First-tier Tribunal (General Regulatory Chamber)

Application for permission to appeal to the Upper Tribunal

Office stamp (date received)

This form should be used when making an application to the First-tier Tribunal (General Regulatory Chamber) for permission to appeal to the Upper Tribunal. You **must** apply to the First-tier Tribunal for permission to appeal before you can make an appeal to the Upper Tribunal.

Please Read the guidance notes before completing the application for permission to appeal. Use black ink and complete the form in **CAPITALS** or in typewriting.
If there is not enough space please continue on a separate sheet of paper putting your name at the top.

A Your details

Full name	Department for Work and Pensions
Address	Caxton House, 6-12 Tothill Street London SW1H 9NA
Telephone number	n/a
Email address	n/a
Do you have a representative?	☒ Yes ☐ No If Yes, please give details below
Name of organisation or business (if any)	Treasury Solicitor's Department
Contact name	Andrew Robertson (Team B6)
Address	One Kemble Street London WC2B 4TS
Telephone number	020 7210 3429
Email address.	andrew.robertson@tsol.gsi.gov.uk
Reference number (if any)	Z1313313/B6/ANR

B About the decision you are appealing

Please give the following details:

Tribunal reference number:	EA/2013/0145, EA/2013/0148 & EA/2013/0149
Date of the decision	19 March 2014, issued to the parties on 24 March 2014
Date you received the decision	24 March 2014

C Time limit for applying to the First-tier Tribunal for permission to appeal to the Upper Tribunal

Your completed application for permission to appeal should reach the Tribunal within 28 days of us sending you notice of the decision you wish to appeal.

If it reaches the Tribunal later you must ask for an extension of time explaining why the application is late.

I request that the time limit for making the application be extended: ☐

Reasons why the application is late.

This appeal is filed in time being sent by email to the General Regulatory Chamber within 28 days of 24 March 2014

D Reasons for appealing

Please state what **errors of law** you think the Tribunal made and what **outcome** you are seeking:

Please see attached Grounds of Appeal.

E Stay or suspension of the First-tier Tribunal decision pending appeal

Do you wish to ask the tribunal to suspend the decision that you are seeking to appeal?

☒ **Yes** ☐ **No**

Reasons why you are applying for a stay or suspension of the decision (if applicable)

The Appellant asks that the decision of the First-tier Tribunal dated 17 March 2014 be stayed or suspended pending the resolution of this application and, if applicable, any reconsideration of this appeal by the First-tier Tribunal or Upper Tribunal (ref Rule 5(3)(l) of The Tribunal Procedure (First-tier Tribunal) General Regulatory Chamber) Rules 2009).

If the decision of the First-tier Tribunal is not stayed or suspended, the Appellant will be required to release the information to the requestor. This would have the effect of rendering the Appellant's application for permission to appeal (and potential appeal should this application be successful) pointless and academic, as the information would already be in the public domain. If the decision of the First-tier Tribunal is not stayed or suspended, and the Appellant is required to release the information, the Appellant's case will, in practical terms already be determined without the need for any appeal. This would be contrary to the Appellant's right to seek permission to appeal (and potentially to appeal) the decision of the First-tier Tribunal, which is contrary to the overriding objective in the Rules, in particular Rule 2(2)(c).

F Application for permission to appeal to the Upper Tribunal

I apply for permission to appeal to the Upper Tribunal

Signature of appellant or representative:	
Date:	16 April 2014

Please post or email this completed form, together with a copy of the decision to the First-tier Tribunal.

Contact details for the General Regulatory Chamber can be found at www.justice.gov.uk/tribunals

Once we receive your application, a tribunal judge will consider it and we will tell you the outcome.

We can help if you need information in a different format (e.g. Braille, large print). We can also provide this form in Welsh if required. If you need any of these services please contact us.

IN THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Appeal Number EA/2013/0145

BETWEEN:-

THE DEPARTMENT FOR WORK AND PENSIONS

Appellant

-and-

(1) THE INFORMATION COMMISSIONER
(2) JOHN SLATER

Respondents

Appeal Number EA/2013/0148

BETWEEN:

JOHN SLATER

Appellant

-and-

(1) THE INFORMATION COMMISSIONER
(2) THE DEPARTMENT FOR WORK AND PENSIONS

Respondents

Appeal Number EA/2013/0149

BETWEEN:

THE DEPARTMENT FOR WORK AND PENSIONS

Appellant

-and-

(1) THE INFORMATION COMMISSIONER
(2) TONY COLLINS

Respondents

THE DEPARTMENT FOR WORK AND PENSIONS' APPLICATION FOR PERMISSION TO APPEAL

References to paragraphs of the Tribunal's decision notice are in the form "DN§x", where "x" is the paragraph number.

1. The Department for Work and Pensions ("DWP") respectfully requests that the Tribunal grant it permission to appeal to the Upper Tribunal against the Tribunal's decision in the above joined appeals, issued on 24 March 2014.

The Tribunal's decision

2. The disputed information before the Tribunal consisted of confidential, internal documents relating to the management and oversight of Universal Credit, the Government's flagship programme for reform of the welfare system ("the Programme"). Those documents were as follows:

   (1) A risk register ("the Risk Register"), which was a continuing record and evaluation of possible risks to the development or eventual operation of the Programme as perceived by those involved in it. The possible mitigating steps to address any risk, and the gravity of that risk, were monitored and frequently updated upon the document. See DN§19.

   (2) An issues register ("the Issues Register"), which was a continuing record and evaluation of problems that had materialised with the Programme; why they had materialised; and how they could best be minimised or eliminated. See DN§20.

   (3) A milestone schedule ("the Milestone Schedule"), which was designed to provide a logical sequence of activities for the progress of the project, and times by which they should be completed. See DN§21.

   (4) A project assessment review ("PAR") report ("the PAR Report"). PAR reports are reports recording the outcome of flexible reviews of major projects at particular critical junctures in their development. They are undertaken by independent teams with the requisite skills and experience, under the auspices of the Cabinet Office. The review on the basis of which the PAR Report was written occurred between 7 and 11 November 2011. See DN§§17, 38.

3. It was a critical part of the DWP's case in the above appeals that, at least as regarded the Risk Register, the Issues Register and the PAR Report, (i) it was essential that such documents should be candid and frank, and record the candidly expressed

views of officials; (ii) the required frankness included where necessary imaginative pessimism about issues or risks to the Programme, and innovative solutions to address such issues or risks; (iii) disclosure of the documents would imperil that necessary candour and frankness. The Tribunal rightly recorded that this was a central plank of the DWP's case at DN§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."

4. The DWP's witness evidence in the case was given by Sarah Cox, who was the Programme Assurance Director for the Programme between February and December 2013. As the Tribunal noted, her evidence was that of a *"well-informed inside observer"*, with very extensive relevant experience in senior roles, looking at events in retrospect. See DN§35.

5. Ms Cox's witness evidence included extensive reasoned observations on the likely "chilling effect" of disclosure of the Risk Register, Issues Register and PAR Report. See for example paragraphs 41-53, 86-92, 104-106, 110-111, and 121-122 of her open witness statement.

6. The Tribunal recorded as follows at DN§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".

7. The Tribunal wholly rejected the contention that disclosure of any of the above documents would have any chilling effect at all. Its central reasoning for doing so was set out at DN§§62-63. Those stated:

"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 [Mr Collins] had inhibited frank discussion within [the Programme]. 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."

Grounds of Appeal

8. It is evident from the Tribunal's central reasoning at DN§62 that it wholly misunderstood the nature and/or manifestation of any "chilling effect"; what evidence could reasonably be produced on its existence; and what the DWP was properly required to prove to satisfy the Tribunal of its existence. In the premises, that misunderstanding amounted to an error of law. Further or alternatively, the Tribunal's finding that disclosure of the disputed information would have no "chilling effect" was perverse. Still further, the Tribunal failed to give due weight to the evidence of a senior public servant with extensive experience of working on large and very high-profile public sector projects, including the Programme.

Misunderstanding of the nature/manifestation of any chilling effect, of evidence upon it, and of what the DWP was properly required to prove

9. Any argument as to the "chilling effect" of disclosure is necessarily speculative, because it makes assumptions about the future effect of an event that has not yet occurred (i.e. the future effect of disclosure of particular information). Any argument as to the "chilling effect" of disclosure in the past may equally be entirely speculative, whether or not a "chilling effect" has in fact occurred. That is because it may (indeed, probably will) be impossible to say how particular documents would have been drafted, had documents of a similar type not been disclosed; or what public officials might have said, had they not been inhibited from speaking their mind by past disclosures. Thus, the only "proof" of any "chilling effect" is likely to be the assertion of persons whose experience in particular working environments has enabled them to assess and evaluate how candour and frankness may alter, or may have altered, in the light of premature disclosure of information.

10. In other words, the only meaningful evidence on the "chilling effect" of disclosing particular documents will in the vast majority of cases be opinion evidence only. That does not mean that the "chilling effect" is any less real. Indeed, it is a matter of

judicial notice that many ex-Ministers and others have spoken of the "chilling effect" of disclosure as an observable phenomenon within government.

11. In that context, the Tribunal's reasoning at DN§62 was defective in a number of respects:

(1) *First,* the Tribunal wrongly stated that *"there is no evidence to support the claim that [a chilling effect] is or is likely to be the effect of disclosure"*. In fact, Ms Cox had given a great deal of evidence that disclosure of the disputed information would, or would be likely to have a chilling effect: see paragraphs 5 and 6 above. That evidence was opinion evidence, based upon her experience and observation of colleagues' reactions. For the reasons already set out above, that evidence was the only evidence material to the circumstances that the DWP was ever likely to be able to adduce. It was no less relevant for that.

(2) *Secondly,* and connected to the first point, the Tribunal appeared to assume that relevant "evidence" for the purposes of proving a chilling effect was limited to evidence of concrete and specific effects resulting from disclosure: in other words, evidence that would almost certainly be impossible for a public authority to provide.

(3) *Thirdly,* the Tribunal wrongly assumed that it would be possible to "prove" a "chilling effect" by *"a simple comparison of documents before and after disclosure demonstrating the change"*, which the Tribunal stated *"would be quite easy to assemble"*. As to that:

i. If the Tribunal was speaking about proof of the "chilling effect" of the disputed information, then plainly it was in error. At the time of the Tribunal hearing, the documents had not been disclosed. So by definition one could not do any "before" and "after" comparison relating to the disputed information.

ii. If the Tribunal was speaking about proof of "chilling effect" related to the disclosure of <u>other</u> documents, then the relevance of its remark is not understood. The question of whether a "chilling effect" exists must

always depend upon the particular documents at issue, in the particular context. It is entirely unclear from the Tribunal's decision how it would be of assistance for the DWP to demonstrate that in an (unspecified) different context, the disclosure of (unspecified) different documents had led to a chilling effect.

iii. In fact, the inference to be drawn from the Tribunal's reasoning on the point was that it was unconvinced that a chilling effect existed at all within government; and the DWP was required to prove, on the basis of the concrete effects of disclosure in other contexts, that it did. Hence, the Tribunal's reference to the position of government departments *"over the last ten years"*. But if that was indeed the unspoken assumption behind the Tribunal's reasoning, it was an unreasoned assumption, on the basis of no evidence, countering which would have required the DWP to address a very different and wider case, of which it had no notice.

iv. The Tribunal's assumption that it would be *"quite easy to assemble"* a "before" and "after" documentary comparison itself exemplifies its erroneous understanding of how a "chilling effect" can be proved. Far from being easy, it would in the vast majority of cases be impossible to demonstrate that a particular type of document had changed fundamentally as a result of disclosure. That is because the likely effect of disclosure will very probably not be a change in the form in which a document (such as a risk register) is produced. It will rather be a change in the substantive content of the register, as a result of a conscious or subconscious decrease in the candour of those contributing to it. But it will equally be impossible to show what those contributors might have said, had it not been for disclosure: because they will not, in fact, have said it.

12. The Tribunal observed at DN§62 that Ms Cox did not state in evidence that disclosure (by way of a leak) of a "Starting Gate Review" for the Programme had led to a particular chilling effect. However, Ms Cox also stated in evidence (which the Tribunal does not record at DN§62) that the Starting Gate Review was a quite different, and much less detailed, type of document than the PAR Report. Self-

evidently, it was also a very different document from the Risk Register and Issues Register[1]. So the absence of evidence of a "chilling effect" resulting from disclosure of the "Starting Gate Review" does not detract from the points made above.

13. The above points amounted to a fundamental error of law on the part of the Tribunal, because they amounted to an erroneous approach to a central issue for the Tribunal to decide, namely the existence and extent of a "chilling effect", if the disputed information were to be disclosed.

Perversity

14. The DWP acknowledges that the threshold for a perversity appeal against a decision of the Tribunal is a high one. It nevertheless contends that the factual finding at DN§63 that disclosure of the disputed information would not have any chilling effect at all was perverse.

15. There is no dispute, and the Tribunal recognized, that the Programme was and is an extremely high profile project, with a very high degree of controversy and media attention. It effects fundamental changes to the welfare system within the UK. There is also no dispute, and the Tribunal recognized, that the shaping and implementation of the reform is a matter of very high importance and public interest. So the need of those engaged in the Programme for a working environment that encourages the frank and robust exchange of ideas about risks and problems is very great; and the attention paid to (and at times, criticism of) their activities is particularly searching.

16. These appeals concerned (inter alia) documents recording risks to, and issues with the Programme (in other words, actual and potential problems with the Programme). They recorded such risks and issues in blunt terms, with candid assessments of their possible effects and what could be done about them. Those documents were the Risk Register and Issues Register.

[1] That evidence is reflected in the Tribunal's account of Ms Cox's evidence at [38]: "Such PARs are more detailed and specific to the project than such standard assessments as Gateway Reviews."

17. The Risk Register and Issues Register were entirely current at the time of the relevant information request, because (as the Tribunal noted) they were iterative documents, updated on a regular basis. They also contained the names of the persons identifying a risk or issue, and the names of persons responsible for addressing them[2]. In some cases, those names were of relatively junior staff: since all staff were encouraged to raise and note issues and risks.

18. In the above context, and in light of the detailed evidence of Ms Cox, a witness in a particularly good position to understand the effects of premature disclosure upon those responsible for the Programme, the Tribunal's factual conclusion that disclosure of the disputed information would have no chilling effect whatsoever was one which no reasonable tribunal, properly directing itself as to the relevant legal principles, could have reached.

Due weight to the expertise of relevant witnesses

19. The Tribunal at DN§63 observed that the need for a degree of deference to the experience of the DWP's witness, Ms Cox was *"not as pressing"* in the context of this appeal, as it might be when dealing with *"questions of security or foreign policy"*. The DWP does not dispute this as a general proposition: but disputes the correctness of the approach in practice applied by the Tribunal, which was to give Ms Cox's views on the chilling effect of disclosure, based on her considerable experience, no deference/weight at all. Such an approach is implicit in the Tribunal's statement at DN§62 that there was *"no evidence to support the claim that [there is, or is likely to be, a chilling effect from disclosure]"*. That approach was an error of law. It will almost always be appropriate, and was appropriate here, for the Tribunal to give some deference to the expertise and experience of a relevant witness, whose

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[2] The Tribunal has permitted those names to be redacted, but has not done so on the basis of any recognition of the chilling effect of releasing such names. See DN§41:
"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."

Indeed, the implication of DN§75 appears to be that disclosure of the names included on the Risk Register and Issues Register would not have a chilling effect:
"We have already expressed our reservations as to the chilling effect of disclosure in relation to these documents as a whole. They extend to the [Risk Register] despite its more immediate character. Indeed, a responsible member of the [Programme] 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."

creditworthiness is not doubted by the Tribunal, and who is opining on matters of evaluation which are within her personal knowledge, and not within that of the Tribunal.

20. The Tribunal is respectfully requested to grant permission to appeal on the above basis.

JULIAN MILFORD

11KBW

April 2014