S Naysmith requested the following information from the DWP:

> *"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 relevant sub-contractors."*

37. On 25 January 2012 [44.283], the DWP sought clarification from Mr Naysmith as to whether Mr Naysmith was requesting the names and locations of organisations that are participating in the Work Programme by providing work placements, or the names of organisations that JHP Group use when delivering Mandatory Work Activity in Scotland. My Naysmith confirmed that it was the latter [45.285].

38. In a letter dated 14 February 2012, the DWP refused to provide the information in reliance on section 43 of FOIA [46.289-290]. Mr Naysmith requested an internal review [47.291] and on 23 March 2012 the DWP confirmed its original decision [48.293-4].

39. Mr Naysmith complained to the ICO. In the course of the investigation, the DWP obtained the opinion of Mr Grayling MP, the Minister for Employment at the time, that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs. As a result, on 11 May 2012 the DWP indicated that it would also be relying on s. 36(2)(c) of FOIA [51.301-337].

40. In the Naysmith Decision Notice [3.25-36] the ICO held, for essentially the same reasons as in the Zola Decision Notice, that:

(1) Section 43 of FOIA was not engaged; and

(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.

(3) LEGAL FRAMEWORK

41. 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."*

42. 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..."

43. 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."*

44. 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)."*

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

46. Section 50 of FOIA provides:

> *"**50.— Application for decision by Commissioner.***
>
> *(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.*
>
> *...*
>
> *(4) Where the Commissioner decides that a public authority—*
> *(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or*
> *(b) has failed to comply with any of the requirements of sections 11 and 17,*

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken."

47. Section 57 of FOIA provides a right for complainants and public authorities served with a decision notice to appeal to the First Tier Tribunal ("the Tribunal").

48. The Tribunal'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

Introduction

49. The grounds of appeal [4.45-58; 5.75-96] set out the Appellant's criticisms of the ICO's reasoning. Those criticisms are maintained. However, because the Tribunal can review the ICO's findings of fact, and because there is a considerable amount of evidence before the Tribunal which was not before the ICO[7], the focus of this skeleton argument is not so much on the flaws in the ICO's decisions but rather on why the Tribunal should come to different conclusions.

[7] The witness statement of Clare Elliot, the attachments to that statement and the Guardian articles were not before the ICO.

50. There are two issues on which, it is submitted, the Tribunal should reach a different conclusion to the ICO:

(1) Whether section 43(2) was engaged;

(2) Whether the public interest balance weighed in favour of disclosure.

(1) Section 43(2)

Introduction – what was likely to have happened

51. The key issue for the purposes of section 43(2) of FOIA was whether the disclosure of the information requested, at the relevant time, would have been likely to prejudice the commercial interests of any of the following:

(1) the contract providers;

(2) the sub-contractors;

(3) the placement hosts; or

(4) the DWP.

52. Prejudice is 'likely' to have occurred if there was a 'real and significant risk' of such prejudice (cf. *John Connor Press Associates Ltd v Information Commissioner* EA/2005/0005).

53. Before turning to the separate commercial interests identified above, it is worth analysing what would have been likely to happen.

54. Some of the placement hosts, that are the subject of these requests, were known to the campaign groups already as a result of earlier FOIA requests. Their names had been published on the internet [5.316-322]. Others were not so known and their names had not been published. It is critical to the issues in this appeal to consider what would or might have happened if the names of these 'unpublished' placement hosts had been disclosed in response to the requests. It is submitted that the best evidence of what would have been likely to happen to the unpublished placement hosts is what did happen to the published placement hosts. It is submitted that the following is what would have happened, or have been likely to happen.

55. First, the names of the 'unpublished' placement hosts would have been added to the names that had already been published in the lists maintained by Boycott Workfare and other such campaign groups.

56. Secondly, the unpublished placement hosts would have been subject to the same pressure as the published placement hosts – i.e. boycotting, threats to withdraw donations, demonstrations outside their stores, even threats of violence (see CE3:Item 20 [74]; Item 28 [84]; CE4: Item 2 [108]; CE4: Item 7 [145]).

57. Thirdly, as a result of the above, many[8] of the unpublished placement hosts would have withdrawn from the MWA and (where relevant) the Work Programme. It is clear from a large number of sources that the negative press campaign in 2012 caused

[8] The ICO in its decision notices wrongly held that it was necessary to indicate the number of placement hosts that would be lost. The wording of section 42 does not require such precision in what is inevitably an imprecise exercise – i.e. assessing what would have happened. It is enough that there was a real and significant risk of several placement hosts withdrawing.

several of the published placement hosts to cease providing placements altogether.[9] There is no reason to suppose that the unpublished placement hosts would have been any more robust in the face of such pressure. On the contrary, the evidence from contractors, sub-contractors and even some of the unpublished placement hosts is that if the identity of the 'undisclosed' placement hosts had been disclosed, that would have been likely to lead to several more placement hosts withdrawing from the schemes.[10]

58. Fourthly, many of the placement hosts that continued with the back-to-work programmes and many others that might have been willing to assist would have been more reluctant to participate and/or have demanded fees (or higher fees) in order to host placements.[11]

59. Fifthly, as a result of the above, fewer placements would have been available for jobseekers.

60. These effects are now analysed by reference to the different commercial interests involved.

(1) The contract providers & (2) the sub-contractors

[9] See Clare Elliott at §§31-39, 45-49 and CE3: Item 6 [56-57]; Item 7 [58-59]; Item 14 [67]; Item 26 [80-81]; Item 28 [84-86]; Item 30 [88]; Item 32 [91]; Item 33 [93].
[10] See Clare Elliott at §40 and 49 and CE3: Item 1 [50]; Item 2 [51]; Item 5 [55]; Item 10 [62]; Item 26 [80-82]; Item 30 [88-89]; Item 32 [91-92]; Item 33 [93-94]; Item 34 [95]; Item 38 [99].
[11] See the letter from Seetec where they report this trend occurring already (CE4: Item 2 [107]).

61. Disclosure of the information requested would have been likely to prejudice the commercial interests of the contract providers and their sub-contractors for the following reasons.

62. First, for the reasons given above, disclosure would have been likely to lead to the withdrawal of several of the 'unpublished' placement hosts, which would have been detrimental to the commercial interests of the contractors and sub-contractors because:

(1) Many of them have invested significant sums in sourcing placement hosts - see §§51-52 and 56 of Clare Elliott's statement and CE 3: Item 29 [86-87]; CE4:Item 3 [115];

(2) If those placement hosts withdraw, that investment would have been wasted;

(3) If the placement hosts withdraw, the contractors and sub-contractors have to invest further sums in order to attempt to source further placements, which may be very difficult, expensive and time consuming and may make the contracts they have entered into commercially unviable (CE4: Item 5 [119]).

63. Secondly, there was a real risk that disclosure might lead to the placement hosts that were prepared to participate requiring payment to do so.[12] This would be to the commercial detriment of contractors and sub-contractors, especially if they have entered into contracts in the expectation that placements would be hosted for free.

64. Thirdly, disclosure would have been likely to prejudice the commercial interests of many contractors and sub-contractors in maintaining their intellectual property.

[12] See the letter from Seetec where they report this trend occurring already (CE4: Item 2 [107])

Contractors and sub-contractors invest significant sums of money in sourcing placements. As a result, they keep their lists of placement hosts confidential (CE4: Item 1 [104-106]; CE4: Item 3 [115]). If the identities of the placement hosts they had sourced were disclosed to the public at large, rival organisations, who have not invested anything in sourcing placements, could use that information to undercut them (see CE3: Item 29 [86-87]; CE4: Item 1 [104-106]). There was a real risk that disclosure would have led to the failure of the business model of those who source placements (CE4: Item 1 [104-106]).

65. Fourthly, there is a real risk that disclosure would have damaged the relationships between contractors/sub-contractors and the placement hosts they work with, because the placement hosts had not given permission for their names to be disclosed to the public at large and may have viewed this as a breach of trust (see CE4: Item 4 [116-117]; CE4: Item 5 [119]).

66. It is clear from the evidence that, taking all these consequences in the round, there is a real risk that disclosure could have had a devastating effect on the businesses of contractors and subcontractors. Seetec, a contractor, believe that disclosure could put their organisation (and the jobs of 53 employees) at risk (CE4: Item 2 [107-108]). Ingeus believe that it could cause them to lose approximately £1m in revenues in the next year and have to make several redundancies (CE4: Item 4 [117]). JobFit believes that there is a real risk that disclosure might make the contracts they have entered into unviable (CE4: Item 5 [119]).

(3) The placement hosts

67. For the reasons given above, disclosure of the information requested would have been likely to lead to the so far unpublished placement hosts being targeted by campaign groups and (potentially) the mainstream media.

68. This would have been detrimental to their commercial interests for several reasons.

69. First, the placement hosts would have been likely to lose customers and (in the case of charitable organisations who provide MWA placements) donations as a result of the negative publicity. This would have been detrimental to all of them, particularly the MWA placement hosts, who rely on good will and donations.

70. Secondly, the unpublished placement hosts who would have withdrawn from the scheme in response to such targeting would have lost an important resource. In the case of MWA, all the placement hosts are charitable organisations or other not-for-profit organisations which are often short of helpers (see CE3: Item 2 [51]). The loss of this resource would have been likely to have had a severe effect on their commercial operations and meant that they would not have been able to make the same level of benefit to the community that they otherwise would have.

71. It is clear that this was exactly the effect that withdrawal had on the published MWA placement hosts. One such charitable placement host, described the effect of negative press as 'huge' because they are 'desperate for helpers' (CE3: Item 8 [60]). Another branch of the same host said that they suffered from 'inadequate staffing levels' and that 'takings and donations' had gone down (CE3: Item 9 [61]). Ingeus said that the

charity shops that withdrew in response to the media pressure are 'struggling to resource their shops and retail outlets' (CE4: Item 4 [116]).

(4) The DWP

72. Disclosure of the requested information would also have been likely to cause prejudice to the commercial interests of the Appellant for the following reasons.

73. First, 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 Appellant (see Clare Elliott at §53 and 55).[13]

74. Secondly, there was a real risk that Appellant would have had to spend more on benefits to jobseekers who would have been likely to be unemployed for longer as a result of their being fewer placement opportunities (see Clare Elliott at §53). On any definition of 'commercial', this is a 'commercial' detriment because the more the Appellant spends on benefits, the less money it has to spend on 'commercial' activities, e.g. contracts with contractors to assist jobseekers back to work.

75. Thirdly, there is a real risk that disclosure could have led to the collapse of the MWA programme because of the severely adverse affect it would have had on contractors, sub-contractors and placement hosts (see CE4: Item 4 [116]). This would have been

[13] The ICO in its decision notices wrongly held that it was indicate the expected increase in government payments to the contractors. The wording of section 42 does not require such precision in what is inevitably an imprecise exercise – i.e. assessing what would have happened. It is enough that there was a real and significant risk of the Appellant have to pay more to contractors.

to the commercial detriment of the DWP who have invested in the MWA programme and entered into contracts as part of that programme.

(2) The public interest balance

Introduction – general principles

76. First, it is submitted that, when assessing the public interest in 'maintaining the exemption' for the purposes of section 2(2)(b) of FOIA, it is permissible to take into account any factors which weigh against disclosure, whether or not they are inherent in the particular exemption which is engaged. That is the force of the words 'in all the circumstances of the case" in section 2(2)(b) of FOIA[14].

77. Secondly, and in the alternative, if the Tribunal is restricted to considering the public interest factors against disclosure which are inherent in the exemptions themselves, they can and should aggregate those factors where (as here) more than one exemption is engaged – see *R (Ofcom) v ICO* [2010] UKSC 3, where the majority favoured the 'aggregating' approach of the Court of Appeal in relation to the EIR.

78. Thirdly, although it is accepted that the Tribunal will need to consider where the public interest balance weighed at the time when the request was received, the Tribunal may consider how the balance weighs at the present time when considering what remedy to grant. – see *OGC v IC* [2010] QB 98 at [98].

[14]see the Ministry of Justice guidance on this issue - http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/exemptions-guidance/foi-exemptions-public-interest

Public Interest in maintaining the exemption(s)

79. It is submitted that the public interest in maintaining the exemptions was formidable for several reasons.

80. First, for the reasons explained above, disclosure would have been very likely to have had a very severe detriment on the commercial interests of contractors, sub-contractors, placement hosts and the DWP. The DWP would have had to pay higher sums to contractors and more in jobseekers' allowance. Contractors and sub-contractors would have been likely to lose a considerable amount of income as well as intellectual property of commercial value and may even have had to abandon contracts and make redundancies. Charitable organisations would have been likely to lose a resource they desperately need in order to staff their retail outlets and carry out other projects.

81. Secondly, and just as importantly, the withdrawal of placement hosts would have been likely to result in fewer opportunities for jobseekers. There is a very strong public interest in schemes which help jobseekers find work being allowed to operate as effectively as possible. A recent evaluation of MWA showed some significant 'soft outcomes' for claimants who attended their placement, 75 per cent said that MWA had made them more attractive to potential employers and 72 per cent of participants said that their personal confidence had increased since attending.[15] As the ICO itself recognised, the cost to society of unemployment is very high.

[15] Department for Work and Pensions (ISBN 978 1 908523 03 8. Research Report 823. December 2012), available at http://research.dwp.gov.uk/asd/asd5/summ2011-2012/823summ.pdf

82. The ICO wrongly held that this second factor could not be taken into account because it was not 'inherent within section 36(2)' and because the cost of unemployment to the DWP was 'financial' rather than 'commercial'. It is submitted that this was wrong for the following reasons:

(1) For the reasons given above, the Tribunal can have regard to all the circumstances of the case when weighing the public interests, not just those inherent within the exemptions.

(2) The cost of unemployment was 'inherent within' the section 36(2)(c) exemption. The 'public affairs' which disclosure would adversely affect were the DWP's attempts to assist jobseekers back into work.

(3) For the reasons given above, the cost of unemployment is also 'inherent within' the section 43(2) exemption – in short, because it is detrimental to the DWP's commercial interests to have to pay more in jobseekers' allowance.

83. In so far as there is ambiguity as to (1), (2) or (3) above, that ambiguity should be resolved in the Appellant's favour. It would be perverse if the high cost to the public of unemployment could only be taken into account, in the public interest balance, as a factor weighing in favour of disclosure[16] when the evidence suggests that disclosure would have been likely to increase that cost significantly.

Public interest in disclosure

84. The public interest in disclosure is not as great for the following reasons.

[16] This is what the ICO purported to do – see the second 47(vii) of the Zola decision notice.

85. First, the Appellant recognises that there is a public debate as to the extent to which the three schemes assist job-seekers in practice. There is, and was at all material times, a great deal of information already in the public domain on that issue (see Clare Elliott's statement at §§59-61). The information which is the subject of these appeals does not significantly assist the public to participate in that debate. It merely provides information as to the names of placement hosts, not as to how many of the jobseekers in question obtained employment as a result of their placements.

86. Secondly, there is already transparency as to the identity of placement hosts for those most directly affected by the three schemes – the job seekers themselves are given information as to their placement hosts.

87. Thirdly, the information requested provides little or no information as to how the DWP's money has been spent on the MWA scheme or the Work Programme, or how the contractors are performing relative to one another. The Tribunal is invited to peruse the withheld material and assess, realistically, the extent to which disclosure would assist the public's analysis of such issues. In truth, the withheld information merely confirms what is already in the public domain – that the MWA placement hosts were organisations providing benefits to the community (usually charitable and not-for-profit organisations) and the Work Programme placement hosts included larger, national organisations, such as supermarkets and pharmaceutical retailers as well as smaller organisations.[17]

[17] Note that from June 2012, the Work Programme changed from a single programme (encompassing a wide variety of placement options) to a dual position where there are now two distinct types of placement – Work Experience (voluntary), and Work Placements (mandatory in certain situations, and must be of community benefit). Note that this is separate to the Work Experience programme detailed above.

88. Fourthly, while the DWP recognises the right of individuals to take part in peaceful political action, the protests by the self-styled 'workfare' protesters have, at times, involved physical intimidation and threats of violence (see CE3:Item 20 [74]; Item 28 [84]; CE4: Item 2 [108]; CE4: Item 7 [145]). It is not in the public interest to provide information that could assist such a campaign, particularly when the recipients of such intimidation are small organisations and charities providing benefit to their local communities. Such organisations cannot be expected to withstand such pressure – see, for example, the letter from the Sue Ryder organisation where they explain that they have withdrawn from the DWP's mandatory back-to-work schemes 'with a heavy heart', despite their belief that the schemes benefits both them and the jobseekers whom they host, because they need to 'protect our service users, their families, our supporters and Sue Ryder staff from any further distress' (CE4: Item 8 [146]).

(5) CONCLUSION

89. 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

12 April 2013