IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0145**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No's: FS50460988 and FS50448587
Both dated: 12 June 2013

Appellant: **John Slater**

First Respondent: **The Information Commissioner**

Second Respondent: **The Department for Work and Pensions**

Case No. EA/2013/0148/9

Appellant: **The Department for Work and Pensions**

First Respondent: **The Information Commissioner**

Second Respondent: **Tony Collins**

Heard together at: Leicester Magistrates Court

Date of hearing: 22 February 2016

Date of decision: 11 March 2016

Date Decision Promulgated: 14 March 2016

Before
CHRIS RYAN
(Judge)
and
MICHAEL HAKE
JOHN RANDALL

Attendances:

Mr Slater appeared in person
Mr Collins did not appear and was not represented
The Information Commissioner was represented by Robin Hopkins of Counsel
The Department for Work and Pensions was represented by Julian Milford of Counsel

Subject matter: FOIA -Public interest test s.2

Cases: *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC).
Al Rawi v Security Service [2011] UKSC 34
APPGER v Information Commissioner and Foreign and Commonwealth Office [2015] UKUT 0377 (AAC).
Department for Work and Pensions v Information Commissioner and John Slater GIA/2705 and 2721/2014

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0145&0148/9**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

Appeal EA/2013/0148 by John Slater is allowed.
Appeal EA/2013/0149 by the Department for Work and Pensions is refused.
Appeal EA/2013/0145 is allowed.

The Decision Notice FS50460988 is substituted by the following notice:

Public Authority: Department for Work and Pensions

Complainant: John Slater

The Decision Notice dated 12 June 2013 shall stand save that the Public Authority is directed to disclose the risk register (as identified in the Decision Notice) in addition to the other documents referred to.

REASONS FOR DECISION

Introduction

1. This decision relates to three appeals under the Freedom of Information Act 2000 ("FOIA") which, having been previously heard together at both first instance and on appeal to the Upper Tribunal, have now been remitted to this Tribunal for a re-hearing.

2. This follows the decision of the Upper Tribunal on 20 July 2015 in cases GIA/2705 and GIA/2721 ("the Upper Tribunal decision") in which it found that the decision made by a differently constituted panel of this Tribunal on 24 March 2014 ("the First Tribunal Decision") contained an error of law and that its direction that the Department for Work and Pensions ("the Department") should disclose three documents should be set aside.

3. The basis of the Tribunal's decision had been that, although each document fell within the exemption from disclosure set out in FOIA section 36 (2) (prejudice to the conduct of public affairs), the public interest in maintaining that exemption did not outweigh the public interest in disclosure.

4. Each of the documents under consideration formed part of the project management tools deployed by the Department in relation to the development of the Universal Credit Programme (sometimes referred to in this decision simply as "the Programme") as provided for by the Welfare Reform Act 2012 and subordinate legislation made under it. They were:
    i. The Risk Register maintained by the management of the Programme in the form in which it existed on 14 April 2012 (the date when it was requested);
    ii. The Issues Register in the form in which it existed on the same date: and
    iii. A Project Assessment Review prepared by the Major Projects Authority between 7 and 11 November 2011 ("the PAR").

5. The nature of the three documents, the role they played in the Programme and, indeed, the nature and scope of the Programme itself are explained in detail in the First Tribunal Decision and in the Upper Tribunal decision. Those decisions also contain an explanation the history of the requests for information and the

Information Commissioner's decisions in respect of them. We need not repeat that information but simply record that, as the matter comes before us, it is agreed between the parties that the exemption under FOIA is engaged and that the only issues we have to decide are the following:

a. Whether the public interest in maintaining the exemption claimed under FOIA section 36 in respect of the Risk Register outweighed the public interest in its disclosure. If it does then Mr Slater's appeal against the Information Commissioner's decision that the Department had been entitled to refuse disclosure will fail. If it does not, his appeal will succeed and a direction for the document's disclosure will be required.
b. Whether the public interest in maintaining the exemption claimed under FOIA section 36 in respect of the Issues Register outweighed the public interest in its disclosure. If it does, then the Department's appeal against the Information Commissioner's decision in favour of Mr Slater, that it should have been disclosed, will succeed. If it does not then the Department's appeal will fail and a direction for the document's disclosure will be required.
c. Whether the public interest in maintaining the exemption claimed under FOIA section 36 in respect of the PAR outweighed the public interest in its disclosure. If it does then the Department's appeal against the Information Commissioner's decision in favour of Mr Collins, that it should have been disclosed will succeed. If it does not then the Department's appeal will fail and a direction for the document's disclosure will be required.

6. At the outset of the appeal there was also an issue about whether names of certain individuals should be redacted from any documents that we might order to be disclosed. This was on the basis that publication would breach the privacy rights of those individuals under the Data Protection Act 1998 and therefore fell within the exemption provided by FOIA section 40(2). However, following concessions made during the course of the hearing, the principle underlying that issue was no longer in dispute, although the parties have yet to finalise the list of those affected and any disagreement on that may have to be referred back to the Tribunal for a final determination.

7. Mr Collins opted not to attend the hearing of the Appeals, but relied on his written submissions. All other parties attended the hearing and we are grateful for their assistance.

<u>The relevant law</u>

8. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a

number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

> *"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*

9. Under FOIA section 10 a public authority must comply with a request for information made under section 1 *"promptly and in any event not later than the twentieth working day following the date of receipt".* If the public authority relies on a qualified exemption it has further time in which to state its reasons for claiming that the public interest balance is in favour of maintaining the exemption (section 17(3)(b)). The statement of reasons must be provided *"within such time as is reasonable in the circumstances".*

10. In this case we are also assisted by guidance on the relevant statutory provisions issued by:

    a. the Upper Tribunal when allowing the appeal against the First Tribunal Decision (which we deal with at paragraphs 43 and 54 below); and
    b. the decision of Mr Justice Charles, sitting in the Upper Tribunal, in *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC).

11. In *Lewis* the Judge considered the application of the public interest balance in the context of the exemption provided under FOIA section 35 (information relating to the formulation/development of government policy). The guidance provided applies with equal effect to the exemption relied on in this case. The Judge, first acknowledged the well-established requirement to adopt a "*purposive and liberal approach … to the interpretation and application of FOIA*" and the existence of a "*strong public interest in the press and the general public having the right, <u>subject to appropriate safeguards,</u> to require public authorities to provide information about their activities"* [emphasis in the original]. He then emphasised the importance of carrying out the assessment by reference to the actual harm and benefit likely to follow from the disclosure of the specific content of the requested information in the context of the particular qualified exemption relied upon. The approach, he said, was analogous to that adopted over several years in respect of the balance required where a government department resisted disclosure of documents to its opponent in litigation (thereby potentially undermining the public interest in the administration of justice) on the ground that

disclosure would harm the nation or the public service (see the summary of the principles of public interest immunity set out in *Al Rawi v Security Service* [2011] UKSC 34 quoted in paragraph 17 of *Lewis).*

12. The detailed working through of the *"contents approach by reference to actual harm and actual benefit"* was then explained in these terms:

> *"26. A classic class claim to PII was based on the public interest in preserving the confidentiality of discussions relating to policy formulation and development. A significant aspect of the reasoning to support that class claim was the "candour argument", namely the promotion of full and frank expressions of view in robust terms and the thinking and discussion of the unthinkable in order to test and develop ideas. This argument is now advanced under FOIA as a part of the "safe space" and "chilling effect" arguments.*
>
> *27. The statement to Parliament referred to in Al Rawi abandoned that class approach and so relieved those who were instructed by Government departments of the difficult task of trying to convince courts that it was persuasive. Historically the candour argument was advanced in support of both class and contents claims for PII and LPP. The common law on these issues diverged with the result that LPP is based on a right and so a guarantee of non-disclosure, whereas no such right exists in the context of PII claims or duties of confidence. The lack of a right guaranteeing non-disclosure of information, absent consent, means that that information is at risk of disclosure in the overall public interest (i.e. when the public interest in disclosure outweighs the public interest in non-disclosure). As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that if he is properly informed, a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed. In general terms, this weakness in the candour argument was one that the courts found persuasive and it led many judges to the view that claims to PII based on it (i.e. in short that civil servants would be discouraged from expressing views fully, frankly and forcefully in discussions relating to the development of policy) were unconvincing.*
>
> *28. The same weakness exists in respect of a qualified FOIA exemption because any properly informed person will*

know that information held by a public authority is at risk of disclosure in the public interest.

29. Properly drafted certificates and evidence claiming PII addressed this weakness. In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:

i) this weakness,

ii) the public interest in there being disclosure of information at an appropriate time that shows that the robust exchanges relied on as being important to good decision making have taken place, and

iii) why persons whose views and participation in the relevant discussions would be discouraged from expressing them in promoting good decision making and administration and thereby ensuring that this is demonstrated both internally and when appropriate externally,

is flawed.

30. So a contents based assertion of the public interest against disclosure has to show that the actual information is an example of the type of information within the class description of an exemption (e.g. formulation of policy or Ministerial communications or the operation of a Ministerial private office), and why the manner in which disclosure of its contents will cause or give rise to a risk of actual harm to the public interest. It is by this route that:

i) the public interest points relating to the class descriptions of the qualified exemptions, and so in maintaining the exemptions, are engaged (e.g. conventions relating to collective responsibility and Law Officers' advice) and applied to the contents of the information covered by the exemption, and

ii) the wide descriptions of (and so the wide reach of) some of the qualified exemptions do not result in information within that description or class that does not in fact engage the reasoning on why disclosure would cause or give rise to risk of actual harm (e.g. anodyne discussion) being treated in the same way as information that does engage that reasoning because of its content (e.g. examples of full and frank exchanges).

31. That contents approach will also highlight the timing issues that relate to the safe space argument. The timing issues are different to the candour or chilling effect arguments in that significant aspects of them relate to the likelihood of harm from distracting and counter productive discussion based on disclosure before a decision is made."

13. Those principles formed the basis for specific guidance to this Tribunal on its approach to evidence and submissions regarding "chilling effect". It was in these terms:

> *"67 In my view, this points firmly in favour of the conclusion (which I reach) that a high degree of deference to either side is very unlikely to be appropriate when the Information Commissioner or the FTT are assessing the public interest balance under s. 2(2)(b) of FOIA and that they should carry out a thorough and critical analysis of the competing reasoning and analysis and the factors on which they are based.*
>
> *68. This is in line with many other evidence based assessments of opinion, and involves the decision maker having regard to the expertise of the relevant witnesses or authors of reports:*
>
> > *i) in his assessment of the factual base of and the content of the analysis and reasoning advanced for the opinion, and*
> >
> > *ii) when giving his reasons for reaching his conclusion on matters of risk or opinion (e.g. a court can depart from the views of an expert but must give reasons for doing so and must not develop its own theory against the evidence of an expert – see, for example, A County Council v K, D & L [2005] 1 FLR 851 at paragraphs 58 and 60).*
>
> *69. At the heart of this approach is a multifaceted assessment by the decision maker, here the FTT (and earlier the Information Commissioner), of the factual bases for and the strength of the rival arguments. This has case and fact specific issues but common themes will be:*
>
> > *i) an identification of the relevant facts,*
> >
> > *ii) a consideration of the relevant factors to be taken into account, and the adequacy of the evidence base for the arguments founding expressions of opinion,*

iii) a consideration of whether and how the relevant factors have been taken into account in the rival analyses and reasoning,

iv) the relevant expertise and responsibilities of those advancing the rival contentions and their impact,

v) a judgmental exercise, and

vi) the giving of reasons for the conclusion reached which will generally be the best way of demonstrating the approach taken to the issues of degree and thus whether "proper" or "appropriate" weight or "judicious recognition" has been given to the relevant factors ."

70. So, for example:

i) in line with my comments on the candour argument if relevant factors are not addressed this will identify flaws in an argument that are likely to detract from the weight to be given to it however experienced or expert the person advancing it may be, and

ii) the identification of inaccuracies, overstatements, lack of objectivity and unpersuasive reasoning will have the same effect."

14. Later in the decision the judge identified certain flaws in the evidence of chilling effect submitted by the Department of Health in the case before him, which he said had justified the FTT's rejection of it. It contains points of guidance that may apply to other types of case. The relevant paragraph reads:

"80 The reasons the FTT give for this conclusion are valid and persuasive. I add that in my view the flaws in the reasoning advanced include a failure to address:

i) how the alleged risk of harm fits with the proper performance by Ministers and their officials of their duties (and in the case of the latter the Civil Service Code),

ii) whether either of the witnesses or this Minister would act in that way and how they would go about doing this,

iii)if as one would expect they would say that they would not why it is said anyone worth his salt would act in such a damaging way,

iv) how it fits with the Department's evidence on the need to provide explanations on disclosure to ensure that a misleading impression is not given and the public is properly informed as to the way in which the Minister is carrying put his duties to further the public interest, and on a pragmatic level

v) how the unnecessary steps or engagements are to be identified and thus which faction or factions of the media or public they are to be directed to, and

vi) why anyone would take the risks involved in being faced with having to explain this course of action."

The Evidence on Appeal

15. The Tribunal has had the advantage of having been provided with evidence beyond that provided to the Information Commissioner before he issued the Decision Notices from which these Appeals arose.

Public documents

16. The evidence included a number of public documents included in the agreed bundles prepared for the hearing, which traced parts of the history of the Universal Credit Programme and public perceptions of its proposed implementation. Those public documents recorded the following events and developments:

a. The status of the Programme in March 2011. The Starting Gate Review for the Programme was issued on 8 March 2011 but only came into the public domain when it was placed in the House of Commons Library following the appearance before the Public Accounts Committee of Ian Watmore, a senior IT executive at the Cabinet Office in May 2011. The document assessed the deliverability of the Programme and the achievability of the intended economic outcomes. It concluded that, while the project had got off to an impressively strong start, a demanding timetable had been set for such a complex project and implementation would require co-operation with a number of other bodies. Its overall conclusion was that a high degree of confidence was justified in its ultimate delivery. However, it was less confident about the likely achievement of the intended economic outcomes because of factors beyond the Department's control and the risks inherent in adopting unproven project management techniques and forecasting the likely response of the intended recipients of Universal Credit. It also drew attention to a number of other risks and made recommendations for addressing them. These included

negative impacts on staff morale, the challenge of imposing a secure internal governance structure and the likelihood of targeting by fraudsters.

b. The Department's prediction for the Programme in November 2011. On 1 November 2011 the Department issued a press release in which it announced that over one million people would be claiming universal credit by April 2014, with 12 million claimants moving onto the new benefit by 2017. The Work and Pensions Secretary, Iain Duncan Smith was quoted as saying that the Programme was "*on track and on time*". The press release added that *"Many of the technology building blocks needed to deliver Universal Credit already exist with the programme reusing existing, proven IT, which represents about sixty per cent of what is needed. Although there will be elements that need to be updated and parts which need to be built from scratch – Ministers are clear that Universal Credit does not require a major new IT system".*

c. The Department's assessment at April 2012. Its Annual Report and Accounts for the period from April 2011 to March 2012 reported that the Programme had progressed well during that period and that the implementation plan had been agreed in January 2012.

d. A commentator's perception of progress made by September 2012. In that month the BBC issued a news item on the Programme in parallel with a feature on its "World this Weekend" broadcast. It quoted the Local Government Association as having concerns that the IT system would not be ready in time and others as having respect for the motivation for reform but concern about implementation. It quoted a Department spokesperson as saying "*Liam Byrne* [an opposition spokesperson who had criticised implementation] *is quite simply wrong. Universal Credit is on track and on budget. To suggest anything else is incorrect."*

e. The House of Commons Work and Pensions Committee perception as at November 2012. The Committee issued a report on implementation of the Programme in November 2012, which included concern about the inadequacy of information provided to it by the Department to demonstrate that information could be passed accurately and quickly between the central government IT systems and those of local authorities.

f. The Department's decision to restructure the Programme in autumn 2012. This included the removal of the programme director and the director of IT and the discontinuance of development of systems for national roll-out in favour of short-term solutions in support of pilot schemes (referred to as"

pathfinders"). [This was not public information at the time but was disclosed in the report of the National Audit Office ("NAO") in September 2013, which is referred to below].

g. The assessment by the Major Projects Authority ("MPA") in February 2013. This was to the effect that the Department had *"…failed to fully implement two-thirds of the recommendations made by internal audit and the Major Projects Authority in 2012."* [The quotation is from the NAO report]

h. The fact that between February and May 2013 a team from the MPA conducted a 13-week reset of the Programme. This followed a project assessment which expressed *"…serious concerns about the Department having no detailed 'blueprint' and transition plan for Universal Credit."* [Again as reported by the NAO, which represented the first public disclosure of the reset]

i. The writing off in May 2013 of £34 million. This represented (17%) of its new IT assets. [The source is again the NAO report]

j. The assessment of the NAO as at September 2013. The NAO issued the report referred to above. It was entitled "Universal Credit: early progress". In addition to disclosing the developments described above the NAO identified the following issues:
    i. It stated that "*Throughout the programme the Department has lacked a detailed view of how Universal Credit is meant to work….By mid-2012 this meant that the Department could not agree what security it needed to protect claimant transactions and was unclear about how Universal Credit would integrate with other programmes."*
    ii. Reviews carried out in mid-2012 had identified that the Department's decision to ring fence the Programme team had led to "*…a 'fortress' mentality with the programme team and a 'good news' reporting culture."*
    iii. The Department had failed successfully to address problems with governance and had changed the governance structure on several occasions.
    iv. Roll out plans were significantly delayed. By July 2013 the roll out of a pathfinder scheme was limited to four sites and involved 1,000 new claims, which were at the most simple end of the range of claims and involved limited IT capability.
    v. The NAO's assessment that it was unlikely that Universal Credit would be as simple or cheap to administer as originally intended.
    vi. The Department's inability to explain how it had originally decided to commence roll-out in October 2013 in light of

the late start of its project to develop the necessary IT systems.

k. The House of Commons Committee of Public Accounts assessment in November 2013. In that month it issued a report on the Universal Credit Programme which concluded that *"… timescales have slipped and that value has not been secured from the £425 million invested so far. There has been a shocking absence of financial and other internal controls and we are not yet convinced that the Department has robust plans to overcome the problems that have impeded progress"*

l. The most up-to-date official assessment available to us. In November 2015 the Office for Budget Responsibility ("OBR") issued its report on the Autumn 2015 spending review, which recorded that the rollout schedule for the Universal Credit Programme was around three years late following a number of delays in the previous three years, with 330,000 claimants expected to be receiving universal credit in 2016-17 as against the 6.1 million that had originally been expected.

17. We comment, in passing, that the requests for information in this Appeal were submitted and dealt with around the time of the events recorded at sub paragraphs c. and d. above.

Witness statements relied on by the Department

18. As the First Tribunal Decision discloses, the Department relied upon the evidence of Sarah Cox at that stage. However, during the course of this Appeal it filed a further witness statement signed by Cath Hamp, which adopted all of Ms Cox's evidence and supplemented it with Ms Hamp's own further evidence. Only Ms Hamp attended the hearing of the Appeal and she answered questions put to her by the other parties to the Appeal and the Tribunal panel, which covered the content of both witness statements. She impressed us with her authority and knowledge and we felt that she gave us honestly held opinions. However, they were too often speculative, rather than based on hard fact, and she appeared at times to be opposed to the concept of transparency inherent in FOIA.

19. Sarah Cox signed her witness statement in December 2013 and, as the First Decision and the Appeal Decision disclose, it formed the main evidence before the Tribunal at that stage. At the time Ms Cox was the Programme Assurance Director for the Universal Credit Programme and had accumulated 25 years' experience in business planning and programme management.

20. Cath Hamp's witness statement was prepared for the purpose of the remitted appeal. She is currently the Director of Security Design for the Universal Credit Programme having worked as one of its senior managers since November 2012. She had previously worked as a civil servant for 30 years in various management roles, several of which involved fraud/security issues and the management of change.

The evidence of Ms Cox, adopted by Ms Hamp and dealt with by her in cross examination

21. Ms Cox outlined the nature of the universal credit reforms and the complex programme designed to implement them, including the operation of the pathfinder scheme affecting only certain categories of claimant in particular areas of the country. In that context Ms Cox explained that the dates when Mr Collins and Mr Slater submitted their information requests (1 March 2012 and 14 April 2012, respectively) fell during a critical stage of policy development, when the enabling legislation was about to pass into law but the regulations required to implement the broad policy statements it contained were still being drafted and detailed implementation plans were being worked on.

22. According to Ms Cox the Department routinely released a great deal of information, both generally and with specific reference to the Universal Credit Programme, and submitted to oversight by the National Audit Office (NAO), the Public Accounts Committee and the Work and Pensions Select Committee. The Department's supportive approach towards FOIA was demonstrated by the large number of information requests that had been complied with and the relatively few cases on which it had resorted to the investigatory powers of the Information Commissioner, or the appeal processes of this Tribunal.

23. Ms Cox put the information requested into the context of the effective management of a major project, in which each of the requested documents constituted an important management tool designed to identify and manage areas of risk that might prevent or delay successful completion and/or to record progress of interdependent elements. She stressed the importance of those involved in identifying and recording risks being free to apply imagination to identify all areas of potential risks, including outlandish or unlikely ones, and to be free to raise points that might appear to criticise the underlying policy. Thereafter, she explained, each risk had to be assessed, in terms of likelihood and impact, so that actions could be identified, recorded and monitored in order to mitigate each element of risk. Rigorous analysis and structured management was required in respect of matters that develop both from events that <u>may</u> happen (to be

recorded in a “risk” register) and those that it becomes clear will happen (to be recorded in an “issues” register).

24. A key part of Ms Cox’s evidence was her concern at the harm she felt might occur if internal programme management documents were, in her terms “*routinely disclosed*”. Ms Hamp’s adoption of that part of the evidence was at variance with the evidence which both witnesses gave regarding the infrequency with which the Department found itself in dispute over FOIA requests.

25. Ms Cox identified five areas of danger which she perceived as likely to result from an order to disclose the Risk Register or Issues Register. Ms Hamp confirmed in cross examination that she adopted each one as a prejudicial consequence which she considered the Tribunal should adopt as justification for withholding disclosure.

26. Ms Cox’s areas of concern, together with Ms Hamp’s evidence during cross examination on each one, will be dealt with in turn.

    i. In preparing programme management documents civil servants must be entirely candid; they must “think the unthinkable” and record their thoughts without hesitation or fear of disclosure. They should do so even if this might give an alarming impression to an outsider reading the document without an understanding of its purpose, or provide an opportunity for a hostile journalist or political opponent to make mischief. A perceived risk of disclosure would undermine frankness and candour, leading to the documents becoming bland records prepared with half an eye on how they would be received in the public domain. Ms Cox expressed the view that this would not be evidence of a failure of robustness or courage but simply a reflection of human nature and an understandable reluctance to jeopardise a programme or embarrass those responsible for its implementation. The downplaying of a potential problem could seriously harm a project and much the same result would be likely to occur if truly candid assessments were provided by word of mouth instead of being properly recorded and shared. It was suggested to Ms Hamp in cross examination that civil servants would approach the task of contributing to documents of this nature fully aware of the checks and balances, which are incorporated into the freedom of information regime and designed to avoid premature or inappropriate disclosure. Her response was that the more senior individuals concerned would be aware of this, in general terms, but that more junior individuals, perhaps contributing on a relatively narrow, specialist topic,

might not be. She accepted that a disclosure made under FOIA, after due consideration and with time to append appropriate explanation of context and significance, may create a different impact from an unforeseen disclosure, such as an unauthorised leak of information. However, she maintained her view, which she fairly conceded was inevitably based on speculation, that the likely consequences on future behaviour would be similar and that only some, but not all, of those involved would understand that, contrary to the statement made by Ms Cox, the FOIA did not lead to "*routine*" disclosure. The overall result would be a tendency, certainly among more junior members of the programme team, to write more succinctly when raising an issue and to deal with sensitive material by oral explanation rather than in writing. This would result in less information being available to others responsible for managing the risk and undertaking consequential tasks needed to address the risk. The specific respects in which the documentation might have been less helpfully prepared were considered in closed session and are commented on in the confidential annex to this decision. The annex is to remain confidential until after the deadline for appealing this decision shall have expired or, in the event that an appeal is launched, until after the appeal shall have been determined or withdrawn.

ii. Ms Cox's second point was that premature disclosure would lead to civil servants being distracted from their tasks, in particular the implementation of the project, in order to address concerns raised by outside organisations involved in it (including local authorities) and/or the media. It was suggested to Ms Hamp in cross examination that the task of explaining the correct position to anyone involved in the official or unofficial scrutiny of public affairs was a normal element of a civil servant's role. Her response was that it was but that FOIA "*adds unnecessarily to the volume*".

iii. Disclosure of the withheld information would, in Ms Cox view, reveal to the public a misleading impression of progress on the Universal Credit Programme and would not assist public debate. It would, in Ms Hamp's words during cross examination, put into the public domain the civil servants "*worry list*", which would create an unnecessarily negative impression which did not reflect the truth about the project's progress.

iv. Allied to the previous point, Ms Cox considered that disclosure could lead to sensationalist, rather than responsible and balanced reporting, which would further contribute to the public acquiring a misleading impression.

Ms Hamp expressed the view under cross examination that, even though several of the risks identified in the withheld information would be seen to be routine and unsurprising, some of the content would be likely to lead to distorted headlines. Her attention was drawn to the newspaper article which had followed the voluntary release of the March 2011 Starting Gateway Review (see paragraph 16 a. above). This was a Daily Telegraph article dated 26 September 2011. She accepted that it was a reasonably bland and high level summary although she took issue with its headline "*Secret report reveals 'real danger' to welfare reform*", which she felt was not balanced by the overall conclusion of the article that *"Overall, the MPA's "Starting Gate" assessment is that DWP and HMRC are able to deliver Universal Credit*". Ms Hamp also expressed the view that the article would have been more vivid had the report itself been more critical of progress and planning up to that time.

v. The fifth concern expressed by Ms Cox, and adopted by Ms Hamp, was that disclosure would have a negative impact on local authorities and other organisations who were co-operating with the Department. A particular concern for local authorities has been the potential impact on Housing Benefit staff whose jobs will be lost when Universal Credit is fully implemented. Ms Cox thought that such authorities would be dismayed if the detail of the risks they faced were to be disclosed. Ms Hamp was challenged in cross examination to explain how the disclosure of material identifying this as a risk could trouble authorities who would be familiar, already, with the impact Universal Credit would have on local human resource issues. She expressed the view that local authority employees, below those senior officials who she conceded would already have "got a feel for" the consequences, might be shocked at how far forward and detailed the planning was. Their managers might have preferred to maintain more control over the release of the information to the public.

vi. Ms Cox's final point of concern was that those writing reports would be inclined to write at more length, in order to include explanations and caveats, which would detract from the value of the document as a "*short and punchy*" commentary. In this respect Ms Hamp's concern seemed to be that the documents would become more concise, rather than less, and she fairly acknowledged that there was a discrepancy between herself and her colleague in this respect and that they were both basing their assessment on an educated guess or hunch.

27. Although Project Assessment Reviews carried out by the Major Projects Authority perform a different function to the two registers previously considered, Ms Cox nevertheless considered that the disclosure of the PAR in response to Mr Collins' information request dated 1 March 2012 would lead to difficulties. She explained that a PAR was typically used to review only the most major projects, which require bespoke terms of reference and involve in-depth investigation by an independent and appropriately skilled team of individuals. Their task is to review the project over a relatively short period of time (in this case it lasted from 7-11 November 2011), adopting a challenging approach in order to explore key risks and issues. This will involve interviewing staff on a non-attributable basis in order to encourage full and frank discussion. The report generated during the review is expected to be shared by those managing the project with the individuals, whether within the department or outside, who have responsibility for its ultimate delivery. The tone set during the review and the manner in which the final report is distributed within the team, but not beyond it, is designed to ensure that the outcome and recommendations are supported by the project team.

28. Ms Cox accepted in her witness statement that most members of the team would know each other's views well enough and that they would therefore know the source of particular views recorded in the report. They would also understand that others would recognise their own view, as recorded in the report, even without direct attribution. Ms Hamp considered that there might still be a degree of speculation about the source of particular comments, if the report were to be disclosed, and that this might affect how an individual would respond to an interviewer. However, her own direct experience of "calling out" an issue, in circumstances where it would have been apparent to the rest of the team that it was she who had done so, suggested that trust and cooperation are not necessarily undermined. Ms Cox thought that there might also be an impact on the drafting of a PAR, with findings more heavily qualified and recommendations expressed in less clear and frank language, if those preparing them considered that it might be published prematurely.

29. Ms Cox concluded her witness statement with a description of the manner in which the particular documents under consideration in this Appeal were created and the role they played in risk assessment and project management. She drew particular attention to the fact that the Risk Register and Issues Register was each an iterative document, which was being updated on an almost daily basis as steps were taken to ameliorate identified risks or assess new ones. If it had been disclosed in response to the original request, therefore, there would have been no time to undertake, and record, steps to manage any risk that had been

identified and introduced into the document during the days immediately preceding the information request. In the case of the PAR, the request had been received just four months after it had been prepared, at a point in time when it was the most up-to-date report available for the Programme and when some of the recommended actions were not yet due for completion. The same concerns about the "chilling effect" of premature disclosure and the need for "safe space" to deal with recommendations therefore applied as for the other documents.

30. In order to address the questions that arose in relation to the First Tribunal Decision regarding the leak of the Starting Gate Review and the impact that might have on civil servants' approach to project management records, Ms Hamp described the difference between a Starting Gate Review and a PAR. The former assesses the deliverability of a new policy or business change initiative prior to public commitment to it and is designed to help in identifying practical delivery issues from the outset. It therefore addresses the project at a high level of generality on the basis of circumstances at the time which are likely to change as the project develops. By contrast a PAR is a "deep dive", which takes place during the lifetime of a project and examines specific issues in detail and over a short period of time. A major project is likely to be the subject of several PAR reports and may have to address sensitive topics such as finances, resources, commercial arrangements and the way in which those responsible for delivering the project are performing their roles.

The open witness statement of Ms Hamp

31. In addition to supporting Ms Cox's evidence on the likely harm of an FOIA disclosure, as described above, Ms Hamp's witness statement included additional concerns of her own. She conceded that, because the FOIA regime does not lead to many cases of sensitive information being released prematurely, the effect of disclosure has to be inferred from other types of disclosure in the context of known departmental behaviour and culture. She also explained why the Department's recent decision to disclose a previously withheld Milestone Schedule in respect of the Universal Credit Programme was not expected to have the same damaging effect on civil servant candour as the disclosure of the information in dispute in this Appeal. She nevertheless thought that it was possible that future milestone schedules might contain vaguely labelled milestones and deadlines that were unrealistically long as a perceived protection against future public examination, but described this as a "minor chilling effect" which was likely to be detected by the robust systems the Department has in place.

32. Ms Hamp was asked if she was aware of the outcome of each of the cases in which disclosure of similar information has been ordered in the past. These were:

    a. an order to disclose a gateway report on a project to introduce identity cards – FTT decision in *OGC v Information Commissioner* EA/2006/0068;

    b. an order to disclose risk and issues registers on a badger cull project – UT decision in *Department for Environment Food and Rural Affairs* 2014 UKUT 0526; and

    c. the release of a project assessment review in respect of HS2 following the government's withdrawal from judicial review proceedings challenging its veto of a direction for disclosure).

    She confirmed that she was not aware of any resulting difference in the behaviour of civil servants and, indeed, was only aware, in general terms, of the fact that the disclosures had been made.

33. Against that background Ms Hamp looked at the consequences of information having been leaked as the closest comparable circumstance to a FOIA disclosure. She did, however, concede, both in her witness statement and during cross examination that an FOIA disclosure can be planned for and managed in a way that an unauthorised leak cannot.

34. A particular leak was the release to the Daily Telegraph of the Starting Gate Review referred to in paragraph 26 iv. above. Ms Hamp said that the leak made DWP officials feel more defensive and built a sense of being "under siege", leading to the imposition of security measures that had the effect of undermining efficient working. She made the point in her witness statement that these effects flowed from the release of a document that was significantly less sensitive than the information under consideration in this Appeal. In cross examination she conceded that these events had taken place before she joined the programme and explained that the consequences had been explained to her as part of the induction process in November 2012. She also accepted that the Daily Telegraph report was one of several factors occurring between late 2011 and the autumn of 2012, covered in her witness statement, which had contributed to the difficulties that the programme team faced at the time and that it would not be appropriate to consider the leak in isolation.

35. It was put to Ms Hamp in cross examination that it was surprising that the consequences she identified as flowing from this particular leak did not seem to have been identified by either Ms

Cox, in her witness statement, or the Department's representatives who prepared written submissions to the Information Commissioner during his investigation. This, it was suggested, indicated that the consequences of the leak which Ms Hamp had described were not as significant as she claimed. In response, Ms Hamp pointed out that Ms Cox had joined the programme later than she had, but she did not otherwise wish to add to what she had said.

36. Ms Hamp also made clear during cross examination that she considered that the PAR under consideration in this Appeal had not been intended for public disclosure at the time when it was written. In further clarification of that statement, she made it clear that she meant that the intention would have been that it would never be disclosed, even after having been superseded by the PAR emerging from a later review, such as the one that took place in May 2012. She did not think that its disclosure, or the disclosure of the other documents under consideration, would provide significant assistance to those seeking where the truth might lie between scare stories in the media about the Universal Credit Programme's progress, on the one hand, and optimistic public statements by politicians and others, on the other. The public would be adequately informed by the answers given to Parliamentary questions and information emerging from the Public Accounts Committee and the Work and Pensions Select Committee. Ms Hamp's attention was drawn in cross examination to a document published by the MPA in March 2012 entitled "MPA Guidance for Departments". It included a section on the confidentiality of project assessment reviews, which included the following guidance:

> *"Information about or for a PAR review, or in a PAR report, will be subject to the FOI Act 2000 and to the Environmental Information Regulations (EIRs) of 2004. SROs are responsible for compliance with requirements under the Government's transparency agenda to publis information in PAR reports, and for making decisions on prior redaction related to commercial, policy, personal data or other sensitivities justifiable under the FOI Act 2000*
>
> *Decisions on FOI requests made to the Cabinet Office or to the MAP for disclosure of PAR information will be taken on a case-by-case basis…"*

The document was put to Ms Hamp in cross examination but she did not express a view as to whether it was likely to operate as notice to all those involved in a project assessment review of the possibility of disclosure if the Information Commissioner (or this Tribunal) made a direction to that effect.

37. In 2013 a report based on a review of the morale of staff working on the Universal Credit Programme was prepared for the Department. It was leaked and Ms Hamp stated in her witness statement that this led to reduced trust between individuals and a reluctance to share comments that might be interpreted as critical of the Programme. At senior management level it led to the imposition of stringent security measures, which further undermined efficient communication between those working on it.

38. Ms Hamp was taken during cross examination to the NAO report of September 2013 As previously recorded it included a review of events occurring across the time covered by the information requests submitted by Mr Slater and Mr Collins. Ms Hamp accepted, by reference to several of the specific issues highlighted by the NAO, that the report was critical of the Programme's progress and had recorded just how serious the problems were that led to the decision to reset it in early 2013. She was invited, in particular, to comment on criticism that the Department had not established how systems and processes were intended to fit together and how they related to the objectives set for Universal Credit – problems that were said to have persisted despite having been raised repeatedly in 2012 by internal audit, the MPA and a supplier-led review. It was also reported that most of the recommendations emerging from the November 2011 PAR had been implemented by April 2012 but that implementation declined significantly after that date and that by January 2013 the Department had failed to implement 67% of recommendations made in 2012. It was accepted by Ms Hamp that it was not possible to control the release to the public of any information that was thought to be critical of the Programme's progress because the true position would ultimately emerge from NAO reports. She also did not dispute that, by contrast with the NAO's criticisms, the impression conveyed by official statements and press releases at the time was more optimistic than appeared to have been justified. These included the press release of 1 November 2011 (paragraph 16 b. above) and the statement to the BBC by a Department spokesperson in September 2012 (paragraph 16 d. above). It was put to Ms Hamp that it could be seen in retrospect that hostile media headlines had been fully justified and that the disclosure of the withheld information would have given the public a more balanced picture than it could obtain from the Department's optimistic public statements at the time. Her response was that she did not disagree with that statement.

The closed witness statement of Ms Hamp

39. The First Decision included a confidential annex in which the Tribunal considered the persuasiveness of a separate, closed witness statement which Ms Cox had signed. There is no equivalent closed witness statement from Ms Hamp in this Appeal. However, she did say, in response to some of the questions put to her in cross examination, that it would be easier to illustrate her concerns by reference to particular parts of the documents under consideration, rather than in vague general terms. The passages to which she referred were then investigated during a closed cross examination session. The detailed outcome of that session is summarised in the confidential annex to this decision.

The submissions of the parties

40. It is common ground between the parties, based on the authoritative statement on the topic in *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2015] UKUT 0377 (AAC), that the moment in time at which competing public interests for and against disclosure are to be assessed is the date of the Department's refusal of each of the original information requests. Applying that rule to this case:
    a. In the case of Mr Collins' request:
        i. The information requested (the PAR) had come into existence during the period of 7-11 November 2011;
        ii. The request was submitted a little under four months later, on 1 March 2012; and
        iii. The Department's determinative refusal, following internal review of its initial reaction, was communicated on 14 May 2012, six months after the PAR had been created.
    b. In the case of Mr Slater's request:
        i. The information in the Risk Register and Issues Register was being developed up to the date of the request;
        ii. The request itself was submitted on 14 April 2012; and
        iii. The Department's determinative refusal, following internal review of its initial reaction, was communicated four months later, on 10 August 2012

41. It was also common ground that we should not base our decision on the reaction to the risk of disclosure that we think civil servants should have but to what it is likely they would have.

42. Although our attention was drawn to earlier cases in which orders have been made for the disclosure of broadly equivalent information about government projects, none of the parties suggested that we should decide this case by analogy or on any basis other than our own assessment of the public interest factors applying in respect of the particular information requested and particular circumstances applying at the relevant time. Our

attention was, however, drawn to the evidence of Ms Hamp 32 in which she had not been able to identify any change in approach following previous disclosures.

43. All parties also acknowledged, if they did not all rely on, the guidance provided by the Upper Tribunal when allowing the Department's appeal from the First Tribunal Decision. This was that it was an error of law to place weight on the fact that no evidence had been adduced to demonstrate that the approach of civil servants to document creation had changed since disclosure requirements first arose under the FOIA in January 2005.

44. There was also agreement on all sides that the Universal Credit Programme constitutes a major reform, which involves severe challenges in implementation and may have very significant impact on the lives of potential recipients. However the arguments varied as to the impact of that assessment on the balance of public interest. The Department, while acknowledging the public interest in being equipped to understand and debate issues arising from the Programme, urged us to conclude that no disclosure should be ordered that might undermine the effectiveness of the project management of such an important reform programme. The other parties relied on the size, complexity and importance of the Programme to stress the importance of the public being able to assess whether the implementation of the policy (but not, obviously, its earlier adoption) was capable of being completed and whether the steps being taken in that direction were effective.

45. The Information Commissioner also highlighted the contrast between government statements suggesting that the project was on time and on budget, on the one hand, and subsequent judgments by others that it had in effect been through a very troubled period. The NAO report in September 2013 was one example of this.

46. A further public interest factor in favour of disclosure presented to us by the Information Commissioner was the light it would shine on the effectiveness of the Major Projects Authority, which had been created in March 2011 as the means by which the 2010 coalition government planned to improve government's record of delivering projects. He drew attention to a statement made by the Cabinet Office Minister, Francis Maude MP, in May 2013 which included this passage:

> *"By their very nature* [major projects] *are high risk and innovative. They often break new ground and dwarf anything the private sector does in both scale and complexity. They will not always run to plan. Public scrutiny, however uncomfortable, will bring about*

improvement. Ending the lamentable record of failure to deliver these projects is our priority."

The Information Commissioner argued that this demonstrated the public interest in seeing the PAR and that it would not have been premature to have released it in May 2012, which was six months after the review had been completed and around the time when the MPA carried out a further PAR, rendering the previous one historic. He relied on the NAO's assessment that up to April 2012 the Department had implemented the majority of the recommendations from the PAR but that its record in that respect grew significantly worse over the following nine months. This, he argued, emphasised the importance of the public being made aware of the approach and effectiveness of the MPA around the time when the information requests were rejected, instead of having to wait for over a year to discover the truth about this and the difficulties the Programme team were facing.

47. The Department argued that if either or both of the registers were to be prematurely disclosed, or if civil servants were to fear that this would be the case, the purpose of providing short and punchy summaries of risk or problems would be undermined because they would come to be written in bland terms as a result of the writer having an eye on how they would be received in the public domain. Disclosure would also deny those engaged on a major government project the necessary safe space in which to deal with issues away from the glare of publicity. Each register is an iterative document which records both the identification of a risk or issue and the subsequent steps planned or taken to manage or mitigate it. Disclosure at a stage when there may have been little or no time to explore solutions would lead to unhelpful media intrusion and unnecessary public alarm. That in turn could lead to resources being diverted in order to address misunderstandings that may have arisen among both the public at large and the delivery partners with which the Department has to work.

48. We were expressly invited by the Department to consider each of the issues raised by reference to the closed evidence which we had received. In particular we were invited to place due weight on the evidence provided by Ms Hamp, in light of her seniority and experience and the helpful and candid manner in which she had answered questions. We were invited to accept that, although inevitably speculative, it was based on the witness's extensive experience.

49. In respect of the PAR the Department again stressed the need for it to be written in frank and candid terms. It was equally important that those interviewed should candidly express their personal views and experiences and should not feel constrained by the fear of being publicly identified as the source of criticism or concern.

Those individuals should also be able to place trust in the review process as they would be the ones required to implement any recommendations arising from the PAR. That would only happen, it was argued, if they accepted the fairness and rigour of the review, including the way in which their own views had been received. Premature disclosure would undermine the process and lead to team solidarity and personal loyalties (to the project or to one or more individuals) coming in the way of frank and honest commentary, thereby reducing the robustness of the PAR process. It would also lead to the reviewers themselves adopting a more defensive approach to drafting, with a disproportionate focus on presentational concerns.

50. Those factors had particular impact, it was said, because the information request had been received less than 4 months after the PAR had been completed and before the expiration of the time set for taking particular remedial steps. Disclosure would therefore have exacerbated the problems faced in managing public expectations in the face of the hostility and criticism which the Programme was said to have attracted at the time.

51. In both argument and evidence the Department's representatives urged us to accept that the anticipated change in civil servant approach should not be regarded as discreditable, let alone a breach of the Civil Service Code, but just the understandable reaction that any person would have in the face of a risk of public exposure. There was, for example, no question of civil servants failing to identify risks or problems – they would still do so, but in terms that made their contribution less valuable to the process of project management. The reaction to unauthorised disclosures in the past, as described by Ms Hamp in her witness statement, was proposed as a parallel and an indication of the reaction that might have been expected had the information requests been complied with.

52. The Department's detailed arguments on the public interest in disclosure (touched on in paragraph 44 above) were that it was likely to be focused more on the wisdom of having adopted the underlying policy than on the detailed process for delivering it. To the extent that there was a legitimate public interest in management issues it was adequately served by other means, such as the inspection and public reporting by the NAO, the Public Accounts Select Committee and Work and Pensions Committee of the House of Commons. In this respect the Department suggested that the problems, identified in the course of such public investigation and relating to an apparent "fortress mentality" within the Programme team, would be exacerbated by premature public disclosure of key elements of the Department's internal project management processes. It would lead to the understandable human reaction to lean towards optimism in

preparing any materials that may be published, particularly in the case of a record affecting a project that has attracting what the Department considered to be particularly vehement, and in some cases unfair, criticism. Particular reliance was placed, in this respect, on Ms Hamp's evidence regarding the extent to which this increased the pressure under which the project team worked.

53. Our attention was also drawn by the Department to the following paragraph of the Upper Tribunal's decision allowing the appeal against the First Tribunal Decision:

> *"21. There is one factor that troubles me about the tribunal's reasoning, although it is not necessary to decide whether this involved an error of law. The tribunal's reasoning show no recognition of the trouble that can be caused by the media taking a selective approach to what it publishes and putting its own spin on that material. The tribunal's reasons seem to assume a rational and objective media operating as a responsible overseer on behalf of the public. No doubt, some of the media do behave in that way, but some do not. It is not difficult, looking at the Risk Register, to see how a journalist or blogger with an agenda could select and present parts of the material in a way that would generate attention and attract criticism of the Department. To take an example at a fairly general level, the officials may have identified a possible, difficult problem that requires a lot of action, which is itemised in the register. Objectively, that might seem responsible conduct. But to someone with a different point of view, it could easily be presented as evidence of a project that is in trouble, or as evidence of waste of public funds on a flawed project. This could generate media attention, which would in turn require a response from ministers, leading to the sort of disruption of normal business that Ms Cox explained in her witness statement. I mention this merely as a warning to tribunals that they should take account of the realities of how some sections of the media work and of the impact this can have.*
>
> *22. The tribunal did discuss the public relations handling of the project. But again the discussion seems to assume that problems can be anticipated and planned for. That is certainly true of some problems, but not of all. There is no limit to the ways in which seemingly innocuous details can be used as a means of causing trouble."*

54. We were invited to regard the quoted passage as persuasive (it was certainly not put to us as binding authority) in terms of considering, within the broad spectrum of print, broadcast and online media, the reaction that anyone might be expected to have to the sort of commentary which publication might be expected to generate. The Information Commissioner's position on the relevance of, and weight to be applied to, the Upper Tribunal

guidance was broadly the same – media reaction was a factor that we should take into account when assessing the harm likely to follow from disclosure. We should therefore take it into account and form our own view as to its significance, bearing in mind that those involved would also know that the manner in which they performed the project management functions would be likely to be reviewed, also, by the NAO and relevant Parliamentary Committees.

55. The Information Commissioner also referred us to the binding authority in *Lewis* and stressed the importance of making our assessment on the basis of the content of the documents under consideration, and not the general class of document in which they each fell, and with an eye to the known risk of FOIA disclosure which members of the Programme team must be assumed to have acquired at the time when the documents under consideration were created (see the passages of *Lewis* quoted in paragraphs 12 and 13 above). It was also suggested to us that the issues mentioned in paragraph 80 of the *Lewis* decision, (quoted in paragraph 14 above), while based on the particular facts of that case, were nevertheless illustrative of the factors we should take into account when reviewing the evidence presented to us.

56. Against that background the Information Commissioner invited us to reject the evidence of Ms Cox as to the behavioural changes she feared, as well as the additional evidence of Ms Hamp regarding what he characterised as the quite different form of disclosure resulting from unauthorised leaks. He also suggested that any risk of misunderstanding resulting from disclosure was overstated and could, in any event, have been dealt with by a clarifying statement, which would not impose any significant burden on Department staff, in terms of its preparation and dissemination. This, he argued, had been demonstrated by the manner in which the Department managed the release of, for example, the NAO report.

57. The Information Commissioner had originally decided (in his decision notice in Slater) that the Risk Register should not be disclosed. However he changed his mind, having seen the evidence of Ms Cox tested during the previous tribunal hearing and considered the arguments set out in the First Tribunal Decision. He therefore no longer opposed Mr Slater's appeal. He argued that the public interest in maintaining the exemption did not outweigh the public interest in disclosure in respect of that information any more than it did in respect of the Issues Register and the PAR.

58. Mr Slater emphasised the importance of disclosure by reference to his own concern, as a consultant in his own right, that

government statements in 2011 seemed to take an approach to such a major project, which was both simplistic and over-optimistic. This was a view, he said, which had been proved to have been justified when, eventually, information was released about the difficulties which the Programme faced and which had been openly accepted in Ms Hamp's evidence. He also argued that suggestions that the public would misunderstand the requested information were patronising and underestimated the public's ability to understand that project risks need to be anticipated and to expect that a thorough risk management exercise would be undertaken and ought to include imaginative speculation about matters that could conceivably undermine progress.

Our decision on the public interest balance

59. We have reviewed the disputed information in the closed bundles provided to us and have reached our decision on the basis of our perception of the harm likely to flow from disclosure of the particular information that each document contains, balanced against the benefit likely to follow from disclosure.

60. We have carried out that exercise by reference to the dates on which the Department notified the respective requester of its decision, on internal review, to refuse disclosure. The relevant dates are set out in paragraph 40 above. The period of time between request and possible disclosure is therefore six months in the case of the PAR and four months in the case of the two Registers. This is on the basis that the iteration of the relevant register would have been the one existing at the time of the information request. However, there would have been nothing to prevent the Department, if it had been minded to make disclosure, adding an explanation of steps taken during the intervening months to address the identified risks, particularly if one or more of them might have been misunderstood.

61. Although it is conceivable that a hostile press might concentrate on the apparently alarming risk identification and might ignore the explanation, the evidence before us suggests that, on this issue, the media has adopted a relatively balanced approach to information about the Programme that has come into its possession. Ms Hamp's evidence on the issue was decidedly muted, even though the examples of disclosure on which she relied arose from unauthorised leaks, which are more likely to attract headlines and are more difficult to manage. It is, in any event, a perfectly appropriate performance of the media's role in a modern democracy for it to investigate and comment on the implementation of a major reform involving large sums of public money and a potentially crucial impact on the lives of some of the least fortunate members of society. We do not therefore accept

the Department's submissions on the likelihood of the public misunderstanding the disputed information, or being misled as to its significance by the media. On the facts of this case disclosure might have corrected a false impression, derived from official government statements by revealing the very considerable difficulties that were beginning to develop around the time when the information requests were submitted.

62. Nor do we accept that resources would be wasted in providing explanations. It is clear from the press releases that we have been shown that the Department has been adept at presenting its case to the public and that it clearly has the specialist staff to carry out that function. We do not accept that the disclosure of the withheld information on the dates we have identified would have imposed a significantly increased burden on the Department in this respect. The evidence supporting both the likelihood and extent of these categories of harm lacked detail and appeared from Ms Hamp's comment recorded in paragraph 26 (ii) to be little more than a vague sense that the FOIA had brought with it an obligation on government to explain itself to a greater extent than had previously been found necessary. That may be regarded as a benefit, provided that it does not give rise to a disproportionate burden, which in this case we think it does not.

63. The evidence on the likelihood of civil servants altering their behaviour in future with regard to their contributions to the preparation of a risk or issues register or to the conduct of a project review was, as Ms Hamp fairly conceded, speculative. It was also inconsistent as between her evidence and that of Ms Cox – see paragraph 2 vi. above. While accepting Ms Hamp's knowledge and experience of major government projects, we did not feel able to accept her judgment that significant change would be likely if it became known that the information under consideration in this case were to have been disclosed four and six months after it had been created. Those periods of time are quite long in the context of the planned timetable for the Universal Credit Programme and in the case of the PAR it was on the point of being superseded by the time the request for its disclosure was refused. We are not convinced that reasonably robust civil servants would consider that the risk of disclosure in those circumstances would create pressure to change the way in which they operated.

64. The written evidence referred in several places to the possible perception that disclosure under FOIA was "routine". This was in conflict with evidence recording the relatively few occasions on which the Department has found itself in dispute with the Information Commissioner on whether disclosure was appropriate in a particular case and with Ms Hamp's apparent lack of concern

over the impact of previous, similar FOIA disclosures. It did not, in any event, address the issue raised in *Lewis* regarding the likely awareness that a FOIA disclosure is possible in any case and that any concern in that regard is likely to be balanced by the civil servant's awareness of the importance of candour in support of good decision-making and their professional obligation to assist that process. We would add to that the individual's likely self interest in ensuring that his or her contribution should demonstrate expertise and judgment in order to reduce the risk of being associated with a failed project, or of being criticised in subsequent reviews (including those carried out by the NAO) for having failed to draw colleagues' attention to problems with sufficient clarity to ensure that they were addressed effectively and in good time.

65. The answers given by Ms Hamp during the closed session did not fulfil the promise which she had held out in open session that her concerns about civil servant behaviour would be more clearly demonstrated by reference to specific items in the withheld documents. The issues addressed during the closed session, as we explained to Mr Slater after it ended, were the risk of fraud and hacking into the system, relations with commercial organisations (explained only in general terms and without reference to specific transactions) and relations with local government. We say no more in this open part of our decision than that no specific, likely impact on drafting any of the withheld documents became apparent during the closed session.

66. We should add that, even if accepted in full and without qualification, the Department's evidence put the possible harm no higher than that risk, while being properly identified, might be recorded differently. Even then, the evidence was that the risk would arise mainly in the case of more junior personnel. Two of us have had extensive experience of conducting and/or reviewing project management by reference to the use of registers and periodic reviews. The third member has had more limited exposure. But we all three felt confident that, if junior members of a team were troubled and allowing this to affect the rigour with which they contributed to risk management activities, a reasonably effective project management process, operated by competent personnel at senior level would be expected to notice and correct the impact at an early stage.

67. The risk of misunderstanding by local authorities and other who work on the Programme with the Department was, again, put at a relatively low level. Ms Hamp accepted that senior members of, for example, a local authority would have been aware that they faced the prospect of making Housing Benefit officers redundant. It would raise questions about local management if they were not. The potential damage was therefore said to be limited to more

junior members of staff who might be surprised at the stage reached in project planning. However, the evidence also demonstrated that the Programme fell behind schedule at a relatively early stage. Although the delay may not have been publicly acknowledged by the Department or Secretary of State effective leadership of the programme would or should have ensured that local government, as a key partner in the programme, was kept informed and involved about the time table and thus enabled to manage the expectations of their more junior staff members.

68. We do not accept the Department's submission that the management of the Universal Credit Programme is already exposed to sufficient public scrutiny and that this dilutes the strength of the arguments in favour of disclosure. On the particular facts of this case it is clear that the true story about the troubles which the Programme team faced only came to light a long time after the event and then showed a markedly different picture than had been portrayed by government statements issued at the time. Indeed, the other parties relied upon the difference as a significant factor in favour of disclosure. We believe that they were fully justified in doing so and that this factor carries significant weight in favour of disclosure.

69. Another factor in favour of disclosure, to which we apply weight, was the importance and cost of the Programme, particularly in light of the serious criticisms that subsequently came to light about the adequacy of the Department's project management. Contrary to the Department's argument we consider this to be as important (on a project of this size) as the decision to adopt the policy of a single route for payments in the first place.

70. We were less impressed by the argument that disclosure would serve a public interest in revealing how the MPA works. It seems to us that the information sought refers to only one review and that a broader picture of the MPA's contribution to the Programme as a whole, as well as other programmes of a similar size, would be needed to provide meaningful information on the point.

71. The other public interest factors in favour of disclosure nevertheless carry significant weight, in our view. By contrast, the public interest factors in favour of maintaining the exemption carry relatively less weight, even at the level presented by the Department in its evidence. And we have decided that, even at that level, the fears expressed on behalf of the Department were over-stated, for the reasons we have given.

72. In light of our assessment of each of the factors set out above we have concluded that the public interest in maintaining the exemption in respect of each of the withheld documents does not

outweigh the public interest in disclosure and that they should therefore have been disclosed when requested.

73. Our decision is unanimous

…….

Judge Chris Ryan

11th March 2016