IN THE FIRST-TIER TRIBUNAL **Appeal Nos: EA/2013/0145, 148 & 149**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50460988
Dated: 12th. June, 2013

(1) **Appeal No. EA/2013/0145**

Appellant:	**John Slater ("JS")**
First Respondent:	**The Information Commissioner ("the ICO")**
Second Respondent	**Department for Work and Pensions ("the DWP")**

and

(2)

Appeal No. EA/2013/0148

Appellant:	**Department for Work and Pensions**
First Respondent:	**The Information Commissioner**
Second Respondent	**John Slater**

and

(3)

Appeal No. EA/2013/0149

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50448587
Dated: 12th. June, 2013

Appellant:	**Department for Work and Pensions**
First Respondent:	**The Information Commissioner**
Second Respondent	**Tony Collins ("TC")**

Before

David Farrer Q.C.
Judge

and
Suzanne Cosgrave
and
Jean Nelson

Tribunal Members

Date of Decisions: **19th. March, 2014**

Date of Promulgation: **24th. March, 2014**

Representation:

The DWP : Julian Milford

The ICO: Robin Hopkins.

Mr. John Slater appeared in person.

Mr. Tony Collins did not appear but submitted a written response to the DWP`s grounds of appeal

Subject matter:

FOIA s.36(2) Disclosure which would or would be likely to prejudice the effective conduct of public affairs

The public interest in disclosure of information relating to development and implementation of the Universal Credit Programme

Reported cases; Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223

University of Central Lancashire v IC EA/2009/0034

John Connor Press Associates Ltd. v IC EA/2005/0005

Kikugawa v IC and MoJ EA/2011/0267

Department of Health v IC, Healey and Cecil EA/2011/0286 and 0287

Information Commissioner v Gordon Bell [2014] UKUT 0106 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses both appeals of the DWP, namely EA/2013/0148 and EA/2013/0149, and allows the appeal of JS. EA/2013/0145, subject to the removal of the names annexed to the closed statement of Sarah Cox and the names contained in the Confidential Annex to the Appellant's Reply in EA/2013/0148.

Dated this 19th day of March, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

Procedural matters

1 In these cases –

(i) the DWP appeals and JS cross – appeals a Decision Notice of the ICO dated 12th. June, 2013 which determined requests for information made to the DWP by JS;

(ii) the DWP further appeals a Decision Notice also dated 12th. June, 2013, which relates to a request to the DWP from TC.

2 By direction of the Registrar, all these appeals were heard together since they involve similarly timed requests for information as to risks arising from the implementation of the Universal Credit Programme ("the UCP") and raise very similar issues as to the competing public interests in disclosing or withholding the requested information. For the same reasons this decision of the Tribunal determines all three appeals

The Background

3 On 8th. March, 2012 the Welfare Reform Act ("the 2012 Act") received the Royal Assent. It followed public consultation on universal credit from July to October, 2010, the publication of a White Paper "Universal Credit: welfare that works" in November, 2010 and the publication of the Welfare Reform Bill on 16th. February, 2011. It introduced the framework of Universal Credit, which will replace working age benefits and tax credits currently provided by central and local government. Its primary purpose is to "make work pay", that is to say, to

encourage people to obtain employment, whether full – time or part – time, by ensuring that they will always be better off working than drawing benefits. The statute created a framework to be filled out by subordinate legislation.

4 A single credit, related to the recipient`s circumstances and responsibilities, will replace the existing complex range of benefits, allowances and tax credits. Ultimately, this should simplify the whole social security system.

5 The principle underlying the 2012 Act is not politically controversial but, as noted above, the Act creates only the basic structure. The details are or will be enacted in a series of statutory instruments, of which five came into force in February, 2013. The ground rules for Universal Credit are contained in the Universal Credit Regulations, 2013, which became law in April, 2013. October, 2013 marked the intended start of the implementation of the Programme in the public arena. The regulations set out the conditions and calculation of entitlement and the elements making up the maximum level of award.

6 The DWP attaches considerable importance to experience gained and to be gained from a pilot scheme, provided for by transitional regulations, involving a limited group of claimants, a “Pathfinder Group” from seven areas of the UK. The intention is that lessons learned from these Pathfinders will inform modifications of the new system before it is introduced nationally, in its final form, in 2017. The scope of the Pathfinder operation was scaled down from its original conception as a result of problems encountered.

7 Such changes affect the work of other public authorities and agencies to a very significant degree. HMRC and local authorities are obvious examples. Communication with such bodies has been and continues to be essential. Hence,

in May, 2012, the draft regulations then proposed were submitted to the Social Security Advisory Committee for wide – ranging consultation. The committee`s report was published with the final draft of the regulations submitted to Parliament and the Government`s response to the consultation.

8 Such consultation culminated in April. 2013 in the issue of agreed guidance to DWP staff as to the operation of the Pathfinder operation.

9 Within the DWP a Universal Credit team was created to deliver the project over a four – year period. The management and progress of the UCP were, not surprisingly, the subject of scrutiny by the National Audit Office ("the NAO"), which reported on "early progress" on 5th. September, 2013. That report was highly critical of a number of central elements in the DWP`s performance. Failings post – dating the various "qualified opinions" provided by the minister to which we refer in paragraphs 15 and 23 are not material to our decision but the NAO referred to reviews in mid – 2012 by the Major Projects Authority ("the MPA" – see below) and by suppliers, citing problems with staff culture, including a "fortress mentality" and a "good news culture". The same or similar reviews identified a failure by the DWP to match systems and processes design to the objectives of the programme or as the NAO put it, there was no *"detailed view of how Universal Credit is meant to work."* There was repeated criticism of the DWP`s control over suppliers to the programme. There was a lack of IT expertise within the Department. There were also concerns over security and protection of the Programme from fraud and the NAO

commented on a lack of transparency and challenge in 2011 and 2012.

10 There have also been reports from the House of Commons Work and Pension Committee (22nd November, 2012) and the House of Commons Public Accounts Committee on "early progress" (7th. November, 2013) ("the PAC"). The PAC was perhaps even more emphatic in its criticisms than the NAO, describing management of the Programme as "extraordinarily poor" and the Universal Credit team as "isolated and defensive" Like the NAO, it denounced the "good news" culture , and the lack of control over suppliers. It seems clear that these faults were perceived as dating back to the period with which these appeals are concerned, if not to 2011 when work on the Programme began.

11 The Programme featured in the Cabinet Office Major Projects Authority Annual Report for 2012 – 3. The media have maintained a close and generally critical interest in this reform and the possible problems of cost and delivery it appears to face.

12. It should be emphasised at the outset that the recitation of these judgements on the management and development of Universal Credit are not included in this decision for the purpose of supporting a finding that it was badly managed in mid- 2012. Whether it was or was not is certainly not a matter for this Tribunal. These matters are recounted as part of the background, as they may be relevant to an assessment of the public interest in disclosure of the requested information.

Criticism from such respected bodies as the NAO and PAC, together with serious media concerns and recent acknowledgements from the DWP of likely delays in the timetable strongly suggest that close scrutiny of the progress and management of the UCP is justified.

13 Plainly, the 2012 Act and related subordinate legislation have enacted a fundamental change to the social welfare system of this country with implications for many millions of its citizens. It is probably the most far – reaching reform since those that followed the Beveridge report. On the one hand, the intended benefits both for recipients of the Universal Credit and for the exchequer are immense. The DWP, in its December, 2012 business case, estimated the net benefit between 2010 – 2011 and 2022 – 2023 at £38 billion and at £7 billion per year thereafter. On the other, considerable risks are involved, both in the short and long terms. The widespread anxiety and hardship, that would result if the highly complex calculation of entitlement or the delivery of payments broke down through a failure of technology or human error, would pose a major threat to the success of the whole venture. Likewise, the possibilities for fraud on a vast scale require robust counter – measures, if public confidence in these changes is to be preserved. The electorate needs to be reassured as to budgetary control, efficient management and timely delivery of such an ambitious project, involving costs estimated in 2012 at £2.4 billion up to 2023,

14 In a nutshell – the shaping and implementation of this reform are matters of the

very highest importance and public interest. So, on the other hand, are the needs of those engaged in UCP for a working environment that encourages frank, robust exchanges of ideas and original and creative thinking about risks, problems and possible solutions

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The requests for information

15 On 1st. March, 2012 TC asked the DWP "what gateway reviews have been carried out on Universal Credit " and requested copies of them. The DWP replied on 26th. March, 2012 stating that there were a Starting Gate Review and a Project Assessment Review (a "PAR"). It refused to disclose them, relying on FOIA s.36(2)(b) and (c) and indicated the limited circulation of such documents within the department. TC sought an internal review, whilst adding other requests which do not feature in this appeal. The DWP confirmed its refusal by letter of 14th. May, 2012. It relied on the opinion of the Minister for Welfare Reform, Lord Freud (the "qualified person"), which was given in response to submissions dated 9th. March and 10th. May, 2012, the latter for the purpose of the internal review. Those submissions are summarised in the Decision Notice. Lord Freud was a "qualified person" by virtue of s.36(5)(a). In fact, he had considerable direct knowledge and experience of the programme.

16 It transpired that the Starting Gate Review was available on a website in October, 2011, hence the ICO concluded that the s.21 exemption applied. So it does not feature in this appeal.

17 A PAR is a periodic high level review of a large government project prepared by the Major Projects Authority ("the MPA") which is part of the Cabinet Office and was set up in 2011 in succession to the Office of Government Commerce. This PAR was prepared between 7th. and 11th. November, 2011. Some time after the

hearing of these appeals the DWP discovered that the version of the PAR supplied to the Tribunal was not the final version which had been requested. It was evidently a draft. How the mistake occurred is not entirely clear to us. Whilst the differences related almost entirely to the format, it did raise questions as to how far the DWP had scrutinised the particular PAR requested, as distinct from forming a generic judgement as to whether PARS should be disclosed.

18 On 14th. April, 2012 JS made a request to the DWP for the Risk Register("RR"), Issues Register ("IR") and the High Level Milestone Schedule ("MS") for the Universal Credit Programme.

19 The RR is a continuing record and evaluation of possible risks to the development or eventual operation of the programme as perceived by those involved in it, whether as staff at whatever level or external stakeholders taking part in meetings. Evaluation involves analysis of the likelihood that the risk might be realised, the impact on the programme if it is, why it might occur, what other risks may be linked to it and who should take ownership of it. Risks are generally scored from 1 – 5 by reference to likelihood and possible impact, using a Red/ Amber/ Green ("RAG") rating, red denoting the gravest category of risk. Possible mitigation and its implementation are recorded and the gravity of the risk is monitored with frequent updates. Clearly, the value of such a register depends on the candour and objectivity of a wide range of officials within, in this case, the DWP.

20 The IR details problems and failures that have materialised and why, and how they can best be managed and their effect on the programme minimised or eliminated. Similar ratings are used as with risks. It also records changes in the

conditions affecting the programme and failures to achieve milestones. Issues are allocated to an identified owner.

21 The MS is designed to provide a logical sequence of activities and provide a critical path for the progress of the project. The timing of particular milestones may be modified in the light of events, including budgetary constraints but the aim is to deliver the product by the specified date. It is subject to constant review.

22 All three categories of document are essential risk management and planning tools in any large long – running project. They are designed to identify and reduce uncertainty and to gain uncompromising input from the widest possible spectrum of participants. UCP, on which work began in 2011, is scheduled for completion in 2017.

23 The officials concerned with UCP considered that disclosure of these three sources of information would or would be likely to prejudice the effective conduct of public affairs. They referred the request to the Minister for Welfare Reform, seeking his approval for a refusal, relying, as with the PAR, on s.36(2)(b) and (c) of FOIA. He agreed with the recommendation and expressed his opinion accordingly.

24 The DWP refused the request by e mail dated 19th. May, 2012 which set out succinctly the case submitted to the Minister. JS requested an internal review which resulted in confirmation of the refusal.

25 Two submissions were made by officials to Lord Freud. The first is dated 4th. May, 2012 and was made for the purpose of the initial refusal. The second is dated 1st. August, 2012 and followed JS`s request for an internal review. We shall consider the thrust of the advice that they provided when addressing the question whether the s.36 exemption was engaged.

The Complaints to the ICO

26 TC complained to the ICO on 15th. May, 2012. By his Decision Notice of 12th. June, 2013, the ICO found that the qualified exemption relied upon was engaged but that the balance of the public interest favoured disclosure. He ordered disclosure of the PAR within 35 days.

27 JS complained on 6th. August, 2012. His complaint extended to the DWP`s response to requests for information as to the use within the project of Agile methodology. In the Decision Notice the ICO concluded that the DWP had discharged its duty under FOIA in this regard and Agile plays no part in these appeals.

28 In his Decision Notice the ICO allowed JS`s complaint as to the disclosure of the IR and the MS but dismissed it in respect of the RR. The arguments that he considered were fully deployed before the Tribunal and are reviewed later in this decision.

The Appeals to the Tribunal

29 The DWP appealed the Decision Notice relating to TC`s complaint on 24th. July, 2013. TC was joined as a respondent.

30 It appealed against the ICO`s decision on JS`s complaint that it should disclose the IR and the MS. JS was made a respondent and supported the decision, though on wider grounds. He also appealed against the ICO decision as to the RR. The DWP supported the ICO`s decision that the RR should not be disclosed. Their respective grounds of appeal emerge from the summaries of their cases as presented to the Tribunal.

The Issues

31 FOIA s.1 entitles any person, in principle, to have communicated to him information held by a public authority. S.2(2)(b) provides that, in respect of exempt information, that right does not apply where or to the extent that the public interest in maintaining the exemption outweighs the public interest in disclosing it.

So far as material s.36 provides –

" *(1) This section applies to*

(a) information which is held by a government department . . . . . and is not exempt information by virtue of s.35 . .

(2) Information to which this section applies is exempt information if,

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

(b) would or would be likely to inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

Like s.35, s.36 provides for a qualified exemption so that, if engaged, it is subject to consideration of the competing public interests in withholding or disclosing the information requested.

32 The DWP, correctly in our view, did not argue that the documents requested involved the formulation or development of government policy so as to fall within s.35. S.36(1) was therefore satisfied.

33 JS , but not the ICO, argued that the DWP had not satisfied the "qualified person" requirement because the minister`s opinion was not reasonable and the submissions upon which it was based were seriously flawed so that it was not arrived at by a reasonable process. If that is right, then the exemption did not apply.

34 If that submission fails, then the exemption was engaged and the Tribunal must ask itself whether the DWP has established, on a balance of probabilities, that the public interest is better served by withholding this information than by disclosing it.

The evidence

35 Sarah Cox gave evidence relevant to all three appeals. It was contained in "open" and "closed" witness statements. She was cross examined on the former by the ICO and by JS; she was questioned on the latter by the ICO and on both by the Tribunal. From February to December, 2013 she was Programme Assurance Director for the UCP. Programme Assurance is an internal mechanism for monitoring governance and performance independent of the teams engaged in the design, development and implementation of the Programme. Ms. Cox was not involved in the Programme at or around the time when the requests were made and the qualified person opinions provided. If there were failings at the material time, they were not hers. Her evidence was, therefore, that of a well – informed inside observer, viewing events in retrospect. Despite her impressive C.V, she was not perhaps the obvious candidate to explain the DWP`s position when refusing disclosure and seeking the minister`s opinion. She has, however, very extensive experience in senior roles, managing change both in the private and, since 2004, the public sector. She led business planning and programme management for LOCOG and was Programme Co – ordination Director for HMG Olympic Executive.

36 Her evidence provided an account of the history, structure and development of UCP and the philosophy that underpins it. She stressed the cardinal importance of effective programme management and oversight, especially when confronted by projects of the vast scale involved here.

37 She described the registers and the schedule with which these appeals are concerned as tools for internal programme management.

38 A section of her statement explained the genesis and mandate of the MPA as an internal overseer of major projects right across government and its function in providing assurance, that is an independent assessment of the current control and operation of high risk innovative projects such as the UCP. She related that function to the use of PARS as flexible reviews of major projects at particular critical junctures in their development by independent teams with the requisite skills and experience. She described the normal composition of such a team and the process by which it performs its reviewing task. including non – attributable interviews of internal staff at all levels, key departmental officers, service providers and private sector suppliers. Such PARS are more detailed and specific to the project than such standard assessments as Gateway Reviews. They last about a week.

39 The need for confidentiality in respect of internal programme management was explained and stressed. The same considerations, she asserted, applied equally to PARS.

40 Her evidence then dealt with the particular information involved in these requests and the effects of disclosure, as seen by the DWP. Those effects are identified in the summary of the DWP case that follows. In particular, she emphasised concerns about the diversion of key members of the project team from their roles in delivery to responding to sometimes ill – informed media approaches or criticism.

41 Ms. Cox further submitted that the personal data of junior civil servants identified in these records should be protected if disclosure was ordered. Without ruling on the issue of principle, absent detailed argument on either side, the Tribunal orders disclosure with the requested redactions as a purely pragmatic measure in this case, where nothing apparently hinges on the identities of those concerned.

42 Ms. Cox`s evidence as to the supposed effects of disclosure on the candour and boldness of team members was tested in cross – examination. She was asked what firm evidence there was of such consequences. Her answer was the sense of people`s reactions gained from experience. She did not believe that the diversion of key staff from delivery to media – handling could have been prevented by a better preparation of the public relations function.

The submissions of the parties

43 It is convenient to review the rival contentions in all three appeals together since the central arguments are common to each.

44 The DWP submitted that –

(i) The s.36 exception was engaged and

(ii) The public interest favoured withholding the requested information.

(iii) The public interest is to be assessed as at the date of the request or, at the latest, the date of the internal review.

(iv) The maintenance of candour and robust comment in the identification of risks and issues by staff and others is of fundamental importance. The removal, by disclosure, of confidentiality as to discussions and as to the expression of "creative pessimism" (also referred to as "imaginative pessimism") would gravely damage all four documents as tools of internal risk management.

(v) The diversion of key staff from project delivery to answering media stories based on a misconception, wilful or not, of the nature of these documents would seriously impede progress and threaten the scheduled fulfilment of the Programme.

(vi) As to the PAR, the "effect on candour" point applies not just to the

interviewees but to the draftsmen of the PAR and the team`s confidence in the PAR.

(vii) These arguments apply with particular force to this PAR because of the timing of the request relative to the date of the review and the high profile and cost of Universal Credit.

(viii) As to the RR and IR, disclosure would destroy the blunt pithy quality of the summaries of risks and problems.

(ix) The familiar "safe space" argument, that is the need for a delay in publicity whilst free discussion of the options can take place, applies in this kind of case as much to implementation as to formulation of policy.

(x) Disclosure could embarrass external parties collaborating in delivery of the Programme and damage DWP relations with them.

(xi) Disclosure of certain risks makes them more likely to be realised.

(xii) The timing of the request for the RR was significant in that some of the mitigating actions would take place after the date for disclosure.

(xiii) The ICO was mistaken in differentiating risks from issues when considering disclosure.

(xiv) As to the MS, it is a very detailed document, based on assumptions which could easily mislead. The necessary explanation would create the diversion of resources problem.

(xv) The DWP makes a large body of information on UCP publicly available. The NAO and PAC reports, together with MPA annual reports provided further detailed information on the matters under consideration.

(xvi) Overall, disclosure of these documents would add very little to public understanding of the challenges and risks faced by UCP.

45 The ICO argued that –

(i) FOIA s.36(2)(b) and (c) was engaged in respect of all four documents.

(ii) All four relate to the implementation of the UCP, not the formulation or development of policy. The "safe space" argument, which may be relevant when considering the s.35 exemption, does not apply here.

(iii) Information as to the management of UCP from the NAO and PAC reports was available only a year or more after the requests in these cases were made. There was a significant public interest in obtaining it around April/ May 2012, when the faults later identified in those reports were apparent.

(iv) The MPA`s "Transparency Policy" stated that a six – month interval between submission of a PAR to the DWP and first publication was sufficient to enable it to take action in response to MPA ratings. According to the NAO report, the MPA recommendations in November, 2011 had been largely implemented by the date of TC`s request and by 14th. May, 2012 the next PAR review was imminent. No further safe space was therefore needed by the time of TC`s request for an internal review, perhaps not even by the time of his original request.

(v) Disclosure of the PAR would assist public assessment of the effectiveness of the MPA as a monitor of the UCP.

(vi) The need for candour and "imaginative pessimism" tips the scales in favour of maintaining the exemption as regards the RR, especially having regard to the timing of JS`s request.

(vii) The same does not apply to the IR, which is less detailed and records events, not speculation or surmise. There is correspondingly less risk of a loss of candour and bluntness in reporting.

(viii) As to MS, the public could readily understand the nature of the assumptions on which the milestones are based. If the proposed timings were unduly optimistic, that is a matter for prompt public scrutiny.

46 TC submitted that –

(i) Until the publication of the NAO report the DWP made no acknowledgement of the serious problems faced by UCP.

(ii) The public deserved to know in March, 2012 how serious were the failures in management of this project. TC could not know at the time of his request whether or when the NAO or the PAC might publish reports to inform public debate .

(iii) Large government IT – enabled projects have too often lacked timely independent scrutiny and challenge to improve performance. Publication

of the November 2011 PAR would have been a valuable insight into what was happening.

(iv) The NAO references to a "fortress mentality" and a "good news culture" within the UCP team simply reinforce the public interest in early publication of this PAR.

47 JS `s case may be summarised as follows –

(i) The s.36 exemption was not engaged because the opinion of the qualified person was not reasonable nor arrived at by a reasonable process. We deal in more detail with his careful and thorough development of this submission in the reasons for our decision.

(ii) The RR, IR and MS are critically important indicators of the current state of a major programme. Their early publication is, therefore, a matter of high public interest.

(iii) The diversion of resources argument, ignores, as regards further FOIA requests, the availability of s.12 – the cost of compliance threshold.

(iv) The DWP cannot rely on the "safe space" argument where the exemption on which it relies is s.36.

(v) There is no evidence to support the supposed "chilling effect" on candour and independent thinking, which is said to result from publication of such information. Reference was made to evidence submitted to the Tribunal in

Department of Health v IC, Healey and Cecil EA/2011/0286 and 0287, (DOH") including academic research on this issue and the evidence of Mr. Healey, a former minister.

(vi) The public interest in transparency for such a vast, costly and risky programme was further intensified by strong indications of mismanagement, reflected in extensive media coverage and, in due course, in the critical NAO and PAC reports.

(vii) Ministerial statements and DWP press releases, which continued from 2011 until late 2013, to the effect that UCP was on course and on schedule demanded publication of these documents as a check on what the public was told.

JS`s written submissions were closely reasoned and supported by extensive documentation. We do not attempt to rehearse them in full but have noted them in reaching our decision. He added to them in a lively oral argument

The Decision of the Tribunal

48. Is s.36(2) engaged as regards the RR, the IR and the MS requested by JS ?

We conclude that it is. The first question is whether the minister`s opinion was reasonable. That means reasonable within the principle enunciated in *Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223*, that is to

say, within the range of opinions that a reasonable person might hold, an opinion which has regard to what is relevant, discounts what is irrelevant and is arrived at by a rational process.

49 In our judgement, it was reasonable to conclude that disclosure would be likely to inhibit the free and frank provision of advice or exchange of views within UCP (s.36(2)(b)(i) and (ii)) and to prejudice the effective conduct of public affairs. (s.36(2)(c)). We treat the term "would be likely to" as denoting simply a realistic possibility not a 51% + probability. (see *University of Central Lancashire v IC EA/2009/0034 and John Connor Press Associates Ltd. v IC EA/2005/0005*). It matters not that the qualified person finds, in the alternative that these results would or would be likely to occur. If they would, then they would also be likely to occur. That the lesser test is satisfied is enough.

50 The minister does not perform a quasi – judicial function. That he is personally engaged in the relevant programme is immaterial, provided his opinion is reasonable. Indeed, it is to be expected that he will be so engaged. (see *Kikugawa v IC and MoJ EA/2011/0267*).

51 If the Tribunal is entitled to examine the process by which the minister`s opinion was reached in relation to JS`s request (i.e., the submissions made to him in

May and August, 2012) then, in our opinion, they were reasonably balanced and full, especially the second submission, and represented a fair presentation of the issues to the minister. That is our assessment referred to at paragraph 25.

52 Although TC did not contest the engagement of s.36 as regards the PAR, we considered whether the qualified person`s opinion in that case was reasonable and, for similar reasons, conclude that it was.

53 Treating the opinion and the process of its formation as reasonable does not, of course, amount to an acknowledgement that it was correct in its assessment of the effects of disclosure, let alone its balancing of the public interest.

54 The Public interest

We turn to the critical issue of the balance of public interests in maintaining the exemption and disclosing the four requested documents. We shall consider first arguments common to all four to a greater or lesser degree because they are fundamental to our decision and represent the greater part of the competing submissions.

55 In weighing the interest in disclosure we attach great importance, not only to the undisputed significance of UCP as a truly fundamental reform but to the criticism

and controversy which it was attracting by the time of these requests in March and April, 2012. They covered a number of aspects of the programme, including governance, IT issues, responsiveness to external opinion, financial control, delays to the planned schedule and strategic grasp. The DWP`s "Starting Gate Review", which TC had requested but which proved to be already in the public domain, had warned that there was "a very real danger the department may lose some of the expertise that it will need to deliver Universal Credit successfully" and recommended that UCP "establish a comprehensive communications strategy and supporting plan." We are struck by the sharp contrast with the unfailing confidence and optimism of a series of press releases by the DWP or ministerial statements as to the progress of UCP during the relevant period. The press release of 1st. November, 2011 quoting the Secretary of State as saying that UCP was *"on track and on time for implementing from 2013"* and a DWP spokesperson in 2012, refuting criticism from the Shadow Secretary of State -

" Liam Byrne is quite simply wrong. Universal Credit is on track and on budget. To suggest anything else is incorrect."

are simply examples of the summary of press releases presented by JS.

Ms. Cox`s evidence appeared to indicate that a programme might be regarded by the DWP as "on schedule" even though milestones had not been achieved on time, provided that punctual fulfilment of the whole project was still contemplated. If that was or is indeed the departmental stance, then the public should have been made aware of it, because prompt completion following missed interim targets is not a common experience.

56 Where, in the context of a major reform, government announcements are so markedly at odds with current opinion in the relatively informed and serious media, there is a particularly strong public interest in up to date information as to the details of what is happening within the programme, so that the public may judge whether or not opposition and media criticism is well – founded.

57 The very great costs involved and the development of a huge complex IT interface with local authority systems are further features underlining that interest.

58 We accept JS`s submission that the documents that he requested are critical indicators of the state of a programme. Reports published a year later, however authoritative, are not sufficient substitutes. Publication of registers, PARs and schedules upon completion of the programme would be a wholly inadequate answer to the demands for transparency.

59 As to the arguments favouring withholding the information, we accept, as did the Tribunal in DOH, that policy formulation and implementation do not necessarily form a linear progression so that the “safe space” requirement is not

necessarily confined to s.35 cases. However, we judge that a safe space for responding to the PAR had been afforded to the UCP team by the time of Lord Freud`s opinion as to the IR and it is not a relevant argument when considering the MS. We consider the content of the RR in this context quite briefly below.

60 The discouragement of candour, imagination and innovation (the "chilling effect"), perhaps the most strongly pressed of the DWP`s arguments, is very familiar in this forum, though familiarity in no way weakens its force.

61 We are aware, through DOH, that research evidence was presented to the Tribunal in that appeal, which tended to cast doubt on whether such an effect was generally a consequence of disclosure. However, such evidence was not tendered to us; it was simply referred to. Although the rules of evidence in the Tribunal are more relaxed than in a criminal court, it would not be right for us to take account of evidence that we have not seen and which has not been tested in cross – examination before us. The same goes for the evidence of Mr. Healey based on his ministerial experience. We do not have regard to it.

62 However, we note that there is no evidence to support the claim that this is or is likely to be the effect of disclosure. If it is, then government departments have been in the best position over the last ten years to note, record and present

the evidence to prove it. Presumably, a simple comparison of documents before and after disclosure demonstrating the change, would be quite easy to assemble and exhibit. Ms. Cox did not suggest that the revelation by a third party of the "Starting Gate Review" requested by TC had inhibited frank discussion within UCP. The same objection was raised in relation to disclosure of that Review as of the PAR.

63 Moreover, we believe, like a number of Tribunals in the past eight years, that the public is entitled to expect and, no doubt generally gets from senior officials a large measure of courage, frankness and independence in their assessment of risk and provision of advice. We are alive to the need for a degree of deference to the experience of senior public servants when dealing with issues of policy formulation and administration but do not consider that need as pressing in the context of this appeal as when tackling questions of security or foreign policy. The duty of the Tribunal is to consider government evidence on issues such as these carefully, conscious of the experience and expertise of the witness, but using its own knowledge of appeals of this kind, of institutions and behaviour in the workplace to determine whether government information requires the protection claimed, considering the importance of the subject matter to the public. We are not persuaded that disclosure would have a chilling effect in relation to the documents before us.

64 As to diversion of resources, human and financial, to explain disclosed risks or assumptions, we did not understand the DWP concern to focus on further FOIA requests but rather on the need to counter ill – informed media or Twitter comment to avoid unjustified public panic, outrage or simple hostility. We consider that a programme such as UCP required at the outset a clear public relations strategy and a substantial staff to handle the inevitable flow or even torrent of inquiries and bad news stories which such an important change must attract. It is not obvious to us that the key players in UCP need be diverted from their vital roles, if proper preparation is made for others with the requisite skills to handle public relations. We observe furthermore that, whilst prompt delivery of the Programme is of very great importance, delivery may be facilitated rather than impeded by good communication with the public, especially those with real expertise in those areas facing problems which delay progress. Valuable insights as to the development of UCP may well exist outside the DWP.

65 Comparisons of unauthorised leaks of information with disclosures made or ordered pursuant to FOIA are, in the Tribunal`s opinion, of limited validity, as regards their effect on the diversion of resources. The leak cannot be anticipated. or prepared for. Disclosures are orderly events made after a reasonable delay

which permits the formulation of an appropriate public relations response. The internal mistrust, which may understandably result from leaks does not arise in the case of disclosure.

66 We turn finally to a consideration of the public interest in relation to the particular documents, bearing in mind that our decision will apply only to them, not generically to the whole class to which they belong.

67 Timing of a request is often of central importance when the public interest is under scrutiny. In this case we consider that the relevant time is the period between April and early August, 2012, when the requests were made and the opinions obtained, both in response to the original requests and the requests for internal review. Clearly, if any significant change occurred between the initial and the confirmed opinion, then the author of the second submission would be expected to say so and the qualified person would be expected to reflect it in his opinion.

68 We have studied each of the requested documents. The PAR contains an executive summary, the findings of the MPA team and a series of recommendations. As Ms. Cox said, it is a document which deals with UCP largely from a high – level strategic position, though more detail is contained in some sections. The

terminology is that of management consultants, as might be expected. This is not a document designed to proffer blunt or biting opinions nor speculative suggestions. We note that it recommended that the next PAR take place in late March or April, 2012. That strongly suggests that the recommendations in this PAR should have been acted on by the time of TC`s request or certainly by the time that the internal review confirmed refusal. We do not regard the safe space argument as very convincing in this context.

69 In her closed statement Ms. Cox helpfully provides specific examples of the prejudice which, she says, would result from disclosure of the PAR. As with her examples in relation to the other documents, we discuss these quite briefly in the closed annex to this decision.

70 The IR contains a short list of problems, the dates when they were identified, the mitigating steps required and the dates for review and resolution. We do not believe that any team member would be deterred from acknowledging the issues specified there by the thought that the register would be disclosed in the near future. The problems are of a predictable kind and unlikely to provoke any public shock, let alone hostility, perhaps not even significant media attention. On the other hand, the public may legitimately ask whether other problems might be expected to appear in the register. Most of the problems were scheduled for resolution by the time of the confirmation of refusal in August, 2012. Although

updated fortnightly, we were told, the IR does not look like a document of which the contents changes dramatically from one edition to the next. If it does, the public can be told as much and draw their own conclusions as to the speed with which problems are solved.

71 In our opinion, the fact that the IR identifies only problems need not lead to a perception of wholesale failure of UCP. The public is capable of understanding the function of such a register when the DWP explains it and such an explanation would not involve a major diversion of resources.

72 An MS is a quite different type of document. It is a graphic record of progress, measured in milestones, some completed, some missed and others targeted in the future. We accept that it is a changing document and that its later disclosure would not reveal the current position. Like the ICO, we do not consider that the use of assumptions need mislead the outside reader, provided that the fact of such assumptions is made clear. We see little if any prejudice to UCP in the disclosure of this register.

73 The ICO perceived a decisive distinction between the IR and the RR as regards the effects of disclosure. He supports the DWP`s submission that disclosure of this current updated record of concerns and perceived risks would discourage candour and imaginative pessimism. Whether he regards this as an example of the supposed “chilling effect” or the need for a “safe space” is not entirely clear.

It is plain, however, that this was the only factor which persuaded him that the public interest is better served by maintaining the exemption in this case. The RR is compiled from individual submissions as to perceived risk, generally dated and stating the assumptions made when the risk is reported followed by entries specifying what steps to counter that risk have been taken or are under consideration. Whether or not the safe space requirement can arise in the course of policy implementation, we do not consider that it does so here. This is an iterative process, which does not involve any obvious need to bat policy options or potentially controversial solutions to and fro.

74 We are not impressed by the argument that the public`s view of UCP would be distorted by a sight of the risks registered and confronted. Once again, the purpose of the RR is easily explained. Ordinary people, properly informed, are capable of grasping why a document dwells on problems rather than successes. Ignorance of how a major programme is being conducted seems to us far more likely to distort people`s perception of the state of progress of UCP or other major programmes than the degree of transparency afforded by disclosure of this RR.

75 We have already expressed our reservations as to the chilling effect of disclosure in relation to these records as a whole. They extend to the RR despite its more immediate character. Indeed, a responsible member of the UCP team might reasonably consider that public disclosure of his/her failure to speak plainly about a risk, hence to conceal it wholly or partly from the team, would be more damaging than a blunt declaration that it could threaten the programme.

76 We acknowledge that disclosure of the requested information may not be a painless process for the DWP. There may be some prejudice to the conduct of government of one or more of the kinds asserted by the DWP, though not, we believe, of the order that it claims. We have no doubt, however, that the public interest requires disclosure, given the nature of UCP, its history and the other factors that we have reviewed.

77 For these reasons we uphold the Decision Notice relating to the request of TC and the Decision Notice on the JS requests so far as they relate to the IR and MS. We allow the appeal of JS relating to his request for the RR. In accordance with the recent Upper Tribunal decision in *Information Commissioner v Gordon Bell [2014] UKUT 0106 (AAC) (para. 29)*, we simply state that the relevant appeals are dismissed or refused, as the case may be.

78 Our decisions are unanimous.

David Farrer Q.C.

Tribunal Judge

19th. March, 2014

Corrections made to pages 1 and 4 on 25 and 27 March 2014 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) General Regulatory Chamber) Rules 2009.

Sentence removed from paragraph 9 on 31 March 2014.