

Before: Upper Tribunal Judge Wikeley

Attendances:

For the Appellant: Mr Andrew Sharland
For the First Respondent: Mr Robin Hopkins
For the Second Respondent: No attendance or representation

**DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to dismiss the appeals.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 17 May 2013 (Appeal Nos. EA/2012/0207, EA/2012/0232 and EA/2012/0233) in relation to the Appellant's appeals against the Respondent's Decision Notices FS50438037, FS50438502 and FS50441818, does not involve any error on a point of law.

REASONS

Introduction

1. Governments of all political persuasions have for many years operated schemes designed to improve the job prospects of long-term unemployed people. In the past, claimants' participation in such schemes was typically voluntary. Historically such welfare arrangements were managed and delivered "in-house" – so, for example, the former Department of Health and Social Security (DHSS) used to operate "re-establishment centres", designed to inculcate the habit of regular employment in those claimants who had been out of work for a long time.

2. The modern welfare state is very different. The new buzzword is "conditionality". Claimants may have to comply with various mandatory conditions, such as participation in work experience schemes and other arrangements, in order to continue receiving benefit. Critics and commentators alike refer to such schemes as "workfare"; I use that term by way of shorthand simply for convenience. The institutional architecture is also very different. The monolithic DHSS is no more. Instead, the Department for Work and Pensions (DWP, or here "the Department") delivers such schemes through a market-based network of contractors, sub-contractors and "placement hosts" (i.e. charities and companies with whom unemployed people are placed for work experience). This obviously has the potential to raise difficult issues of accountability and transparency.

3. The present appeals concern requests made to the Department under the Freedom of Information Act 2000 (FOIA) to disclose the names of charities and private sector companies participating as placement hosts under certain workfare schemes. The Information Commissioner and the First-tier Tribunal (“the Tribunal”) both decided that the Department should disclose the names of the placement hosts in question. The Department now appeals to the Upper Tribunal against the Tribunal’s decision. I dismiss the Department’s three joined appeals for the following reasons. I start by setting out the background.

The original FOIA requests and the complaints to the Commissioner

4. In January 2012 the Department received three FOIA requests from Mr Kelly, Mr Naysmith and Mr Zola respectively. Each request sought the disclosure of the names of those organisations engaged in the delivery of certain workfare schemes in particular parts of the country. The schemes in question were Mandatory Work Activity and the Work Programme.

5. According to the gov.uk website, “Mandatory Work Activity (MWA) is intended to help claimants move closer to the labour market, enabling them to gain the discipline and habits of working life, such as: attending on time regularly; carrying out specific tasks; working under supervision while delivering a contribution to the community.” MWA is designed to assist Jobseeker’s Allowance (JSA) claimants who have been out of work for a long time and who would benefit from a short period of such activity. Placements last for 4 weeks at up to 30 hours a week and must be of benefit to the local community (and must not displace paid jobs), so they tend to be with charities or other not-for-profit organisations. Claimants are not paid for their work but continue to receive JSA, subject to the usual conditionality requirements, and so are at risk of sanctions for non-compliance.

6. The Work Programme (WP) is designed to assist long-term unemployed people, or those at risk of long-term joblessness. It is intended to provide such individuals with personalised work-focussed support. Referrals are for a two-year period, and at different stages the programme may include support, training and work experience. Most participants are JSA or Employment and Support Allowance (ESA) claimants and are required to engage with the WP, again with possible exposure to the sanctions regime. Both large private sector companies and smaller organisations are involved in the delivery of the Work Programme.

7. Until the requests in issue here, the Department had been releasing the names of placement hosts in response to FOIA requests. A pressure group, “Boycott Workfare”, had been established in 2010 and its website included a list of companies and other organisations involved in the delivery of workfare, compiled (at least in part) from these FOIA responses. Campaigners engaged in what the Department described as “aggressive targeting”, using various tactics to encourage companies and charities either to withdraw from, or not to become involved in, schemes such as MWA and WP. In addition, in January and February 2012 the Guardian newspaper published a series of critical articles about workfare schemes.

8. In February 2012 the Department refused all three requests, taking the view that disclosure of the requested names would prejudice its commercial interests or the commercial interests of those delivering services on its behalf. It thus relied on the exemption in section 43(2) of FOIA.

9. All three requesters made complaints to the Information Commissioner. In the course of the investigation that followed, the Department obtained an opinion from a minister (the Rt Hon Christopher Grayling, then Minister for Employment) that

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disclosure of the names involved would prejudice, or be likely to prejudice, the effective conduct of public affairs. The Department accordingly also sought to rely on section 36(2)(c) of FOIA.

10. In August and October 2012 the Information Commissioner issued three virtually identical decision notices (FS50438037, FS50438502 and FS50441818). The Commissioner concluded in each case that (i) section 43(2) (commercial interests) was not engaged; and (ii) section 36(2)(c) (prejudice to effective conduct of public affairs) was engaged but the public interest balance favoured the disclosure of the information sought.

The joined appeals to the First-tier Tribunal

11. The Department appealed all three decision notices to the Tribunal, which sensibly joined the three appeals. For reasons that need not concern me, Mr Kelly and Mr Naysmith were not added as parties. Mr Zola was joined, but took no part in the hearing (nor indeed did he take any active part in the Upper Tribunal proceedings, but that is his prerogative). In reality, battle was joined at both tiers between the Department and the Information Commissioner.

12. In terms of the public interest balance, and as regards the qualified exemption under section 36(2)(c), the Department's case was summarised thus (as it applied to the MWA disputed information):

“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 of the information in relation to the MWA scheme 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” (Department's grounds of appeal to the Tribunal at paragraph [50]).

13. The Information Commissioner was distinctly unimpressed by this argument:

“The Commissioner respectfully finds it implausible that such a national catastrophe could arise from disclosure of the names of certain charities and private sector organisations that have chosen to participate in and benefit from major national employment schemes. The DWP's case is essentially that these enormously important national schemes can only operate if the identities of the participating organisations are kept secret. The Commissioner is not persuaded. There may well be some prejudice to the operation of the scheme, but the Commissioner does not agree that these interests in maintaining the exemption at s.36(2) are as weighty as the DWP says they are” (Commissioner's skeleton argument to the Tribunal, paragraph [57]).

14. At the Tribunal hearing on 3 May 2013 the Department presented documentary evidence which it had not produced before the Information Commissioner – survey responses, correspondence from contractors opposed to disclosure and material relating to three charities that were or had been involved in workfare schemes (Sue Ryder, PDSA and the Salvation Army). The only witness at the Tribunal hearing was Ms Clare Elliott, the Head of the Department's Work Programmes Division.

15. The Tribunal dismissed the Department's appeals and upheld the Information Commissioner's three decision notices. In outline, the Tribunal concluded, like the Commissioner, that section 43(2) of FOIA (commercial interests) was not engaged

and that although section 36(2)(c) (prejudice to effective conduct of public affairs) was engaged, the public interest favoured disclosure of the disputed information.

16. Judge Warren, Chamber President, subsequently gave the Department permission to appeal.

The proceedings before the Upper Tribunal

17. I held an oral hearing of the Department's further appeal at Field House in London on 12 June 2014. Mr Andrew Sharland of Counsel (who did not appear at the Tribunal below) represented the Department. Mr Robin Hopkins of Counsel (who did appear below) represented the Information Commissioner. I am indebted to them both for their careful and comprehensive submissions, which were made tenaciously but courteously.

18. The Department was given permission to appeal by Judge Warren on four grounds. The first was that the Tribunal had failed to provide adequate reasons as to why section 43(2) of FOIA was not engaged. The second was that the Tribunal had misdirected itself as to the proper test to be applied under section 43(2). The third was that the Tribunal had failed to take into account relevant evidence and/or had reached perverse conclusions in relation to such evidence. The fourth was that the Tribunal had failed to consider the section 36(2)(c) exemption adequately, and in particular had failed to have regard to the most significant factor in favour of maintaining that exemption, namely the public interest in reducing unemployment.

19. The first three grounds thus all relate to the possible engagement of the commercial interest qualified exemption under section 43(2). I will take the second ground of appeal before the first, as that seems to me the more logical approach (given that answering the question as to the adequacy of the Tribunal's reasons may be informed by the appropriateness of the Tribunal's directions as to the relevant principles applicable under section 43(2)). The fourth and final ground of appeal concerns the public interest balance under the section 36(2)(c) qualified exemption, which both parties were agreed was engaged.

20. The Information Commissioner resisted the appeal on all four grounds. Mr Hopkins's opening submission was that this was a classic example of an attempt to re-litigate the case on the facts. In effect, he said, the Department was seeking another chance to get its evidence and its case right and so get a second bite at the cherry.

21. Before dealing with each of the four grounds of appeal in turn, it is important to say something about the structure and context of the Tribunal's decision.

The proper context: reading the First-tier Tribunal's decision

22. This is not a case in which the Tribunal's decision can be criticised for brevity. Rather, it is a lengthy and in places densely-argued decision (37 pages and 223 paragraphs). Mr Sharland described it as a decision in two parts, paragraphs [1]-[186] dealing with the factual background and the parties' submissions and paragraphs [187]-[223] containing the Tribunal's conclusions. It was from paragraph [187] onwards, he submitted, that the Tribunal went "horribly wrong" and where its reasoning was "fundamentally flawed".

23. Mr Hopkins sought to counter this by reminding me that appellate tribunals and courts should exercise an appropriate degree of restraint when considering the adequacy of a first instance tribunal's reasoning. They "should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning

is fully set out in it” (*Jones v First-tier Tribunal* [2013] UKSC 19 (*per* Lord Hope at paragraph [25]). In addition, of course, those reasons had to be read as a whole.

24. In the present case the structure of the Tribunal’s decision was as follows:

[1] – [5]	Introduction
[6] – [24]	Factual background: the relevant DWP programmes
[25] – [29]	Background: underlying controversy
[30] – [40]	The requests
[41] – [58]	The Decision Notices
[59] – [75]	The main submissions by the DWP
[76] – [80]	The Commissioner’s initial response to the grounds of appeal
[81] – [112]	The further evidence before the Tribunal
[113] – [148]	The Appellant’s contentions
[149] – [186]	The Commissioner’s submissions
[187] – [222]	The Tribunal’s conclusions
[223]	Conclusion

25. I agree with Mr Hopkins both that it is important to read the decision as a whole and that a degree of appellate restraint is in order when considering challenges based on adequacy of reasoning. This is especially so where, as here, the expert Tribunal has carefully set out the background to the appeal, the key evidence and the parties’ submissions in some considerable detail. It was telling, in my view, that Mr Sharland did not take me to any passages in paragraphs [1] to [186] where he argued that the Tribunal had, for example, misunderstood either the issues or the evidence in the appeal. Furthermore, it would be wrong to characterise the opening 186 paragraphs of the decision as being purely narrative and descriptive in nature. In various places in that first half of its decision the Tribunal also evaluated the submissions being made and gave reasoned conclusions on those points (see e.g. paragraphs [54], [56] and [155]-[158]). I turn now to the four grounds of appeal.

(1) Did the Tribunal misdirect itself in law on the section 43(2) test?

26. The first ground of appeal that I will address (the second ground as set out in the notice of appeal to the Upper Tribunal) is that the Tribunal misdirected itself as to the test to apply under section 43(2) of FOIA. According to section 43(2), “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).” It is well-established that the prejudice must be real, actual or of substance, and that in this context “likely” means a very significant and weighty chance of prejudice (see *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) at paragraph [106]).

27. In my view the Tribunal directed itself in precisely these terms (see e.g. the discussion at paragraphs [49], [165] and [188] of the decision). The suggestion that the Tribunal misunderstood the test is simply without foundation. Mr Sharland argues that the passage at paragraph [165] was misleading as it simply referred to a “real and significant risk”, without spelling out that the risk of prejudice may be less than 50 per cent, i.e. need not meet the civil standard of “more probable than not”. This argument will not run for two reasons. First, the relevant standard is well known to the Tribunal and to the parties, being part of the normal currency of information rights litigation, and so the Tribunal did not need to articulate all its dimensions fully. Second, and in any event, the Tribunal added, as an alternative formulation, that it had to be shown that there “may well be” prejudice. Of itself, that demonstrated that the Tribunal knew exactly what the test was for determining whether section 43(2)

was engaged and had it to the fore of its thinking when considering the evidence before it.

28. Mr Sharland also attacks the passage in paragraph [188], where the Tribunal stated that “the burden is to show that the risk of prejudice is real, actual or substantial”. This, he submits, demonstrates that the Tribunal conflated the separate issues of risk and prejudice. It does nothing of the sort. This is a classic example of the danger of focussing on particular words or short passages and taking them out of context of the decision as a whole. Paragraph [188] is not an essential step in the Tribunal’s reasoning – it is simply summarising and referring back to a point made earlier in the decision. The Tribunal’s correct understanding of the principles in play was set out in paragraphs [49] and [165] – any apparent elision of the tests in the final sentence of paragraph [188] is just that, apparent and not real, and the function of compressed drafting rather than any fundamental misunderstanding as to the relevant law.

29. So how did the Department seek to bolster its challenge to the Tribunal’s approach to section 43(2)? The Department’s fire in developing this ground of appeal was principally focussed on paragraph [215] of the Tribunal’s decision, and in particular on the passage in that paragraph which is italicised here for emphasis:

“[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.*”

30. Mr Sharland argued that the highlighted passage showed that the Tribunal had either set the bar too high, as regards the degree of prejudice required, or had wrongly assumed that “commercial interests” could not include the “economic” interest of non-profit making organisations. He submitted that the recognition that smaller charities would “inevitably suffer economic uncertainty” could only mean that the Tribunal must have misdirected itself in concluding that section 43(2) was not engaged.

31. This submission is again based on a failure to read the Tribunal’s decision both as a whole and in context. The Tribunal had already explained in its conclusions why it had arrived at the finding that section 43(2) was not engaged on the facts (paragraphs [187]-[206]); I return to those matters in the context of the further ground of appeal relating to the adequacy of the Tribunal’s reasons. The Tribunal then enumerated six background considerations it had in mind in applying the public interest balancing exercise (paragraphs [207]-[214]). Paragraph [215] obviously

followed after this point. It is plain from the opening sentence of that paragraph that the discussion proceeded on the assumption that both sections 36(2)(c) and 43(2) were engaged (the former as all were agreed and the latter contrary to the Tribunal's earlier conclusions on causation). In other words, the Tribunal's analysis was premised on the basis that the Department's case had been successfully put at its highest.

32. What then did the Tribunal conclude? It made two main points in considering the public interest in maintaining *both* the exemptions (i.e. approaching the analysis in such a way as to give the Department the benefit of the doubt on section 43(2), notwithstanding its own factual findings). The first was that the Department had not made out a persuasive case on the evidence. The second was that, as Mr Hopkins graphically put it, large commercial organisations should “man up” and face the music in the event that their participation in such schemes was made public. In that context, and specifically in that context, the Tribunal then made the point in the italicised passage about smaller charitable organisations. It was not making a factual finding as to the inevitability of the relevant degree of commercial prejudice. On the contrary, it was assuming that outcome for the purposes of argument, and acknowledging that smaller charities will be less able than large corporate players to withstand such consequences, but then making the point that such prejudicial effects did not carry great weight in the public interest balance. The weight to be attached to competing factors is, of course, a classic question of fact for the first instance Tribunal (*DBERR v Information Commissioner and O'Brien* [2009] EWHC 164 (QB), [2011] 1 Info LR 1087 *per* Wynn Williams J at paragraph 32).

33. It follows that I am satisfied that the Tribunal properly directed itself on the test for establishing whether section 43(2) was engaged, and so this ground of appeal necessarily fails.

(2) Did the Tribunal fail to give adequate reasons for finding that section 43(2) was not engaged?

34. The Department's principal ground of appeal is that the Tribunal failed to provide adequate reasons as to why section 43(2) of FOIA was not engaged. This ground was put in two ways. First, Mr Sharland argued that the Tribunal had failed to explain why it had rejected the Department's case that disclosure would be likely to prejudice the commercial interests of placement hosts by causing them to withdraw from MWA and/or WP. The examples of the experiences of the charities Sue Ryder and PDSA were central to this submission. Second, he complained that whereas the Department had, in its submissions to the Tribunal, enumerated a total of nine different ways in which disclosure of the disputed information would be likely to prejudice the commercial interests of various players, the Tribunal had only addressed two of these matters. It had simply failed to “enter into” seven of the nine issues canvassed by the Department.

(i) The adequacy of the Tribunal's reasoning for rejecting the Department's case

35. There were times at which the Department's case on appeal before the Upper Tribunal came very close to, if not arguably crossed the line into, seeking to re-argue the case on its factual merits. It is therefore important, as Mr Hopkins stressed, to “see the wood for the trees” and to go back to first principles, not least given that the Upper Tribunal's jurisdiction is limited to correcting errors of law.

36. There is no escaping the fact that schemes such as MWA and the WP attracted (and, of course, continue to attract) a considerable degree of political controversy. There has been extensive media comment about such schemes, some of it highly critical. There has always been a risk that the names of those

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organisations participating as placement hosts would get into the public domain – there is, for example, no confidentiality requirement on jobseekers not to reveal the names of placement hosts. Accordingly, the critical issue which the Tribunal had to address was the incremental impact of disclosure as a result of compliance with a FOIA request. As the Tribunal correctly explained:

“[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.”

37. Reading the Tribunal’s decision as a whole, rather than cherry-picking particular passages, I agree with Mr Hopkins that it is perfectly clear why the Department’s argument that section 43(2) was engaged failed to impress the Tribunal. Once the effects of adverse media coverage were put to one side, and the focus was on the impact of naming the placement hosts, the Tribunal concluded as a matter of causation (and so of fact) that the Department’s evidence was insufficiently persuasive to demonstrate that there was (as section 43(2) required, see further above) a significant and weighty chance of placement hosts and providers withdrawing or suffering commercially to any real, actual or substantial extent.

38. In this context there was considerable discussion at the Upper Tribunal oral hearing of the examples of Sue Ryder and PDSA. These charities formed two of the so-called case studies in the extra evidence produced by the Department for the Tribunal hearing below. The Tribunal dealt with these case studies (in part at least) at paragraph 196 of its decision:

“[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.”

39. As Mr Hopkins argues, in summary what the Tribunal was saying that whatever commercial prejudices had been suffered by Sue Ryder and PDSA it had not been satisfied, on the evidence before it, that the causal link between being named as a result of a FOIA request and those effects had been made out. Mr Hopkins observed that the charities in question had announced their withdrawal from the schemes in February 2013, over a year after the date of the information requests and at a time where the charities’ involvement had been in the public domain for even longer. In argument Mr Sharland described this one year delay as Mr Hopkins’s “best point”, but a factor which had not appeared in the Tribunal’s decision, meaning that the

Information Commissioner was impermissibly seeking to re-write the Tribunal's decision to cover up the gaps in its reasoning. I simply cannot accept that submission. In paragraph [196] the Tribunal had expressly placed its analysis in the context of "the year since the disclosure of the names of those three charities", before dealing with the Salvation Army and the other two named charities. Perhaps the point might have been made even more explicitly, but semantic sophistry cannot undermine the essential fact that the Tribunal had explained its core reasoning and the time factor was one consideration underpinning the Tribunal's reasoning. The further argument that the Salvation Army suffered commercial prejudice as a result of maintaining its involvement cannot be made now, as this was not the way that the case was put before the Tribunal below. This first aspect of the principal ground of appeal ultimately boils down to an attempt to re-argue the case on its facts.

(ii) The Tribunal's omission to enter into seven of the nine issues canvassed

40. The second aspect of the main ground of appeal concerns the Tribunal's omission to deal with all nine of the various matters canvassed by the Department to support its case that section 43(2) was engaged. In doing so, the Department had identified a range of different ways in which it said that the disclosure of the withheld information would be likely to prejudice the commercial interests of the Department itself, the contractors, sub-contractors and/or placement hosts. The Tribunal, it was said, had only sought to address two of these matters, leaving the bulk of the Department's submissions unaddressed.

41. Mr Hopkins, in response, argues that Mr Sharland is seeking to set the bar for adequacy of reasoning too high. The Department had argued before the Tribunal that its case was made out on the basis of the evidence it had produced as to the result of past disclosures of the names of placement hosts. However, the Tribunal had considered that evidence and had found it wanting. In particular, it had not been satisfied that the incremental effect of naming was in itself sufficient to engage section 42(3). Given that the fundamental issue of causation had not been made out, the Tribunal was not then obliged to go through each and every one of the Department's submissions as to the different types of commercial prejudice that were involved.

42. I reiterate that this is not a case where the Tribunal skimmed on its analysis. The Department's arguments as to commercial prejudice were conscientiously and exhaustively set out (see e.g. paragraphs [59]-[65], [81]-[105] and [113]-[133] of the decision). There has been no challenge to that account of the way in which the Department had put its case. As noted above, the Tribunal then focussed on the critical question it had to resolve, namely the incremental effect of disclosure and whether the casual link between disclosure and commercial prejudice had been established. The Tribunal went on to explain why it was not satisfied that the Department had made out its case. It explained, for example, its serious misgivings about the methodology used in the Department's surveys. Those were classic matters of weight for the first instance Tribunal. It would have been otiose for the Tribunal to then go through each and every one of the nine separate submissions or examples of commercial prejudice, given that the fundamental causation point had not been demonstrated. Furthermore, it is well established that the Tribunal's obligation is to give adequate reasons for its decision; this is not the same as saying that the parties are entitled to have each and every point that was raised in the course of argument addressed. This Tribunal certainly did enough to explain why it preferred the Commissioner's case to the Department's on section 43(2).

43. It follows that I do not accept that the Tribunal failed to provide adequate reasons for its decision.

(3) Did the Tribunal fail to take into account material evidence and/or reach perverse conclusions on the evidence?

44. The Department's third ground of appeal is that the Tribunal failed to consider relevant evidence and/or reached perverse conclusions in relation to such evidence. Mr Sharland highlighted six particular passages, all drawn from paragraphs [193] to [201] of the Tribunal's decision, which he argued exemplified these deficiencies. Mr Hopkins characterised this ground of appeal as no more and no less than an attempt to re-litigate on the facts the evidential points that the Tribunal had decided against the Department.

45. I have already referred to the length of the Tribunal's decision (see paragraph 22 above). This alone is indicative of the Tribunal's careful and detailed consideration of the issues. Against that background the argument that the Tribunal failed to take into account material evidence is unpersuasive. In essence the Department is saying that it disagrees with the Tribunal's conclusions on the facts, an argument which is unlikely to progress far in appellate proceedings concerned solely with identifying any error of law. This is all the more so given that, as has already been observed, the weight to be attached to any specific piece of evidence is a classic question of fact for the first instance Tribunal (see *DBERR* above at paragraph 32).

46. I also agree with Mr Hopkins that this ground of appeal essentially boils down to a perversity challenge. That being so, the onus is on the Department to make out an "overwhelming case" that no reasonable tribunal, properly directing itself on the law and the evidence, could have arrived at the decision this Tribunal reached. This demanding threshold was applied in the FOIA context by Irwin J in *British Broadcasting Corporation v The Information Commissioner* [2009] EWHC 2348 (Admin) (at paragraphs [83]-[85]). Of course, the same threshold for perversity applies in other jurisdictions (e.g. in employment tribunals, see Mummery LJ in *Yeboah v Crofton* [2002] EWCA Civ 794, at paragraphs [92]-[95], and social security tribunals, see Sir John Donaldson MR in *Murrell v Secretary of State for Social Services*, reported as Appendix to Social Security Commissioner's decision R(I) 3/84, asking whether the decision was so "wildly wrong" as to merit being set aside).

47. In those circumstances I do not regard it as appropriate to go through each of the six examples cited by Mr Sharland. I will just deal in detail with the first and last of those six areas of complaint by way of example, and simply record that I agree with Mr Hopkins's submissions on the other four matters. As Mr Hopkins submits, the other four examples likewise involve taking matters out of context, failing to read the decision as a whole or seeking to re-open the Tribunal's factual assessments.

48. The first example relied on by the Department concerned paragraph [193] of the Tribunal's decision. Having referred to various articles in the *Guardian* newspaper (e.g. "Waterstones ends unpaid work placements after investigation", 3 February 2012), the Tribunal said this:

"[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 Welfare blog."

49. The Department's argument appeared to be that in equating the Boycott Welfare blog with the newspaper articles the Tribunal had overlooked the strong and emotive language used in the blogs. The foremost example given (an example to which Mr Sharland returned on more than one occasion in the course of oral

argument) was the assertion in one blog that, because of its involvement in the workfare programmes, the charity PDSA were “thieving fucking criminals”. That expression does not actually appear in the Boycott Welfare blog, but in a news item on another anti-workfare blog (“The void – narking off the state since 2005”). However, the Tribunal can hardly be fairly criticised for failing to pick up the occasional outburst of offensive language. Rather, the Tribunal here was forming an assessment of the overall tenor of the material in question. It was making a factual evaluation in paragraph [193] which was entirely sustainable on the evidence before it. The news reports and opinion pieces in the *Guardian* amounted to wholly predictable broadsheet journalism from that source. Entries in blogs such as Boycott Welfare were typically more combative, but again that was to be expected on a subject of intense political controversy. The overall thrust of those blogs was well within the bounds of legitimate political expression in a democratic society, even if the occasional comment overstepped the bounds of decency. This first example of allegedly failing to consider material evidence or reaching a perverse finding is about as far from constituting an arguable material error of law as I can imagine.

50. The sixth and last example referred to by the Department in the context of this third ground of appeal faces similar problems. Mr Sharland complained that the Tribunal had unfairly dismissed the results of the DWP’s survey of contractors, sub-contractors and placement hosts as “distinctly unrepresentative and mixed” and the responses that were garnered as “lukewarm” (paragraphs [200] and [201]). The submission was that the Tribunal had failed to examine the survey results with sufficient care. I simply do not accept that proposition. The passages objected to by the Department must be read in context. The Tribunal had previously summarised how the surveys had been conducted (paragraphs [86] ff). It then explained in the concluding section of the decision that it had placed greater weight on what it described as the case studies rather than the surveys. The Tribunal also set out five reasons why it attached less weight to the surveys (see paragraphs [197]-[205]). In short, the Tribunal was unimpressed by the methodology adopted. That was a view on a factual issue that it was entitled to take. It explained why it had reached that view. Again, we are not even close to the territory of a potential error of law.

51. Accordingly I do not find the third ground of appeal to be made out.

(4) Did the Tribunal fail adequately to consider the public interest in maintaining the section 36(2)(c) exemption?

52. The fourth and last ground of appeal relates to section 36(2)(c) of FOIA, which provides that information is exempt information if “in the reasonable opinion of a qualified person” disclosure of such information “would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”. In this context “otherwise” means otherwise than by prejudicing collective ministerial responsibility (section 36(2)(a)) or the free and frank provision of advice or exchange of views (section 36(2)(b)). A “qualified person” means any Minister of the Crown (section 36(5)(a)). It was agreed that this exemption was engaged as a matter of principle.

53. The substance or thrust of this fourth ground of appeal has morphed over time. In both the original application for permission to appeal and the notice of appeal to the Upper Tribunal, the Department’s argument was that the Tribunal had erred in law in its assessment of the public interest balance in favour of maintaining the section 36(2)(c) exemption. In particular, the Department’s submission was that the Tribunal had failed to have regard to the “single most important factor in favour of maintaining the section 36(2)(c) exemption – i.e. the public interest in reducing unemployment” (notice of appeal at paragraph [74]).

54. The difficulty with this ground of appeal is that it assumes as a given what it seeks to assert. The Department's arguments about the importance of the schemes in question as measures to reduce unemployment were obviously before the tribunal (see e.g. paragraphs [133]-[139]). However, as we have seen, the Department had failed in its attempt to persuade the Tribunal that disclosure of the requested names would be likely in itself to lead to placement hosts withdrawing from MWA and the WP. That being so, it necessarily followed that any issue as to a reduction in employment opportunities counted for very little in the public interest balancing exercise.

55. Mr Sharland also argued that the Tribunal had fallen into error in relation to section 36(2)(c) by starting from the position that "the scales stand empty at the outset of the analysis" (paragraph [212]), by analogy with the position under section 35 (as set out in *OGC v Information Commissioner* [2013] QB 98). However, Mr Sharland rightly observed that section 35 is a general class-based exemption whereas section 36 is a prejudice-based exemption. Furthermore, both the First-tier Tribunal (see *Guardian Newspapers Ltd v IC and BBC* [2011] 1 Info LR 854 at paragraph [92]) and the Information Commissioner's own guidance *Prejudice to the effective conduct of public affairs (section 36)* (at paragraphs [68]-[71]) indicated that the reasonable opinion of the qualified person should have been accorded weight when judging the public interest balance; as such the scales did not stand empty at the outset.

56. I will assume for the purposes of argument that Mr Sharland is correct to argue that the Tribunal's starting point at paragraph [212], namely that the scales stand empty in section 36, represents an error of law. The point, however, is by no means free from uncertainty – for example, in *Evans v Information Commissioner and MoD* (EA/2006/0064) another information tribunal took the view that the qualified person's opinion was a threshold condition for section 36, rather than a major piece of evidence in its own right (at paragraph [36]). However, be that as it may, both the *Guardian Newspapers* case and the Commissioner's guidance make it clear that the Commissioner (and, by implication, the Tribunal on appeal) must form an independent assessment of the public interest balance, and this will necessarily include an evaluation of the weight to be attached to the qualified person's opinion (as the Tribunal here had acknowledged at paragraph [54]).

57. If the Tribunal erred in law here, it was by no stretch of the imagination a *material* error of law. I say that for three reasons. First, paragraph [212] was just one of six preliminary considerations which the Tribunal referred to before applying the public interest balancing test. Second, section 36 is in any event plainly a qualified exemption, and the qualified person's opinion is not conclusive (save for the special situations covered by section 36(7), which do not arise here). Third, the reality is this was not a case where the scales under section 2(2)(b) tipped narrowly in favour of the public interest in disclosure as against that in maintaining the exemption (and, it might be added, it is the public interest in *maintaining the exemption*, and not any public interest in *non-disclosure* that counts here). Rather, echoing the Commissioner's analysis, the Tribunal concluded that it was "*firmly* of the view that in these appeals the scales are weighed *appreciably* in favour of disclosure" (paragraph [214], emphasis added).

58. In both his skeleton argument and at the oral hearing, Mr Sharland raised two further matters under the general banner of the Department's fourth ground of appeal which had not previously been canvassed in either the application for permission or the notice of appeal. Indeed, these points were arguably not directly relevant to the public interest in maintaining the section 36(2)(c) exemption at all. This was less than

satisfactory, not least as at an earlier stage in the proceedings the Department had declined to submit a written reply to the Commissioner's response to the appeal, indicating that its submissions could be dealt with by way of its skeleton argument for the oral hearing. That skeleton argument was supposed to have been circulated 21 days before the hearing – in fact it arrived only 9 days beforehand. Mr Hopkins indulged in a certain amount of adversarial huffing and puffing, pointing out that there had been no application by the Department to amend its grounds of appeal. However, tribunal procedures are, for the most part, less formalistic than those in the courts, and I did not consider that there was any serious prejudice to the Information Commissioner in taking the new points now. However, given the procedural history I deal with them in fairly short order.

59. The first additional point is a challenge to paragraph [210] of the Tribunal's decision, which referred to the focus of the public interests involved (see further *Chichester DC v Information Commissioner and Friel* [2013] 1 Info LR 38 at paragraph [24]). There is nothing in this argument – all the Tribunal was saying was that when considering the balancing test for exemptions one had to focus on the factor or factors which the public interest was seeking to protect.

60. The second extra point is on the face of it potentially more far-reaching. The Tribunal had noted that "it is not conclusively established that the notion of aggregation applies to requests under FOIA" (paragraph [211]), whereas of course aggregation certainly does apply under the Environmental Information Regulations 2004 (SI 2004/3391) (see *Ofcom v Information Commissioner* [2010] UKSC 3 and Case C-71/10; [2011] 2 Info LR 1). Mr Sharland argued that the principle of aggregation in the FOIA context is "well-established", citing a range of authorities, and so the Tribunal was in error. Mr Hopkins demurred, pointing to the recent discussion in *Department of Health v Information Commissioner* (EA/2013/0087; at paragraphs [49]-[58]), currently on appeal to the Upper Tribunal. However, this is neither the time nor the place to resolve the FOIA aggregation puzzle. The simple fact is that the Tribunal here found that only one exemption was engaged, and so aggregation simply did not arise – as indeed the Tribunal commented in paragraph [211] itself, if rather elliptically. Even if section 43(2) had also been engaged, the Tribunal's assessment was that the Department was essentially making the same public interest arguments in respect of both exemptions (see paragraph [56]) and that the public interest in favour of disclosure by some considerable margin outweighed the (aggregated) public interest in favour of maintaining the exemptions (see paragraphs [187] and [214]-[215]).

61. The Tribunal referred in particular to the following factors which, in its view, justified the conclusion that there should be disclosure, reflecting its firm finding that "the scales are weighed *appreciably* in favour of disclosure" (paragraph [214], emphasis added):

"[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.”

62. It is thus crystal clear that the Tribunal agreed with the Information Commissioner’s assessment of the public interest balance. This had been summarised by the Tribunal in the following terms:

“[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.”

63. This was a conclusion that was open to the Tribunal on the findings it had made. It follows that this final ground of appeal shares the same fate as its three predecessors.

Conclusion

64. Accordingly I dismiss the Department’s appeals. The Tribunal’s decision on the three joined appeals does not involve any material error of law (Tribunals, Courts and Enforcement Act 2007, section 11). The Tribunal’s decision stands and hence the Information Commissioner’s Decision Notices should now be complied with.

**Signed on the original
on 15 July 2014**

**Nicholas Wikeley
Judge of the Upper Tribunal**