



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Cases EA/2014/0073, 0109, 0130

ON APPEAL FROM:

**Information Commissioner's
Decision Notices: FS50515872, FS50517872, FS50520380
Dated: 5 March 2014, 31 March 2014, 29 April 2014 respectively**

Appellant: Department for Work and Pensions

Respondent: The Information Commissioner

Heard at: Fleetbank House, Salisbury Square, London EC4Y 8JX

Date of hearing: 29 and 30 October 2014

Date of decision: 22 December 2014

**Before
CHRIS RYAN
(Judge)
and
ROGER CREEDON
PIETER DE WAAL**

Attendances:

For the Appellant: Andrew Sharland of Counsel

For the Respondent: Robin Hopkins of Counsel

**Subject matter: Qualified exemptions:
The economy s.29;
Prejudice to effective conduct of public affairs s.36(2)(c);
Commercial interests/trade secrets s.43.**

**Cases: *DWP v IC and Zola* [2014] UKUT 0334 (AAC)
Hogan and Oxford City Council v Information Commissioner [2011] 1
Info LR 588
OFCOM v Information Commissioner (C-71/10) [2011] PTSR 1676.**

DECISION OF THE FIRST-TIER TRIBUNAL

Each of the appeals is dismissed.

REASONS FOR DECISION

The Appeals under consideration in this decision

1. The issue arising in each of the three appeals covered by this determination is whether the Department for Work and Pensions (“DWP”) was entitled to refuse to disclose publicly the identity of certain organisations that had participated in government schemes designed to help unemployed people back into work. In each case disclosure had been sought in a request for information under the Freedom of Information Act 2000 (“FOIA”). However the requests were not in the same format. In one case the requester asked for a list of participating organisations (plus other information), but in the other two he asked the DWP to confirm or deny whether an organisation, identified in the request, had been a participant. The effect of complying with each request would have been the same – the identity of the organisations in question would have been made public
2. The DWP relied on statutory exemptions created by FOIA sections 29 (prejudice to the economy), 36 (prejudice to the conduct of public affairs) and 43 (prejudice to commercial interests). Our decision is that it was not entitled to prevent disclosure under any of those exemptions and that its appeals against each of the Information Commissioner’s decision notices, in which he ordered disclosure, should therefore fail.
3. The appeals under consideration in this decision are:
 - a. **EA/2014/0073 (“Sheehan”)**: This arises out of an information request by a Mr Sheehan dated 24 May 2013, which sought information about the possible involvement, as a Placement Host in the Government’s Mandatory Work Activity programme, of a named organisation. The request had been submitted to the DWP, which had refused to either confirm or deny that it held the requested information. Following a complaint to the Information Commissioner he issued a decision notice on 5 March 2014 (under reference FS50515872) in which he directed the DWP to confirm or deny whether the requested information was held.

- b. **EA/2014/0109 (“Sheldon”)**: This arises out of an information request submitted to DWP by a Mr Sheldon on 8 July 2013, which sought information about government Work Programme work placements which the requester believed had been effected by a named organisation. DWP had, again, refused to either confirm or deny that it held the requested information, which led ultimately to a decision notice by the Information Commissioner (number FS50517872 dated 31 March 2014) directing it to confirm or deny whether the requested information was held.
 - c. **EA/2014/0130 (“Chance”)**: This arises out of an information request submitted to DWP by a Mr Chance on 5 September 2013. In this case the information sought was the names of the organisations that had provided placements on the government’s Day One Support for Young People programme through two named providers. DWP refused to provide the information. In this case, following a complaint, the Information Commissioner issued decision notice FS50520380 on 29 April 2014 in which he directed the DWP to disclose the withheld information.
4. The Sheehan and Sheldon case appeals were joined, by order of the Tribunal Registrar, and the Chance case appeal was ordered to be heard at the same time as the joined appeals.

Factual background

5. Each of the information requests considered in the decision notices sought information about one of several schemes created by the government with a view to providing work experience and other arrangements for unemployed persons. We will refer to those schemes by the collective term “the Schemes”. Those of the Schemes relevant to these appeals are summarised in the following paragraphs.

Mandatory Work Activity (“MWA”)

6. Since May 2011 an individual in receipt of Jobseeker’s Allowance (typically one who has been out of work for a long time) may be given the opportunity of undertaking a few weeks work experience with an organisation which has agreed to participate in the scheme (a “Placement Host”). The placements are intended to involve work that is of benefit to the community and should not result in other employees being displaced. Placement hosts are therefore frequently charities or other non-profit organisations. Although Jobseeker’s Allowance continues to be paid, this could be temporarily withdrawn if the recipient failed to complete a MWA placement.
7. Arrangements were put in place by the government for private organisations (“Contract Providers”) to take on the task of recruiting Placement Hosts and arranging placements. The Contract Providers were to be paid for their efforts

and were to be free, if they wished, to pay Placement Hosts for their involvement.

8. The MWA scheme continues to operate today. At the time when the relevant information requests were submitted there were approximately 30,000 places available for MWA, at a cost to the tax payer of £23 million a year.

Work Programme

9. The Work Programme was introduced in June 2011 and provides financial incentives for Contract Providers whose support leads to Jobseeker's Allowance claimants taking up employment. Most claimants selected for the Work Programme have no choice about participating. If work experience is considered to be an appropriate form of support, the Placement Host may be selected from commercial organisations as well as charitable or voluntary organisations.

Day One Support for Young People

10. Between August 2012 and November 2013 the government operated an experimental scheme in parts of London for 18-24 year old claimants of Jobseekers Allowance, who had less than six months work history since leaving full time education. It involved them participating in a work placement that was of benefit to the community while continuing to receive support to obtain full time employment.

The relevant law

11. FOIA section 1 imposes on the public authorities to whom it applies an obligation to inform a person requesting information whether it holds the requested information and, if it does, to have that information communicated to him or her. The relevant part of section 1 reads:

“(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.*

...

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as ‘the duty to confirm or deny’ ”

12. The relevant parts of the statutory provisions on which the DWP relied are as follows:

- a. **Section 29:**

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to prejudice –

(a) The economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of [the government of the UK, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly or the National Assembly for Wales]

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

b. Section 36:

“(1) ...

(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 ... prejudice, or would be likely to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

c. Section 43:

“(1) ...

(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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

13. FOIA section 2(3) categorises each of the exemptions relied on by the DWP as “qualified exemptions”. That has the following consequences for the appeals under consideration:

- a. Sheehan and Sheldon: Under section 2(1)(b) the duty to confirm or deny does not arise in relation to any information falling within the scope of a qualified exemption if:

“in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny

outweighs the public interest in disclosing whether the public authority holds the information.”

- b. Chance: Under section 2(2)(b) the duty to communicate information under section 1(1)(b) does not apply:

“if or to the extent that-

(a) ...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

The decision notices under appeal.

14. In each of the decision notices the Information Commissioner decided in favour of the individual who had made the request. His reasons in each case are summarised below, although, as the Sheehan and Sheldon decision notices were almost identical, they are dealt with together.

Sheehan and Sheldon

15. The Information Commissioner considered the risk of the government being forced to pay more in benefits (if identified Placement Hosts were targeted by campaign groups and withdrew from the scheme) or more to support the unemployed into work (if such targeted hosts sought payment for their continued involvement). The DWP had argued that in those circumstances harm would be suffered by the national economy as a whole. However the Information Commissioner did not consider that sufficient evidence had been produced by the DWP to establish a causal link between disclosure of the information sought and the prejudice claimed. The necessary prejudicial effects for the section 29 exemption did not therefore arise, in his view.
16. Notwithstanding his finding under section 29, the Information Commissioner accepted that the section 36 exemption was engaged. He accepted that a valid opinion had been issued by a suitably qualified person and that it was not unreasonable for that person to have concluded that prejudice to the conduct of public affairs was likely to result if the identity of the organisations mentioned in the information requests were to be disclosed by a confirmation or denial. The Information Commissioner then proceeded to undertake the public interest balancing test required by section 2(1)(b). He balanced the public interest in the transparency of the Schemes against various points which the DWP stressed, involving the risk of damage to the Schemes resulting from the public identification of Placement Hosts and their consequent targeting by campaign groups. However, he concluded, on the evidence before him, that the anticipated damage would not occur frequently, and/or that it would not be extensive or severe. The public interest in maintaining the exclusion of the duty to confirm or deny did not, therefore, outweigh the public interest in disclosing whether the DWP held the requested information.

17. As regards section 43(2) the Information Commissioner did not accept that the exemption was engaged because the evidence submitted by the DWP had not established a sufficient link between the consequences of disclosure and the prejudice claimed.

Chance

18. The Information Commissioner was not satisfied that the section 29 exemption was engaged. Although the DWP had presented him with evidence and argument regarding the likely impact of disclosure on both the scheme referred to in the information request and the Schemes as a whole, this was held not to be sufficient to establish that disclosure of the requested information would be likely to lead to campaign groups using it to discourage organisations from being involved. Accordingly the link between disclosure and the prejudice claimed was not established.

19. Section 36 was, again, found to be engaged but the Information Commissioner did not think that the public interest in maintaining the exemption outweighed the public interest in disclosure. He considered that there was a strong public interest in the disclosure of information that would help the public to understand, from an informed perspective, how the Schemes were being delivered. Against that the DWP stressed the risk of organisations identified in a response to the information request being discouraged from further participation, leading to a reduction in the opportunities available to unemployed people. However, the Information Commissioner concluded, as in the Sheehan and Sheldon cases, that he was not persuaded by the evidence submitted that there was a significant risk of campaign groups succeeding in their efforts to discourage the continued involvement of relevant organisations.

20. The Information Commissioner also rejected the DWP's arguments that the section 43 exemption was engaged because there was, in his view, an insufficient link between the targeted pressure of campaign groups and organisations choosing to leave the Schemes as a result of that pressure.

The Appeal to this Tribunal

21. The DWP appealed to this Tribunal from each of the Decision Notices and the appeals were heard at the same time, on 29 and 30 October 2014, (as a result of the directions referred to in paragraph 4 above).

22. The Grounds of Appeal in support of each appeal were substantially identical, as were the written forms of Response filed by the Information Commissioner. At that stage both parties declined to set out a detailed case because an appeal to the Upper Tribunal was pending from a First Tier Tribunal decision concerning similar information requests. The appeal was determined in July 2014, before the hearing of this appeal. It has been reported as *DWP v IC and Zola* [2014] UKUT 0334 (AAC) ("Zola") and was referred to extensively in skeleton arguments filed by the parties and during the course of the hearing.

23. The *Zola* appeal arose out of requests for information relating to the identity of Placement Hosts in the MWA scheme (as in Sheehan), the WP scheme (as in Sheldon) and a further programme entitled Work Experience, which does not feature in any of the requests under consideration in this appeal. The exemptions relied on by the DWP were FOIA sections 36(2) and 43(2). The Information Commissioner decided that the DWP had not been entitled to rely upon those exemptions and the First Tier Tribunal (“FTT”) dismissed the DWP’s appeal. The FTT concluded that FOIA section 36(2) was engaged, but not section 43(2), and that the public interest in maintaining the section 36(2) exemption did not outweigh the public interest in disclosure. It reached that decision on the basis of the evidence before it.
24. An obvious difference between *Zola* and these appeals is that the section 29 exemption was not considered in *Zola*. It is also relevant to note that the evidence relied on by the DWP in *Zola* was supplemented by further evidence filed by the DWP in these appeals.
25. The Upper Tribunal reached the following conclusions in *Zola* on the FTT’s decision in respect of section 43(2):
- a. It had not misdirected itself as to the proper test to be applied under that section;
 - b. It had not failed to give adequate reasons for finding that the section had not been engaged;
 - c. It had not failed to take into account relevant evidence and/or reached perverse conclusions in relation to such evidence.
- In the course of its decision on those points Upper Tribunal Judge Wikely noted that the FTT had treated the evidence before it to a careful and detailed analysis.
26. In relation to the public interest test under the section 36 exemption the Upper Tribunal concluded that the FTT had been wrong in treating the scales as empty at the outset of its analysis, because some weight should be given to the fact that an opinion had been issued by a qualified person (in this case a Minister) as to the prejudice likely to result from disclosure. The FTT should have formed “*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...*” (Upper Tribunal decision at paragraph 56).
27. We have given due consideration to the guidance provided by the Upper Tribunal when approaching the decisions that we have to make in order to determine these appeals. We have been assisted by full skeleton arguments, supplemented by arguments presented at the hearing by counsel for the parties, as well as an agreed bundle of papers and a lengthy (164 paragraph) witness statement signed by Jennifer Bradley, the DWP’s Acting Deputy Director, Labour Market Interventions Strategy. Ms Bradley adopted evidence previously submitted to the FTT in relation to the *Zola* appeal by her colleague, Claire Elliott (then Joint Head of the Work Programmes Division at the DWP), but supplemented it with additional evidence. Ms Bradley was cross examined at the hearing of these appeals. We set out, in the following paragraphs, the essence of the evidence provided in Ms Bradley’s witness

statement. We do not deal with the extensive argument that it included, although the issues she raised were reiterated in the legal arguments present by DWP's counsel, Mr Sharland, and we address them when reviewing the debate on the legal issues below.

Ms Bradley's witness statement

28. Ms Bradley summarised the three information requests and the DWP's response to each of them, reciting substantial extracts from the correspondence in which the DWP explained its reasons for the position it had adopted. The evidence then addressed the following issues.
29. The DWP's commitment to transparency in respect of the Schemes: the practice of publishing statistics and evaluation reports for the Schemes was summarised.
30. Controversy surrounding the Schemes: it was explained that the Schemes have been described, collectively, as "workfare" and attracted journalistic criticism, particularly between November 2011 and February 2012. The DWP considers that the criticism, focusing on the suggestion that commercial organisations were benefiting from "free labour", was unfair and unbalanced but Ms Bradley acknowledged that it led to the withdrawal of several Placement Hosts. The coverage also identified a campaign group called Boycott Workfare. The witness statement did not state when this group first emerged, but asserted that the newspaper coverage gave it a level of exposure it did not have before and that the impact of such "anti-welfare to work" campaigns led to the DWP refusing to release information about the identity of Placement Hosts, as it had done before.
31. The activities of the Boycott Welfare campaign group: The Boycott Workfare group was identified as one of a number which criticised the Schemes because, in its view, they benefited the rich by providing free labour while threatening to withdraw benefits from individuals who refused to participate. An exhibit to the witness statement (itself running to over 1,000 pages) included prints of webpages encouraging readers to attend public meetings, participate in telephone blockades, hijack twitter feeds, distribute leaflets, boycott participating organisations, demonstrate at their premises and/or occupy shops operated by them. Some of the pages included images of protesters carrying a banner reading "If you exploit us we will shut you down" and recorded information about organisations who had withdrawn their support, as well as those who continued to support. In the case of those in the second category, readers were encouraged to co-operate in picketing or other forms of targeted protest. The suggested targets included both commercial organisations and charities. One of the charities that faced criticism was Sue Ryder, which ultimately withdrew from the MWA scheme in the circumstances described below. Readers were encouraged to boycott the charity and to carry out a "rolling online picket" of it. The webpages also recorded a government decision to remove sanctions against non-participating claimants and a legal challenge against two of the Schemes.

Readers were encouraged to join a protest outside the court on the day of the hearing of that challenge.

32. Other campaign groups: Boycott Welfare was said to encourage other groups, as well as individuals, to take action against Placement Hosts. Website pages were exhibited in support of the claim that action by local groups was being coordinated and information shared. Groups connected in this way included the Bristol Anarchist Federation, the Disabled People Against Cuts group, the Edinburgh Anti-Cuts Alliance, a section of the International Workers Association and a blog publisher entitled “johnnyvoid”. The last named was said to engage in the encouragement of aggressive and possibly criminal targeting of any organisation known to be involved in the programmes – an allegation that was supported by several extracts exhibited to the witness statement.
33. Boycott Welfare’s publication of Placement Host details: An analysis of information released by the DWP in response to past information requests against the content of the Boycott Welfare website demonstrated that freedom of information responses had been cited as the source of information about organisations (including those criticised for their involvement) in a number of cases. The verification provided by a freedom of information response was also mentioned on occasions and readers were provided with information to assist them to make further requests.
34. Protests against Placement Hosts: The witness statement drew special attention to the appearance of names released in response to particular information requests appearing in invitations on the Boycott Welfare website to join “days of action”, telephone/email lobbying or similar protests. Evidence was also exhibited of protests taking place inside charity shops and similar premises.
35. Damage to property: Extracts from the “johnnyvoid” website demonstrated that its publisher had on several occasions advocated damaging the property of participating organisations, including, in particular, an organisation called Byteback IT Solutions Ltd (“Byteback”).
36. Targeting individuals: Among several invitations on websites, including that of Boycott Welfare, for readers to contact Placement Hosts by telephone or via social media, Ms Bradley again cited the “johnnyvoid” targeting of Byteback, which included the disclosure of the personal Facebook page of an individual employed by Byteback accompanied by an invitation from a contributor to “*message him directly plus everyone on his friends list to let people know what we think of benefit scroungers that exploit workfare.*” The witness statement also exhibited evidence of Boycott Welfare publishing the communication details of certain senior executives of a Contract Provider called Seetec, accompanied by an oblique invitation to contact them and “*just ruin their day*”. The identity of Contract Providers was, of course, always in the public domain, unlike Placement Hosts. In contrast to these specific instances of individual targeting, the witness statement included the following

allegation, for which no supporting evidence or identification of source was provided:

“120. More than one prime provider has told DWP that they and their Placement Hosts have also been subjected to social media “attacks”. This lobbying has been in the form of attacks through telephone, text and via social media channels, which were sometimes persistent and intrusive. These attacks have been from groups who have managed to get hold of the names of Placement Hosts involved with Work Programme and Mandatory Work Activity Schemes”.

37. Commercial Impact of protests: In June 2011 Boycott Welfare claimed on its website that a conference entitled “Making Work Pay” had been relocated at short notice because of fear that a planned protest might undermine the relationship between the conference organiser and the Royal Society, the venue owner. Ms Bradley speculated, on the basis of this occurrence and the other instances of Placement Host premises being targeted, that the relationship between Contract Providers and Placement Hosts, on the one hand, and co-tenants or landlords, on the other, would be adversely affected, possibly leading to a need to relocate.
38. The withdrawal of Placement Hosts: Ms Bradley adopted the following evidence, originally submitted by Claire Elliott in respect of the *Zola* appeal:
- a. Ms Elliott had arranged for certain enquiries to be carried out in October and November 2012 by DWP employees with management responsibilities within the MWA and Work Placement schemes. They had been asked to make enquiries about the attitude of Placement Hosts and Contract Providers to the release into the public domain of the identities of work Placement Hosts. The exercise was described by Ms Elliott as being “*semi-structured*” and based on an “*information sheet*”, which the employees were to use “*as the basis for a discussion with each provider*”, recording the information requested on a standard form.
 - b. Ms Elliott exhibited copies of the briefing document issued to the employees and the form on which “*feedback*” was to be recorded. The briefing document made it clear that the purpose of the exercise was to obtain “*robust ‘witness’ evidence from providers*” in support of the DWP’s view that release of the Placement Host names would lead to “*another concerted campaign against the programme and placement organisations*” and a negative impact on both the Schemes and Placement Hosts. This evidence was to be obtained by the DWP employees arranging for Contract Providers “*discreetly*” to gather the views of Placement Hosts on the implications for them of the release of their identities. Although the instructions suggested that only Placement Hosts were to be interviewed, it is clear that views were also sought from Contract Providers (both those dealing direct with the DWP and others operating in a sub-contractor role). The instructions stressed the importance of establishing, in particular:

- i. What issues Placement Hosts had experienced due to negative press comment and previous campaigns?
 - ii. Whether any Placement Hosts had been lost? and
 - iii. What consequences were expected to follow, both positive and negative, if Placement Host identities were released in the future?
 - c. The feedback forms were designed to record the identity of the organisation approached and provided space for the answers to various questions, including:
 - i. *“What issues have providers or placement organisations experienced due to negative press campaigns against [MWA/Work Programme]”*;
 - ii. *“Are there any ongoing impacts of the negative press and previous campaigns on providers or organisations providing placements?”*
 - iii. *“Have any placements been lost/how many”*; and
 - iv. *“What would be the consequences for them (as a provider or a placement organisation) should DWP release this information into the public domain”*
 - d. Ms Elliott exhibited a number of completed forms, some written up by the questioner and others by a representative of the organisation approached. They recorded a variety of reactions to the issues raised and Ms Elliott set out her own analysis of the results. In Ms Bradley’s witness statement she added her conclusions, which were to the effect that Placement Hosts would withdraw if they were targeted by campaigners who identified them as a result of the decision notices in these appeal being upheld. The recorded responses were also relied on at the hearing by Mr Sharland, counsel for the DWP. However both the answers received and the nature and conduct of the evidence gathering process, were subjected to critical comment by counsel for the Information Commissioner, Mr Hopkins. We therefore limit ourselves to saying, at this stage, that the exercise carried out by the DWP did not purport to be a scientifically robust opinion survey and that none of those who completed a feedback form was called to give evidence at the hearing.

39. Ms Bradley concluded her witness statement with a summary section, which she introduced with this paragraph:

“In summary, based on the evidence exhibited to my statement, if in response to FOI requests, DWP is required to either confirm or deny whether particular organisations are Placement Hosts or is required to release the names or other information about Placement Hosts, it is highly likely that any names will be posted on Boycott Workfare’s (or other) websites. Once those names appear on Boycott Workfare’s website as confirmed Placement Hosts (either for the first time or confirming information obtained by Boycott Workfare from other means) that will, in my view, mean that Boycott Workfare will publish further information or contact details about them and include them in its “Calls to Action”. When that happens, it is highly likely that the

Placement Hosts will be subject to lobbying, protests, bullying, harassment and direct action. In my view the evidence shows that in many instances this goes far beyond legitimate demonstration and has the avowed aim of interrupting business by causing the closure or blockade of commercial premises and deterring customers by preventing access to shops or premises. It is clear that the object of the direct action is to force or coerce Placement Hosts into withdrawing from the schemes with the avowed aim of disrupting the schemes to the extent that they become unworkable and with the intention of 'shutting down' or 'breaking' the schemes."

The witness statement then went on to consider each of the claimed exemptions and the public interest test arising under them in the context of the evidence, as summarised. Ms Bradley acknowledged, in this respect, that there was public interest in transparency and regretted that the activities of campaigners had caused the DWP to discontinue its practice of disclosing the names of placement hosts. She drew attention, however, to the publication of performance statistics and evaluations, which, she suggested, could lead to better understanding of the Schemes.

40. Ms Bradley was cross examined on her witness statement during the hearing. Although inevitably faced with the difficulty of being both witness of fact and having some responsibility for the Schemes (and therefore having an interest in their uninterrupted operation) Ms Bradley strove to give truthful evidence and was only occasionally tempted by Mr Hopkins' questions to slip into arguing the DWP's case. She also found it difficult at times to avoid referring to the contents of a second witness statement which, as explained in paragraph 46 below), was declared inadmissible.
41. In the course of Ms Bradley's cross examination she provided clarification on the following material points:
- a. Campaigners such as Boycott Welfare do not rely entirely on freedom of information disclosures to identify Placement Hosts (and will sometimes target an organisation identified by other means). However, she stressed that, in her opinion, an FOIA disclosure would provide them with verification of information obtained by other means and had the convenience of potentially providing a comprehensive list. It might also include the names of organisations, such as manufacturers, which were not present on the high street and whose involvement was not therefore so easily discovered by other means.
 - b. For the national economy to be harmed, so as to engage the FOIA section 29 exemption, it would be necessary for the withdrawal of Placement Hosts to be at such a level that the current schemes would collapse.
 - c. There was an inevitable degree of overlap between the factors that may lead to a Placement Host withdrawing, such as union pressure, negative press coverage, targeted protest campaigns and its own, unprompted, consideration of the merits of a scheme, but Ms Bradley maintained that the documentation exhibited to her witness statement demonstrated that media comment stimulated protest with the two

operating “hand in hand” in exerting pressure on participating organisations.

- d. The evidence of Placement Host withdrawal which provided the strongest support for the DWP case was the public statement made by the Sue Ryder charity in February 2013. It stated that the organisation had reviewed its position with regard to the Schemes in the light of *“Recent online lobbying using strong and emotive language and making misleading claims about our volunteering practices”* which had *“presented a risk to our critical work”* and led to a decision to withdraw from mandatory schemes in order to *“protect our service users, their families, our supporters and Sue Ryder staff and volunteers from any further distress.”* Ms Bradley conceded that the decision had been made over 18 months after the organisation had been named in a freedom of information disclosure, but maintained the view that there was a real connection between that disclosure and the instigation of a “rolling online picket” campaign by Boycott Workfare which operated as the trigger for the Sue Ryder decision to withdraw.
- e. The DWP did not impose an obligation of confidentiality on those involved in its schemes (including jobseekers) and a Placement Host could not therefore have an expectation of anonymity when agreeing to be involved.
- f. Although much of the evidence relied on by the DWP came from the Boycott Welfare website, and might therefore include a measure of propaganda, Ms Bradley believed it demonstrated what actions were likely to follow a disclosure, particularly as the websites of other organisations covered many of the same events.
- g. One of those other websites, the “johnnyvoid” blog site referred to in paragraph 32 above, appeared to have a significant twitter following. It was believed by the DWP to have an effect in mobilising individuals to go beyond legitimate protest, although the connection between it and instances of property damage and the like, had not been established.
- h. Public statements by organisations (other than Sue Ryder) about their reasons for withdrawing, written in terms suggesting that the decision was based on principle, might in fact be the result of harassment by campaigners. This, Ms Bradley said, was not to suggest that those organisations deliberately misled the public but that the public statement might have been limited to only part of the reason for withdrawing. Other organisations had withdrawn without making any public statement about their reasons.
- i. Many organisations had “weathered” the storm of protest and continued to participate. In some cases this was because they had greater commercial strength. However, the withdrawal of Byteback, referred to above, was an instance of a commercial organisation withdrawing (although the release of its identity was through a government press release and not in response to an information request.)

Closed material

42. Before considering the debate on the issues arising from the appeals we should deal with two procedural issues which arose shortly before the hearing and were determined during its early stages. First, an application was received from a national newspaper that it be provided with copies of any skeleton arguments or witness statements filed by the parties. The application accepted that the disclosed documents might be redacted to exclude material that should remain secret unless or until the Tribunal ordered disclosure. With the consent of the parties, and on the basis that both sides' skeleton arguments and the witness statement filed in support of the DWP case would in due course be read into the record of the hearing, copies were made available at an early stage of the hearing. The applicant newspaper did not ask for copies of the extensive documentation exhibited to Ms Bradley's witness statement.
43. The second application was made by the DWP under Rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules") for an order that certain parts of the bundles prepared for the hearing should not be disclosed to the public and should only be quoted during the hearing in a closed session. In some cases the application related to a complete document and in others it was for the redaction of a part of it. For various understandable reasons counsel for the parties had not been able to explore areas of possible agreement in advance but, in the course of discussion at the hearing, agreement was quickly reached (and approved by us) to the effect that the following categories of information should be treated as closed material:
- a. The names of organisations which would be disclosed in response to the Chance information request if the decision notice in that case were upheld;
 - b. The names of other individuals who had submitted information requests;
 - c. The telephone numbers of certain individuals;
 - d. The DWP's answers to certain questions raised by the Information Commissioner in correspondence, which would have disclosed the information that is in dispute;
 - e. The names of the organisations which had completed questionnaires created as the result of the evidence gathering exercise referred to in paragraph 38 above, which had been treated as closed material in the *Zola* appeal;
 - f. The names of certain representatives of charities identified in two pieces of correspondence between the respective charity and the DWP, as well as information recorded in that correspondence relating to the charity's financial arrangements.

The DWP also agreed to withdraw its application to redact the names of Contract Providers mentioned in correspondence (there has never been any secrecy as to their identity), to redact the names of the Placement Hosts from the Sheehan and Sheldon information requests and certain entirely anodyne redactions (for example, a cross reference to the existence of an annex, where the annex itself was properly redacted).

44. As a result of those agreements the issue debated at the start of the hearing was restricted to a second witness statement which had been signed by Ms Bradley and to which she had exhibited two letters from Contract Providers. Ms Bradley explained that it had been hoped that a representative of each Contract Provider would have given oral evidence in support of the appeal but that each of the organisations was so concerned about raising its profile as a supporter of DWP in the appeal process (which it feared might lead to retaliatory action) that they had declined to sanction this. Each had, however, written a letter to the DWP setting out certain facts and anticipated problems, but had imposed a requirement that the material could only be deployed if an order was made for it to be treated as closed material. The main part of the witness statement then summarised the content of the letters. The information contained in the letters was highly relevant to the question of whether or not FOIA section 43 was engaged.
45. Mr Hopkins objected to the admission of the evidence in this form. He argued that it amounted to anonymous hearsay evidence and that the concerns expressed by the two organisations did not justify the proposed departure from normal rules of evidence. He also suggested that the two organisations had a commercial interest in the outcome of the appeal, in that it could affect their dealings with Placement Hosts and the DWP. He urged us to direct that either the whole of the material should be treated as open or it should be rejected as inadmissible. Although a possible compromise was floated during the course of debate it became clear that this would not be appropriate or acceptable. Mr Sharland accepted that issues might arise as to the weight to be attached to the material, in light of the manner in which it was being presented, but urged us to admit it as relevant to a key issue which we would be required to determine. He suggested that the point made by Mr Hopkins regarding the commercial interests of the two organisations actually supported the DWP's case in respect of commercial prejudice, for the purpose of the exemption under FOIA section 43.
46. The starting point for resolving this dispute is that justice is required to operate in an open and public way unless there are powerful reasons for ordering otherwise. Given that the two relevant organisations are already known to be Contract Providers under the Schemes, we do not consider that the reasons put forward for retaining their anonymity are sufficiently strong to justify a departure from that rule. The evidence that would be introduced by these letters to the case could not be tested by cross examination or verified by any form of enquiry and this would put the DWP's opponent at a disadvantage, on a crucial issue in the appeals, which could not be justified. We therefore informed the DWP that the second witness statement and exhibits would either have to be submitted in open form or it would not be admitted. The DWP decided that in those circumstances, while reserving its position in respect of our decision, it would remove the material from the hearing bundle.

Debate on legal issues

47. It is common ground between the parties that FOIA section 36 is engaged and that the opinion of the appropriate qualified person, which triggered the

engagement must be given due weight when we come to consider the public interest test in respect of that exemption. There was also agreement between the parties that, in the context of these appeals, the consequence of a confirmation or denial in Sheehan and Sheldon would be the same as a disclosure in response to the information request in Chance – in all cases the identity of one or more Placement Hosts would be put into the public domain. That is the extent of any agreement between the parties and the questions which we therefore have to answer, formulated with regard to the way in which each of the parties has presented its case (and in the same order), are:

- a. Would the disclosure of the identity of Placement Hosts prejudice, or be likely to prejudice, the commercial interests of Placement Hosts or Contract Providers so as to engage the section 43 exemption?
- b. Would the disclosure of the identity of Placement Hosts prejudice, or be likely to prejudice, the economic interests of the UK and/or the financial interests of the UK Government so as to engage the section 29 exemption?
- c. In respect of FOIA section 36, and any other of the exemptions which we may find to have been engaged, does the public interest in maintaining the exemption/s outweigh the public interest in disclosure (Chance) or does the public interest in excluding the obligation to confirm or deny outweigh the public interest in knowing whether or not information is held about the identified organisation (Sheehan and Sheldon).

Preliminary

48. Mr Sharland made the following preliminary points on behalf of the DWP before addressing each of the questions we have identified. First, he drew our attention to the distinctions between these appeals and *Zola*, in particular that:

- a. the evidence before us was more extensive than that considered by the FTT in *Zola* (and found by the Upper Tribunal in that case to have justified the FTT's determination); and
- b. FOIA section 29 had not been relied upon in *Zola*.

His second point was to stress the importance of the Schemes to assist unemployed people to equip themselves for, and secure, full time employment. Thirdly, he drew attention to the DWP's original policy of disclosing the names of participating hosts which, he said, demonstrated its support for openness. Its reversal of that policy was, he said, forced upon it as a result of the use made of the information by Boycott Workfare and others.

FOIA section 43

49. Mr Sharland presented the DWP case on the lower of the two tests that are capable of arising under section 43. That is to say that he did not argue that the necessary prejudice "*would*" arise if disclosure were made but that it "*would be likely to*" arise. Basing himself on the FTT decision in *Hogan and*

*Oxford City Council v Information Commissioner*¹ (a decision which does not bind us, but which contains frequently quoted guidance on the approach to adopt in section 43 cases) Mr Sharland argued that there was a real and significant risk of the disclosure sought being likely to prejudice the commercial interests of Placement Hosts and Contract Providers. Placement hosts stood to lose customers (to the extent that they raised funds through retailing) and donations and to face difficulties with landlords and co-tenants in the event of their premises being targeted. If the resulting pressure led them to withdraw from relevant schemes they would also lose the benefit of having staff provided at the taxpayer's expense. Such withdrawal would have a detrimental knock-on commercial impact on Contract Providers, who would have to find new Placement Hosts (at a cost) and might not be able to deliver the job opportunities they had promised when entering the relevant Scheme.

50. The position of the Information Commissioner (also based on *Hogan*) was that, while the disclosure of the requested information could lead to the consequences anticipated, the evidence did not support the argument that there was a real and significant risk that they would occur. In order to succeed, his counsel, Mr Hopkins, said the DWP had to demonstrate that a particular chain of events was likely to occur following disclosure, and that it would or would be likely to lead to consequences that were sufficiently severe to engage the exemption.

51. The best evidential support for a causal link between the disclosure sought and the anticipated outcomes was said (by both parties) to be the history of what occurred when Placement Host names had been disclosed in the past. In that connection Mr Sharland relied, in particular, on the events that led to the withdrawal of Sue Ryder and Byteback, as well as the evidence of Boycott Workfare supporters being urged to complain to, or take disruptive action against, organisations identified on its website as being participants in one or other of the Schemes.

52. As to Byteback, the evidence included information posted on the website of the Bristol Post newspaper, which recorded that, following publicity about a visit by the Chancellor of the Exchequer to the company's premises near Bristol (where he was photographed talking to an individual who was working under one of the Schemes), the company had become the subject of public criticism (it was described by the newspaper as "a TWITTER backlash") which had led to it withdrawing. Its own public statement on the issue read:

"We've read all your comments and spoken to some of you. We want to say thank you to Robin who called and explained to us the issues surrounding workfare. From tomorrow, we will have no further involvement ever with this scheme. We had the best of intentions, both of us started this company as a result of a similar scheme back in 2002. Clearly we were wrong to get involved with workfare"

Mr Sharland suggested that the fact that the statement did not acknowledge the impact of other activities such as that advocated by "johnnyvoid" – see paragraphs 35 and 36 above – should not be taken as evidence that the

¹ [2011] 1 Info LR 588

decision to withdraw was based solely on principle. He also argued that the incident was an example of the sort of pressure to which Placement Hosts were likely to be subjected, once their involvement becomes publicly known, and it was of no consequence that, on this particular occasion, this did not result from a freedom of information disclosure.

53. The position in relation to Sue Ryder was that the organisation had been named on the Boycott Workfare website some months before it withdrew in the face of an imminent “rolling online picket”, which might be expected to disrupt its activities. Mr Sharland relied particularly on the terms of the charity’s public statement at the time (quoted at above paragraph 41 d. above) and asserted that the time lag between the information about its involvement becoming available to campaigners and their instigation of targeted protest actions was not a material consideration for us to take into account when determining whether there was a causal connection between the disclosure, the protest and the decision to withdraw. The Information Commissioner took the opposite position, arguing that the length of time between disclosure and withdrawal demonstrated the speculative nature of the causal chain on which the DWP relied. Mr Hopkins emphasised that the weakness of the connection was particularly significant given that this was the predominant example cited by the DWP as support for the likely impact of campaign group pressure, following disclosure.

54. At a more general level the DWP relied upon the “call to arms” and similar messages encouraging direct protest action, which appear on many of the copy webpages exhibited to Ms Bradley’s witness statement and derived from the websites of Boycott Workfare and other organisations appearing to share its publisher’s aims. The Information Commissioner argued that the DWP had failed to establish a clear link between the disclosure of Placement Host identities and protest activity by Boycott Workfare or others who shared its ambitions. It was clear, Mr Hopkins argued, that information about the involvement of various organisations in the Schemes could be obtained from a number of sources, including the personal testimony of individual jobseekers. No confidentiality obligations were imposed on those involved and there had never been any promise of anonymity to Placement Hosts. The Information Commissioner also asserted that the public statements given by certain organisations demonstrated that it was not the activities of campaigners that had led them to withdraw but their own concerns about the nature of the Schemes. He argued that, even if an organisation came to that decision as a result of negative press coverage, that did not necessarily support the existence of a connection with the disclosure of Placement Host identities. It was necessary to consider whether the journalist’s criticism had been aimed at the Schemes as a whole, rather than the participation in them of the particular organisation in question.

55. The DWP also relied on indications as to what might happen in the future derived, not from events in the past, but from the views recorded in the evidence gathering exercise referred to above. Mr Hopkins described the exercise as a survey and criticised it on the grounds that it was not even-handed, having been clearly designed to obtain evidence in support of a

particular line of argument. He suggested that, even then, the responses did not provide significant support for the DWP's case, with comparatively few respondents attributing difficulties to the disclosure of Placement Host identities (as opposed to negative publicity directed at the Schemes as a whole).

FOIA section 29

56. Mr Sharland argued that if Placement Hosts withdrew from a relevant Scheme (or declined to become involved) the DWP would have to spend more on welfare benefits to jobseekers and would have less to spend on other activities that might assist the unemployed. He accepted that the resulting impact on government finances would only arise if there were a significant number of withdrawals. He argued that the risk of that happening was real and significant and that a direct causal link existed between that eventuality and the disclosures requested. Mr Hopkins, on the other hand, argued that it was simply implausible that the disclosure of the identity of some (but by no means all) Placement Hosts could lead, in the manner suggested, to consequences at national level.

Public Interest Balance

57. The central element of the Information Commissioner's case, as expressed in Mr Hopkins' skeleton argument, was as follows:

"...if ...organisations are comfortable with participating in and benefiting from these work schemes, they should also be comfortable with their customers/donors being aware that they do so. There are no adequate reasons for their expecting to obtain that public benefit on an anonymous basis, especially where there has been no offer of confidentiality in the first place."

58. Mr Sharland accepted that there was a public interest in accountability and transparency where public money was being spent on programmes like the Schemes. However, he argued that, in contrast to the information already made available to the public regarding the operation, cost and effectiveness of relevant schemes, the disclosure of Placement Host identities would contribute nothing of relevance to collective public knowledge. It would not help the public to assess the success, or otherwise, of individual Contract Providers in securing work placements or other aspects of the Schemes. Mr Hopkins disputed the point, arguing that if the public is to understand how the schemes were being applied in practice they needed to know the detail of which organisations were participating.

59. Mr Hopkins also relied on a number of factors including the following:

- a. The public interest in the schemes evidenced by media coverage and campaigning (including legal challenges);
- b. The receipt by Contract Providers of substantial sums in order to incentivise them in securing the placement of jobseekers;

- c. The fact that the DWP applies a relatively “light touch” in monitoring the conduct of Contract Providers and Placement Hosts;
 - d. The degree of power that participating organisations have over individual jobseekers under the schemes;
 - e. Comments made by the National Audit Office about the operation of some of the Schemes in the past.
60. As to the public interest in maintaining secrecy, Mr Sharland laid particular stress on the degree of commercial detriment likely to be suffered by Contract Providers and Placement Hosts. This was said to lead, almost inevitably, to the withdrawal of Placement Hosts, which would result in fewer opportunities for jobseekers and a significant reduction in the effectiveness of the Schemes, which had been designed to provide a better life for individual jobseekers and a reduction in the burden that benefit payments impose on the overall body of taxpayers.
61. In putting the DWP argument in this way Mr Sharland effectively aggregated the public interest factors arising from the individual grounds for exemption relied upon. He argued that there was a firm precedent requiring us to pursue that approach in the decision of the Court of Justice of the European Union in *OFCOM v Information Commissioner* (C-71/10) [2011] PTSR 1676. Mr Hopkins disagreed, arguing that the public interest should be assessed on an exemption-by-exemption basis, rather than in the aggregate, because the precedent relied upon applied only to cases arising under the Environmental Information Regulations, and not FOIA. In the event, for the reasons given below, it is not necessary for us to resolve that dispute.
62. Mr Hopkins also argued that, in any event, the fact that some Placement Hosts (having been identified as a result of the Decision Notices in this case being upheld) might suffer at the hands of campaigners did not create the sort of cumulative commercial or economic prejudice that was postulated. Even when aggregated, therefore, the level of likely harm did not, he said, create a significant public interest in avoiding its occurrence.

Our conclusions

63. In order for the DWP to succeed in establishing that the disclosure sought would, or would be likely to, lead to the consequences it has said that it anticipates, the evidence it submitted would have to demonstrate that:
- a. The disclosure sought would lead to the publication of some or all of the Placement Host identities on campaign websites;
 - b. That publication would provide those wishing to challenge the Schemes with either information they did not already have, or verification, without which they would not be likely to target criticism or direct action against organisations already believed to be Placement Hosts;
 - c. The consequence of the publication itself, or of criticism or direct action resulting from it, would, or would be likely to, result in a material level of commercial detriment to a significant number of the identified Placement Hosts;

- d. The commercial detriment, or anticipation of it, would cause one or more Placement Hosts to withdraw from the Schemes;
- e. Those withdrawals would further damage the Placement Hosts who took that action and would have a knock-on detrimental commercial effect on Contract Providers; and
- f. The number of withdrawals would be at such a level that the operation of the Schemes would be so severely undermined as to have a detrimental effect on the national economy.

In our view the evidence did not establish those points. We explain why, by reference to each element in turn, in the following paragraphs.

64. Publication: We are satisfied that the evidence demonstrates that the names of any Placement Hosts, disclosed as a result of the respective Decision Notices being allowed to stand, would be likely to be published on the websites of Boycott Workfare or similar campaign groups.

65. Campaigner reaction to publication: The evidence does not establish the necessary causal connection between publication and the alleged targeting of Placement Hosts. No FOIA disclosures have been made since 2012, yet the campaigning has continued. And although, clearly, such disclosures may provide campaigners with a convenient aggregation of new names and confirmation of existing ones, there is no evidence that particular reliance has been placed on this source of information in preference to others such as word of mouth (nobody involved has been made subject to terms of confidentiality) or enquiries directed at the Placement Hosts themselves. Nor did the evidence establish that campaigners have held back from taking action until suspected involvement by a target organisation had been verified by a FOIA disclosure confirming it.

66. Consequence of publication in the past: Accepting the DWP's contention that the best evidence of what may happen in response to future Placement Host identification is what has happened in the past, we do not accept that it made good its case on the evidence it adduced. It relied upon:

- a. Direct Consequences: We were presented with no evidence from Placement Hosts, or others, that the mere publication of their names on relevant websites led to their commercial interests being prejudiced by, for example, a decrease in donations or retail returns following any previous disclosure. Campaign websites certainly claimed success in encouraging readers to boycott participating organisations but did not attribute any claimed success to the persuasiveness of the message, as opposed to the impact of other tactics.
- b. Indirect consequences of targeted physical activity: As to the connection between those other tactics and commercial detriment it is again clear that campaigners advocated direct action and that their websites (as well, on occasions, as the independent media) reported instances when campaigners demonstrated outside the premises of Placement Hosts and even entered those premises. However, the frequency of those activities, and the severity of any disruption to the

Placement Host's activities, is not apparent from the evidence adduced. Again, we did not see any evidence from the Placement Hosts, who had experienced direct action of this type, about the consequences they suffered.

- c. Indirect consequences of targeted activity using electronic communications: We were, again, presented with evidence of encouragement by campaign groups to swamp switch boards, private telephone lines, e-mail systems and twitter feeds. We also saw claims that Placement Hosts had suffered business disruption as a result of this and other types of direct action. We approach such claims with a degree of caution given the understandable questions raised as to the reliability of campaigning propaganda. However, we were on this issue presented with one piece of independent evidence in the form of the explanation given by Sue Ryder for its decision to withdraw from one of the Schemes. We were warned during the hearing that this form of public justification was, in effect, as capable of being influenced by a perceived need to put the best face on an announcement as the claims of success appearing on campaigner websites. As previously mentioned, there was also a delay of several months between the charity being publicly identified and the threat of the "rolling on-line picket" which triggered its withdrawal. It does not necessarily follow that the two events were not connected, but the gap in time certainly raises a reasonable doubt in that respect. We were provided with no other evidence that might have resolved that doubt - according to the evidence, no other Placement Host informed the DWP that this type of activity was occurring, or that it had caused business disruption or other commercial detriment. There was certainly insufficient to justify the sweeping assertion set out in paragraph 120 of the witness statement, quoted in paragraph 36 above, or the speculation summarised in paragraph 37 above.

In those circumstances the evidence does not, in our view, establish that Placement Hosts suffered material impact on their operations as a result of having been identified as participants in the Schemes.

67. Likelihood of Placement Host withdrawal in the future: Only certain information could safely be gleaned from the responses given by Placement Hosts and Contract Providers to the questionnaire used in the evidence gathering exercise conducted by DWP employees. It was as follows:

- a. The survey exercise originally carried out by Ms Elliott produced responses by 40 organisations. 15 of them were Placement Hosts and one combined the role of Placement Host and Contract Provider. The remainder had been completed by Contract Providers.
- b. Only four out of the 40 made any reference to staff harassment (or as one respondent described it "hassle" at the hands of campaigners) as a cause of concern. The remainder of those that thought that Placement Hosts had withdrawn in the past, or might withdraw in the face of future disclosure, suggested that this had resulted (or, in the future, might result) from negative press comment. The questions posed did, of course, encourage the respondents to focus on this but, even then,

some of the responses suggested that it was not press comment as such that influenced the decision to withdraw but the ethical dilemma faced once the media had made them aware of certain aspects of the Schemes.

- c. Of the 15 Placement Hosts that responded, 8 did not think that previous press coverage had caused them any harm. However, some that had not suffered in the past nevertheless speculated that future disclosures might lead to such an outcome and might cause them to leave the Schemes.
- d. The responses from Contract Providers laid greater emphasis on past Placement Host withdrawals, following press criticisms, and their fear that their own businesses might be damaged by future withdrawals as a consequence of further disclosure. But even then there was by no means unanimity and some respondents, while recording their perception of the impact of previous press coverage, felt that its impact had been short-lived.
- e. One of the responses cast doubt on the evidence presented in respect of Sue Ryder, in that it appeared to record a representative of that organisation stating, in late 2012, that it had not suffered any detriment at that time. The organisation had, of course, been listed by Boycott Workfare as a Placement Host some months before this

68. We should add that we were, in any event, concerned at the evidential value the DWP invited us to attribute to the responses it garnered. The exercise fell a long way short of the requirements for opinion survey evidence that would be admitted in the type of court litigation where it might have relevance. Even allowing for the freedom given to us (by Rule 15(2) of the Rules) to admit evidence that might not be admitted in a civil trial, the evidential weight to be attributed to this material was significantly reduced as a result of the flaws in its preparation. These include:

- a. We were not told whether the 40 responses constituted the entirety of the exercise or whether there had been a degree of selection out of a larger sample;
- b. We were given no evidence about the basis for selection of those questioned and no justification for the size of the sample;
- c. None of the respondents appeared, on the basis of the materials presented to us, to have signed the completed form to confirm that it correctly recorded the responses;
- d. On one occasion the respondent had clearly been shown a completed response form in respect of a previous interviewee and on another he/she had clearly received additional briefing beyond that provided for in the form itself (the respondent records his/her understanding from the briefing that the DWP needed “*every possible justification not to release*” names):
- e. One completed form was included, even though the respondent had indicated that he/she did not consent to the data being used in that way and another did not name the respondent;
- f. The questions were heavily slanted and either led the respondent into giving a particular answer or had the effect of inviting him/her to speculate on the issue presented – this is a particularly serious flaw in

the case of questionnaires submitted to Contract Providers, who are dependent upon the DWP for their continued involvement in a potentially profitable scheme.

69. The flaws we have identified might have had less significance if the exercise had been treated as a witness gathering programme, with one or more of the respondents signing a witness statement confirming his or her views, and the wider body of responses being disclosed to demonstrate that the witness was more than a lone voice and could be taken as fairly representative. But no such evidence was adduced and the combination of the failings in the conduct of the exercise and the largely ambivalent nature of the responses, taken as a whole, leads us to the conclusion that this evidence gathering exercise did not produce any evidence having the weight to support the DWP's case.
70. Effect of Placement Host withdrawals on Contract Providers: The DWP case to the effect that Contract Providers would suffer commercial detriment was based on the premise that Placement Hosts would withdraw from the Schemes if they were identified. Given that we have found that the DWP did not establish that disclosure was likely to lead to prejudice to Placement Hosts' commercial interests, there is no rational basis for them to withdraw. If one or more Placement Hosts did decide to withdraw as a result of being identified, even without identification having led to commercial detriment, we would expect to have seen evidence to that effect. In the event, those organisations who are recorded in the evidence as having withdrawn and who chose to make a public statement on the subject, appear to have said that they were motivated by their own concerns about the nature of the Schemes. Even Byteback (which had, of course, been identified by other means) explained its withdrawal by reference to its concerns about certain aspects of the Schemes and not its fear of continued campaign action against it. It is possible, of course, that (just as in the case of other public statements by Placement Hosts or campaigners) Byteback did not tell the whole story and that fear of business disruption had influenced the decision to withdraw. But the statement bears no sign of having been crafted as an exercise in public relations and we are inclined to take it at its face value as a genuine admission by the company's two founders that they had failed to appreciate the mandatory nature of some elements of the Schemes.
71. The impact of withdrawals at national level: The case for engagement of FOIA section 29 also fails because it was based on the argument that commercial detriment to, and consequent withdrawals from the Schemes by, Placement Hosts would be so extensive that it would undermine the operation of the Schemes as a whole and that this would have a knock-on effect on the nation's economy. In light of our findings in respect of the engagement of FOIA section 43 the exemption is clearly not made out.
72. Our assessment of the evidence therefore leads us to conclude that neither FOIA section 43 nor section 29 is engaged.
73. In assessing the public interest in favour of maintaining the section 36 exemption we have had the following two preliminary issues in mind:

- a. We are required, as counsel for the DWP reminded us and as we noted above, to give due weight to the fact that the relevant government minister has issued an opinion to the effect that use of the section 36 exemption was appropriate. The opinion in fact took the form of a one line acceptance on behalf of the relevant Minister of a recommendation to that effect contained in a lengthy document submitted to him. The recommendation was supported by detailed arguments, substantially along the lines of those that have been presented to us, including the causal link between the disclosure of Placement Host identities leading to the targeting of such organisations by campaign groups and, as a consequence, their likely withdrawal from a relevant Scheme. In forming our own view on the severity, extent and frequency of the anticipated harm we took account of the extent to which the factual basis for the ministerial recommendation was supported by the evidence presented to us. The effect of our decision on the non-engagement of the section 43 exemption is that it was not.
- b. Secondly we have sought to distinguish the impact of legitimate criticism and protest from the detriment caused by disproportionate and possibly illegal business interference. FOIA exemptions should not be used as a means of hindering the public or the media from examining the operation of the Schemes and articulating any concerns about their impact. If, therefore, Placement Hosts might withdraw from the Schemes because they had a fear of press criticism or peaceful actions by the public (such as the withdrawal of custom or non-violent demonstration not involving trespass, threatening behaviour or damage) that is not an element of harm to which we should give weight at this stage, although it was relevant at the stage of considering whether or not commercial interests might be prejudiced. It is only detriment to those interests that can be shown to have resulted from unlawful or disproportionate direct action, itself generated by the disclosure sought, which should properly be taken into account.

74. In our view the DWP has not established, on the evidence it presented to us, that the identification of Placement Hosts will lead to a likelihood that they will be targeted in a relevant manner and/or to the extent that the public interest will be harmed to any material extent.

75. We should add that, such are the weaknesses in the DWP's case in establishing that disclosure will lead to any of the problematic issues it has identified (whether for Placement Hosts, Contract Providers or the operation of the Schemes as a whole), we would have reached the same conclusion even if we had decided that other exemptions had been engaged and had been persuaded that the public interest factors against disclosure should be aggregated.

Conclusion

76. In light of the findings set out above we have concluded that:

- a. FOIA sections 29 and 43 are not engaged;
- b. FOIA section 36 is engaged but the public interest test favours disclosure;
- c. If we were wrong about the non-engagement of sections 29 and 43, and if, as a consequence, the public interest factors militating against the disclosure sought were to be aggregated, the operation of the public interest test would still favour disclosure.

In those circumstances the Information Commissioner was right to conclude that the DWP was not entitled to give a “neither confirm nor deny” response to the Sheehan and Sheldon information requests and should not have refused to disclose the information sought in the Chance information request.

77. Each of the appeals therefore fails and the DWP should respond to each of the information requests in the manner indicated in the relevant decision notice.

78. Our decision is unanimous

Mr Christopher Ryan

Judge
22 December 2014