IN THE MATTER OF APPEALS TO THE (FIRST-TIER) TRIBUNAL (INFORMATION RIGHTS)

EA/2013/0145, 0148, 0149

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

BETWEEN:

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**

BETWEEN:

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

and

(3) **Appeal No. EA/2013/0149**

BETWEEN:

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

The Tribunal's Decision on an application for permission to appeal

1. This application is made pursuant to Rule 42 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules, 2009.

2. The Tribunal declines to review this decision pursuant to Rule 44 because it is not satisfied that an error of law is involved, as required by Rule 44(1)(b).

3. If the Tribunal had considered that there was an error of law involved as submitted by DWP, hence that its decision should be reviewed pursuant to Rule 44(1), then, having regard to the overriding objective and to the matters summarised at paragraph 16 below, it would have decided to take no action and to refuse permission, in accordance with Rule 43(2).

4. The DWP`s grounds of appeal may be summarised as –

   (i) The Tribunal wholly misunderstood what is meant by a "chilling effect", how it is manifested and how its existence can be proved.

   (ii) A finding that there was no chilling effect was perverse.

   (iii) Both these errors constituted errors of law.

5. As to (i), the DWP Grounds of Appeal wholly fail to substantiate the claim that the nature of ("what is meant by") the "chilling effect" was misunderstood by the Tribunal; they concentrate exclusively on the evidential aspect (see paragraph 9). The Tribunal is well aware from long experience since the inception of this jurisdiction of what government departments mean when they make this assertion. Its nature is set out at paragraphs 60 and 62 of the Decision. The Tribunal further comprehends that such an effect would be demonstrated by a loss of the qualities identified at paragraph 60 resulting from fear of disclosure of advice, discussion or innovative proposals to the public. These are not difficult concepts.

6. The argument as to means of proof of a chilling effect comes close to asserting that the opinion of an experienced civil servant based on his/her perception of colleagues` attitudes must be accepted by the Tribunal unless, presumably, another equally experienced civil servant asserted the opposite, relying on identical sources for his/her contrary opinion – an improbable scenario. Indeed, paragraph 10 suggests that, in general, the only available evidence will be opinion evidence, evidently from that source. As to the reference to judicial notice, the Tribunal is well aware of contrary views expressed by at least one minister, which the Tribunal expressly forbore to rely on (see paragraph 61 of the Decision).

7. The Tribunal was entitled to reject the claim that there could be no objective support for the essentially "speculative" type of evidence referred to above. Government departments and other public authorities have by now extensive experience of decisions requiring them to disclose information which they sought to withhold for the reasons advanced by DWP here. If the chilling effect is a widespread and damaging result of the fear of disclosure, there is every reason for central government to investigate the matter, enabling a government department to present a case based on its research. Quite apart from that, those receiving reports, conducting discussions and reading advice might be expected to observe, over a period, any trend in changing style and content of their colleagues` written work, so as to be able to present examples and relate them to the perceived threat of disclosure. Obviously the form of document will remain the same but it is hard to believe that the experienced observer could not spot and demonstrate a general loss of trenchancy, of innovation or of boldness in the content over a period if that were indeed the effect of possible public exposure. Such changes would constitute "concrete and specific effects", adopting DWP`s wording.

8. In saying that there was no evidence to support the claim of a chilling effect (advanced by Ms. Cox) it was to the absence of such evidence that the Tribunal referred. It was fully alive to the fact that she gave evidence as to that effect.

9. It did not suppose that evidence of a chilling effect as to the information in this case could be produced (see paragraph 11(3)(i)) as it had grasped the fact that the question of possible disclosure was what it was there to decide.

10. As to paragraph 11(3)(ii), its implications are that no relevant evidence of such an effect can be derived from other examples. If that is so – and we do not accept that it is – then it is not clear why, in other appeals, very senior civil servants, indeed cabinet secretaries, have been called on behalf of government departments in order to speak of a general risk of such an effect in government[1]. Moreover, sections 6 – 8 of Ms. Cox`s witness statement are evidently based on general experience unrelated to the documents in issue here. DWP`s submission appears to cast doubt on the existence of any such general phenomenon.

11. As to the observed consequences of disclosure, it appeared that her direct experience was of leaks rather than FOIA disclosures, a rather different problem, as emerged in evidence, since they could not be foreseen or prepared for.

12. This application treats this phenomenon as something intangible, incomparable and immeasurable of which only insiders can give useful evidence, which a tribunal has little choice but to accept.

13. The Tribunal read and heard the evidence of Ms. Cox, considered the subject matter and the withheld material, took account of her experience, applied its own experience of these cases and its commonsense and, on this issue, found her testimony unpersuasive, as it was entitled to do.

14. For these reasons the Tribunal rejects the claim that its handling of the "chilling effect" issue involved an error of law.

15. As to (ii), perversity, the Tribunal did not discount the possibility of any chilling effect in any circumstances; it was not called upon to make any such judgement. It was concerned only with the claim that such a threat existed to a significant degree in this case so as to influence the balance of public interests. Paragraph 63, ends with this sentence –

E.g., *DFES v ICO & Evening Standard EA/2006/0096; Department of Health v ICO, Healy and Cecil EA/2011/0286/0287; OGC v IC EA/2006/2068 & 80.*

"We are not persuaded that disclosure would have a chilling effect in relation to the documents before us."

That was the Tribunal`s conclusion.

16. A finding that there would be no chilling effect in this particular case is not perverse. Clearly, the possibility that some minimal discouragement to candour affecting one or more particularly cautious officials cannot be discounted but that would not undermine this finding. Consideration of the public interest involves regard for substantial factors.

17. If, contrary to the view of the Tribunal, the rational conclusion should have been that there would be no significant effect in this case such as to tip the balance in favour of withholding this information, so that an error of law was involved in the Tribunal`s finding and the decision should have been reviewed, it would nevertheless have declined to take any action and refused permission to appeal, pursuant to Rule 43(2). It would have taken that course because the error had no practical consequences in the assessment of the public interest and the overriding objective (see Rule 2(2)) requires it to act proportionately, flexibly, fairly to all parties and to avoid purposeless delay.

18. For these reasons this application is refused.

19. As requested by DWP, the Tribunal`s order will be suspended for 28 days from service of this decision on the parties.

20. The Appellant may apply to the Upper Tribunal for permission to appeal against the Decision. Under rule 21(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, the Appellant has one month from the date this ruling is sent to him to lodge an appeal with the Upper Tribunal (Administrative Appeals Chamber), 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL. Further information about the appeal process is available on the Upper Tribunal's website at http://www.justice.gov.uk/tribunals/aa

David Farrer Q.C.

Tribunal Judge

April 25th, 2014