

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**EA/2011/0081**

**BETWEEN:-**

**DAVID MOSS**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

---

**RESPONSE**

**BY DAVID MOSS**

---

*References to paragraphs, n, in the Commissioner's 28 February 2011 Decision Notice are in the form ICODecNot:n*

*References to paragraphs, n, in David Moss's 29 March 2011 Appeal are in the form DMApp:n*

*References to paragraphs, n, in the Commissioner's 27 April 2011 Response are in the form ICOResp:n*

**Hearing**

- 1 This Response is served in accordance with Rule 24 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009<sup>1</sup>.
- 2 The Commissioner, in his Response, "invites the Tribunal to dismiss the appeal" (*ICOResp:33*). The Appellant contends in the paragraphs below that the Hearing should not be aborted and trusts that the Tribunal will not accept this craven invitation of the Commissioner's.

---

<sup>1</sup> <http://www.tribunalservice.gov.uk/Tribunals/Documents/Rules/GRCRulesConsolidated.pdf>

### Confidentiality agreement

- 3 The Commissioner says in his Decision Notice that: “the public authority has not provided evidence of an explicit agreement between it and IBM that this information [the IBM report] would remain confidential, but has stated that IBM considers this information to have been provided in confidence” (*ICODecNot:19*). Instead of evidence, we have a consideration.
- 4 And he relies on this: “The public authority has also stated that IBM believes that information that was provided to IBM by other organisations was subject to an explicit obligation of confidence” (*ICODecNot:19*). Instead of evidence, we have a belief.
- 5 And this: “As mentioned above, IBM has also made clear that it would expect the Home Office to maintain the confidentiality of this information” (*ICODecNot:20*). Instead of evidence, we have an expectation.
- 6 And this: “Whilst the public authority has not provided evidence of an explicit agreement of confidentiality between it and IBM, the combination of the guarantees of confidentiality that IBM gave to its suppliers, the representations from IBM to the public authority that it would not wish this information to be disclosed, and the marking of this information as ‘Restricted’, lead to the conclusion that IBM would have held a legitimate expectation that the Home Office would maintain the confidentiality of this information” (*ICODecNot:21*). Instead of evidence, we have the wish of IBM and the word “Restricted” on the report.
- 7 Given several months to reflect on its flimsiness, far from changing the Home Office’s case, the Commissioner repeats it in his Response: “Although there was no evidence of an explicit agreement between the Home Office and IBM that the information would remain confidential, the Home Office had stated that IBM considered that ...” (*ICOResp:22b*).
- 8 The Commissioner’s position is that there isn’t a confidentiality agreement between the Home Office and IBM but somehow, simultaneously, there is.
- 9 This confidentiality agreement which mysteriously both does and doesn’t exist is standing between the public and seeing the IBM report. The Appellant hopes that the Tribunal will agree that this is an intriguing mystery worth investigating at a Hearing.

### Real confidentiality agreements

- 10 In the ordinary course of commerce, if you do business with a supplier who requires confidentiality, the supplier doesn’t just write “Restricted” on his documentation and he doesn’t rely on there being a general atmosphere of confidentiality. He would be laughed out of court if he did. No, the supplier makes you sign non-disclosure agreements which specify very clearly the exact temperature of the tongs that will be applied if you fail to abide by the agreement.

**Public interest**

- 11 In his Decision Notice, we find this: “The view of the Commissioner is that an obligation of confidence should not be overridden on public interest grounds lightly ... There must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence” (*ICODecNot:25*).
- 12 As noted above, this “obligation of confidence” is the very lightest of *soufflés*, confectioned in the Home Office kitchens – one IBM wish, one belief and two considerations for every three expectations – and served at table by the Commissioner. It will be hard for it not to collapse in the atmosphere of cold logic at a Hearing.
- 13 Compare the levity of the Commissioner’s confection with the gravity of the “specific and clearly stated factors” adduced in support of disclosure of the IBM report.
- 14 The Appellant cites firstly:
  - the UK Passport Service biometrics enrolment trial (*DMAApp:43,44,E8.1,E8.2,E8.5*). That’s the trial where the biometrics were demonstrated not to work. And
  - the House of Commons Science and Technology Committee report on the plans for the National Identity Scheme. That’s the report where the Committee describe themselves as “surprised”, “regretful”, “sceptical” and, finally, “incredulous” at the Home Office’s performance. That’s the report where the US Department of Homeland Security are quoted saying that biometrics technology “was probably not as reliable or as accurate as it might need to be for a national identity card scheme” (*DMAApp:53,E8.2*). And
  - the humiliating reverses of NIST (*DMAApp:38-42*).
- 15 And second, the Appellant cites the £265 million contract awarded to IBM by the Home Office and the £385 million CSC contract (*DMAApp:E4.1*) and the waste of money deploying so-called “smart gates” at UK airports.
- 16 The public have good reason to be sceptical about the Home Office’s procurement of biometrics – the published evidence suggests that they don’t work well enough to do any of the jobs expected of them. And if they don’t, then £650 million of the public’s money is being wasted.
- 17 That surely is grounds for a public interest case. But, hard man to please that he is: “The Commissioner submits that no grounds have been advanced upon which the Tribunal may overturn the Decision Notice” (*ICOResp:32*).
- 18 Why does the Appellant’s evidence not amount to grounds at least to consider overturning the Decision Notice? Because of an “obligation of confidence”. And what is that obligation based on? A confidentiality agreement that doesn’t exist.

19 The Appellant hopes that the Tribunal will agree that the public deserve a little more consideration. At a Hearing.

### **The public**

20 The Commissioner, in his Decision Notice and in his Response, considers his own position, and the positions of the Tribunal, the Home Office, IBM, Morpho and the unnamed competitors of Morpho. Omitted from the cast is the public, the people who have to pay £650 million to IBM and CSC on the basis of an unseen report which the Home Office refuse to disclose, an incarceration of information which the Commissioner makes every effort to assist.

21 It's as though, for the Commissioner, there is no public. In which case, no, there wouldn't be any point holding a Hearing. But there is a public.

### **Immunity**

22 Suppose that there were a real confidentiality agreement that the Tribunal could inspect rather than a confection of wishes, considerations, beliefs and expectations.

23 If that's all it takes to ensure that information is never disclosed – just sign a non-disclosure agreement with someone, anyone – then the Freedom of Information Act could never have the desired effect, it could never be used as a tool to improve public administration. That cannot be the intention of Parliament and so there must be circumstances in which such agreements can be set aside so that disclosure is not actionable.

24 The Commissioner recognises this option (*ICODecNot:11,13,22,23,29,30* and *ICOResp:7,22*) but concludes that granting immunity is not available in this case.

25 It is not available, he says, because, on the one hand, there is a vague atmosphere of confidentiality between the Home Office and IBM and Morpho and others unnamed, he has been assured, and, on the other hand, the Appellant has failed to provide any evidence, he says, in favour of granting immunity, even though that's exactly what the Appellant has done.

26 That's £650 million of public interest that the Commissioner ignores. £650 million which there is good reason for the public to suspect is being knowingly wasted by the Home office – “knowingly”, because the Home Office had been warned for years by several organisations with standing, in addition to the Appellant<sup>2</sup>, that the technology is not up to the job.

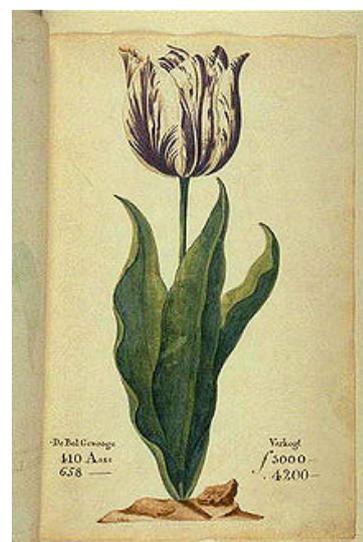
27 The Commissioner has the power to grant immunity from prosecution in matters of breach of confidence. The question why he didn't use that power in this case deserves an airing.

---

<sup>2</sup> Please see *Tulipmania and the Home Office*, <http://dematerialisedid.com/BCSL/Tulipmania.html>. The Appellant warned not just officials but also Home Secretaries, please see for example these letters to Rt Hon Dr John Reid MP as he then was <http://dematerialisedid.com/Open.html> and <http://dematerialisedid.com/Open2.html>.

## Tulipmania

- 28 There was good reason at the time the contracts were awarded to IBM and CSC to suspect that the Home Office's procurement processes were unbusinesslike, irresponsible, unscientific and illogical and there is even more reason now.
- 29 In April 2011, over the signature of President Obama himself, the White House issued its *National Strategy for Trusted Identities in Cyberspace*<sup>3</sup>. There is not a single occurrence of the word "biometrics" in the whole 45-page document, nor any of its cognates.
- 30 Again in April 2011, the Appellant was kindly invited by the Cabinet Office together with others to discuss the UK's proposed Digital Delivery Identity Assurance project<sup>4</sup> (IdA). In the documents<sup>5</sup> describing IdA, all 75 pages of them, there is not a single occurrence of the word "biometrics" nor any of its cognates.
- 31 The Home Office's biometrics tulipmania may now at last have been shaken off by the rest of government.
- 32 And yet again in April 2011, with their first-hand experience of tulipmania<sup>6</sup>, the Dutch government suspended<sup>7</sup> its plans to develop a centralised flat print fingerprint population register: "home affairs minister Piet Hein Donner ... says there are currently too many concerns about the security and reliability of the system".
- 33 It's like London buses. Ever since Atos Origin published their report<sup>8</sup> on the UKPS biometrics enrolment trial in May 2005, the Appellant has been waiting for one country or another to break ranks and point out that the biometrics emperor has no clothes<sup>9</sup>. Nothing for six years. Now three of them come along. Typical.



A tulip, known as "the Viceroy", displayed in a 1637 Dutch catalogue. Its bulb cost between 3000 and 4200 florins depending on size. A skilled craftsman at the time earned about 300 florins a year.

<sup>3</sup> [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/NSTICstrategy\\_041511.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/NSTICstrategy_041511.pdf)

<sup>4</sup> <http://gdigital.direct.gov.uk/>

<sup>5</sup> The Appellant has the kind permission of the Cabinet Office to make these documents available to other people with only this proviso: "we would prefer it if they are only distributed to parties with a genuine interest in this programme". If the Tribunal would like to see them, the Appellant will arrange it.

<sup>6</sup> <http://en.wikipedia.org/wiki/Tulipmania>

<sup>7</sup> [http://www.dutchnews.nl/news/archives/2011/04/government\\_drops\\_central\\_finge.php](http://www.dutchnews.nl/news/archives/2011/04/government_drops_central_finge.php)

<sup>8</sup> [http://dematerialisedid.com/PDFs/UKPSBiometrics\\_Enrolment\\_Trial\\_Report.pdf](http://dematerialisedid.com/PDFs/UKPSBiometrics_Enrolment_Trial_Report.pdf)

<sup>9</sup>

<http://dematerialisedid.com/BCSL/Is%20the%20biometrics%20emperor%20wearing%20any%20clothes%20001.pdf>

## Debate

- 34 The Commissioner, of course, claims that events subsequent to the original Freedom of Information Request are irrelevant: "It should also be noted that what is to be considered is the position at the time of the request. Accordingly, events which occurred after the time of the request (e.g. the Identity Documents Act 2010 and its provisions repealing identity cards) would not be relevant when considering disclosure of the Report pursuant to the Appellants FOIA request in January 2010" (*ICOResp:29*).
- 35 What he ignores is the good reason for citing subsequent events in the Appeal – despite the comprehensive failure of the Home office to deploy the National Identity Scheme (*DMAApp:28*), the public's money is still being wasted on IBM and CSC and smart gates at UK airports (*DMAApp:29-32*). It was necessary to confirm to the Tribunal that it is still important to have a Hearing.

## Public administration

- 36 According to the Commissioner, the public have no information rights in this case because if the IBM report is disclosed then the Home Office won't be able to do their job properly: "If disclosure would prejudice the ability of the public authority to carry out this process - by discouraging commercial organisations from participating in this process, for example - this would be counter to the public interest. If the public authority was unable to secure the services of the best quality and value providers, this would not be in the public interest" (*ICODecNot:26*).
- 37 Remember: "In December 2010, the Identity Documents Act was passed, repealing the Identity Cards Act and, despite all the work of IPS and its consultants and contractors and the UK Border Agency (UKBA) and the Home Office Scientific Development Branch (HOSDB), and despite the unconditional political support of the previous government and apparently unlimited funds, there was no NIR, there was no national network of registration centres, there was no secure national telecommunications network, about 30,000 ID cards had been issued to UK nationals (just 0.07% of the 50 million expected to be in circulation at any one time) and no-one had any equipment to read the biometrics on those cards, so that they were useless from that point of view to the police and everyone else" (*DMAApp:28*).
- 38 Even *with* the best providers money can buy, the Home Office failed.
- 39 Even *with* the best non-disclosure arrangements Whitehall can provide, the Home office failed.
- 40 And remember the public. Please. Even when the Home Office *fail*, the public carry on paying the bills.
- 41 The public carry on paying for IBM and CSC and smart gates ... The tribunal are probably getting a bit tired of hearing about those examples.
- 42 Consider another.

- 43 In May 1997, a 10-year adult passport in the UK cost £18. In May 2010, it cost £72. RPI inflation between those dates was 42.5%. If the price of a passport had merely kept pace with inflation, it would have cost £25.65 in May 2010. Why did it cost £72? And why did the price go up in September 2010 to £77.50?
- 44 The answer is, because the Home Office is no good at procurement. They retain expensive consultants, they give business to expensive contractors, they can't control them and the public end by paying three times too much for a passport with biometrics in it that don't work<sup>10</sup>.
- 45 All of that happens now, with non-disclosure the default.
- 46 It's an unbearably expensive failure of public administration and it's got to stop.
- 47 It must be worth at least considering, at a Hearing, whether perhaps the problem exists *because* of default non-disclosure. Perhaps one way to improve public administration is *precisely* to publish the IBM report and its ilk.
- 48 Freedom of information isn't an end in itself. One object is to improve the quality of public administration. Disclosing the IBM report might help to improve the Home Office's performance.

### Commerce

- 49 "It is a truth universally acknowledged that a single man in possession of a good fortune must be in want of a wife". The same is true of the Home Office, a government department in possession of an annual budget of over £10 billion. There is no chance whatever that the Home Office will want for suitors and it is commercially naïve of the Home Office to suggest it. If not naïve, then mendacious.
- 50 There is similarly no chance whatever that any supplier will sue IBM in this case. Why would they? If the IBM report suggests that the supplier's biometrics products work spectacularly well, the supplier is hardly likely to complain – how dare you tell the public how good our products are? And conversely, if the IBM report suggests that the supplier's products are a dud, they still won't sue, that would just attract bad publicity.
- 51 Suppliers are used to competing. They don't sue the universities who organise the international Fingerprint Verification Competitions<sup>11</sup>. They don't sue NIST when that organisation publishes the results of competitive trials<sup>12</sup>. If they come out badly from one encounter, the suppliers dust themselves off and move on to the next opportunity. The Home Office, with their monopoly, may not understand that resilience but there it is, that's how commerce works.

---

<sup>10</sup> [http://dematerialisedid.com/BCSL/23\\_medicine.html](http://dematerialisedid.com/BCSL/23_medicine.html)

<sup>11</sup> <http://bias.csr.unibo.it/fvc2006/>

<sup>12</sup> <http://www.frvt.org/FRVT2006/docs/FRVT2006andICE2006LargeScaleReport.pdf>

52 It is a matter for debate, but it seems possible that the Commissioner seeks to protect the Home Office and IBM from damages claims the suppliers would never bring while entirely ignoring the rights of the public.

### Accessibility

- 53 In his Decision Notice, the Commissioner says: “The approach of the Commissioner is that information will have the necessary quality of confidence if it is not otherwise accessible ... On the issue of whether this information [the IBM report] is otherwise accessible, the Commissioner is aware of no evidence that this is the case and the stance of both the public authority and IBM suggests that it is not. On this basis, the Commissioner accepts that this information is not otherwise accessible” (*ICODecNot:14*).
- 54 He repeats this point in his Response: “The information in the Report had the necessary quality of confidence ... because there was no evidence that it had been made otherwise accessible and the Home Office and IBM had suggested that it had not been (§14 DN)” (*ICOResp:22a*).
- 55 It is over a year since the Appellant sent evidence to the Home Office (*DMApp:E1.1, 23 February 2010 and 4 March 2010*<sup>13</sup>) that the IBM report was being discussed at an international conference hosted by NIST between 1 and 5 March 2010<sup>14</sup> and 10 months since it was sent to the Commissioner (*DMApp:E1.1, 1 July 2010*).
- 56 At that conference, a paper by Peter Waggett of IBM and others was delivered (presentation #57), describing the IBM approach to testing the reliability of biometrics systems. The Appellant cannot claim that this amounts to the IBM report having been published but it does suggest that IBM are prepared to some extent to share their methodology with the biometrics world. They have not sued themselves for disclosing their methodology.
- 57 Did the Home Office sue IBM for breach of confidence? No. In fact, the Home Office and GCHQ and the National Physical Laboratory were there at the conference, represented by Nigel Gordon (#17), Tony Mansfield (#21,31,59), Marek Rejman-Greene (#40) and Geoff Whitaker (#61).
- 58 Did Morpho sue IBM for revealing that their products won the IBM trial? No. In fact Morpho (Sagem Sécurité) were at the conference, too – Jean-Christophe Fondeur presented paper #15.
- 59 Have any of the losing biometrics suppliers sued IBM or the Home Office? Perhaps the Commissioner could advise on that matter.
- 60 The Commissioner’s case on the accessibility of the IBM report is, perhaps, at least diluted and with it, his case on confidentiality and on the need to withhold the report.

---

<sup>13</sup> <http://dematerialisedid.com/bcsl/13728%20disclosure.html>

<sup>14</sup> [http://www.nist.gov/itl/iad/ig/ibpc2010\\_presentations.cfm](http://www.nist.gov/itl/iad/ig/ibpc2010_presentations.cfm)

### Biometrics performance testing

- 61 The embarrassing case of NIST's predictions for the reliability of biometrics used in US-VISIT has already been referred to (*DMAApp:38-41*).
- 62 NIST are a resilient lot, they acknowledge the problem with their methodology and they have organised entire conferences to debate the matter, including this March 2010 conference.
- 63 Tony Mansfield's presentation #59<sup>15</sup> is accompanied by his paper, co-authored with two others, on 'Fundamental issues in biometric performance testing: A modern statistical and philosophical framework for uncertainty assessment'<sup>16</sup>.
- 64 The conclusion of the paper is: "Improving our ability to understand, predict and control the performance of biometric systems in operational environments will require more [thorough] study of the human and environmental influence variables, greater attention to definitional completeness in our measurands, and more experience in estimating the systematic uncertainties introduced by changes to the software, hardware, environmental and human factors encountered in the 'real world'".
- 65 In other words, the world doesn't know yet how to predict the reliability of biometrics systems. The IBM methodology no more provides an answer than the NIST methodology. The Home Office agreed to spend £650 million of public money without knowing what to expect by way of benefits. That matter deserves a Hearing.

### Statistical control

- 66 Tony Mansfield's paper revolves around the concept of statistical control. It is hard to bring a technology like biometrics under statistical control, he says. Until it is, biometrics will continue to suffer from, among other things, "the current disconnect (lack of inductive relevance) between testing results and 'performance' as assessed by system operators".
- 67 The Appellant's suggestion that the UK Statistics Authority should be involved in deciding whether Whitehall technology projects should be allowed to proceed (*DMAApp:21-24*) may not be quite as ungermane as the Commissioner says (*ICOResp:30*). It is an idea which, if the Tribunal were to comment on it, at a Hearing, even in passing, might be picked up and might help the public to get better value for money from the Home office and their peers.

---

<sup>15</sup> [http://biometrics.nist.gov/cs\\_links/ibpc2010/pdfs/Wayman\\_Jim\\_IBPC\\_Keynote.pdf](http://biometrics.nist.gov/cs_links/ibpc2010/pdfs/Wayman_Jim_IBPC_Keynote.pdf)

<sup>16</sup> [http://biometrics.nist.gov/cs\\_links/ibpc2010/pdfs/FundamentalIssues\\_Final.pdf](http://biometrics.nist.gov/cs_links/ibpc2010/pdfs/FundamentalIssues_Final.pdf)