

RESTRICTED

**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

First Respondent

-and-

THE HOME OFFICE

Second Respondent

**RESPONSE BY THE APPELLANT
FOLLOWING THE RESPONSE OF THE SECOND RESPONDENT**

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

References to paragraphs, n, in the Appellant'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

References to paragraphs, n, in the Appellant's 10 May 2011 Response are in the form DMResp1:n

References to paragraphs, n, in the Second Respondent's 19 May 2011 Response are in the form HOResp:n

Determination

- 1 The Commissioner, in his Response, "invites the Tribunal to dismiss the appeal" (ICOResp:33). The Home Office in their Response conclude that "the Tribunal should therefore dismiss the appeal". The Appellant wishes to thank the Tribunal for not accepting these craven entreaties.
- 2 The Appellant wishes to thank the Tribunal also for allowing this Response to the Home Office submission dated 19 May 2011. The arguments presented here are supplementary to the arguments advanced in the Appellant's earlier Appeal (29 March 2011) and Response (10 May 2011).

The Appeal

- 3 Based on evidence in the public domain, the Appellant has good reason to believe that biometrics technology is not ready yet for the mass consumer market.
- 4 To be clear:
- The world has over a century of evidence of police fingerprint experts successfully helping to fight crime. That use of biometrics is rightly trusted. The Appellant's doubts concern applications where computer systems are meant to do the recognising instead of human experts. That is what is intended here by "*biometrics technology*", automated human recognition.
 - The Appellant has in mind large populations, the set of all airline passengers, for example, the set of all voters in UK general elections, the set of all employees, the set of all NHS users, the set of all schoolchildren, ... That is what is intended here by "*mass consumer markets*".
 - Biometrics technology would be ready for these mass consumer markets if it was capable of identifying each human in a given large population uniquely. That is, if it was possible to create a population register on which there were no duplicate entries, i.e. each set of biometrics had been compared to every other set and shown to be unique. But it isn't capable of doing that. The maths makes it practically impossible¹. Biometrics technology is *not ready yet* for large populations.
 - And it would be ready if biometrics technology was capable of verifying people's identity whenever necessary. While trying to prove the right to work in the UK, for example, while trying to register with a GP, while trying to undertake a transaction in a bank, ... But it isn't capable of doing that. The failure rate with flat print fingerprinting, for example, is about 20 percent. A technology that informs 20 percent of the working population that they don't have the right to work in the UK will not be trusted, it cannot be relied on, it cannot provide evidence in a criminal court², it is *not ready yet*.
- 5 It follows that the Appellant has good reason to believe that any public money spent on the operational use of biometrics is public money wasted. In that sense, the expenditure is not in the public interest.
- 6 For the record, the Appellant is heartily in favour of funding biometrics research. But for now at least, in the eyes of the Appellant, public money should not be spent on mass consumer applications which rely on biometrics, there is no good reason to believe that the technology can do any of the jobs required of it.

¹ <http://dematerialisedid.com/BCSL/Drown.html>

² <http://dematerialisedid.com/BCSL/NotWorking.html>

- 7 The evidence against biometrics is in the public domain³ and it follows that any member of the public could assess it and come to the same belief as the Appellant.
- 8 The Home Office have never made the case in favour of investing in biometrics, a point noted by, among others, the House of Commons Science and Technology Committee in their July 2006 report⁴ on the Home Office's plans for the National Identity Scheme (NIS):

81 ... When questioned about the maturity of biometric technologies, [a group of senior policy advisers from the Department of Homeland Security] agreed that currently the technology was probably not as reliable or as accurate as it might need to be for a national identity card scheme. We put these views to Katherine Courtney [Executive Director of Business Development and External Affairs at the Identity and Passport Service] during an oral evidence session and she declined to comment on what we had been told ... In order to build public confidence in the technologies involved, we recommend that the Home Office publishes an overview of the scientific advice and evidence that it receives as a result of international co-operation.

88 ... the Home Office has selectively used evidence from the [UK Passport Service] biometrics enrolment trial to support its assertions. We believe that the Home Office has been inconsistent regarding the status of this trial and this has caused confusion in relation to the significance of the evidence gathered about biometric technologies. We recommend that the Home Office clarifies whether or not it accepts the validity of the results gained during the trial regarding the performance of biometric technologies.

89 ... Given the findings of the biometrics enrolment report regarding the performance of current biometric systems, we seek reassurance from the Home Office that systems will be adapted as necessary to improve performance levels and that final performance levels will be verified by independent testing.

93 We are surprised and concerned that the Home Office has already chosen the biometrics that it intends to use before finishing the process of gathering evidence. Given that the Identity Cards Act does not specify the biometrics to be used, we encourage the Home Office to be flexible about biometrics and to act on evidence rather than preference. We seek assurance that if there is no evidence that any particular biometric technology will enhance the overall performance of the system it will not be used.

103 ... In the light of this lack of evidence, we can only conclude that the Home Office is not confident in its figures and as a result, we are incredulous that the Home Office is seemingly able to produce firm costings regarding the

³ <http://dematerialisedid.com/Evidence/Biometrics.html>

⁴ *Identity Card Technologies: Scientific Advice, Risk and Evidence*, <http://dematerialisedid.com/PDFs/1032.pdf>

running costs of the scheme when the costs of the technology are not yet clear.

136 There has been criticism over the lack of public debate regarding the technologies supporting the identity cards scheme.

- 9 That is the background to the Freedom of Information Request, no.13728, submitted to the Home Office on 6 January 2010 which has led to this Appeal.
- 10 No announcement was made by the Home Office, but in a press release issued by Safran Group in Paris on 7 October 2009 it was announced that a contract had been let to their subsidiary, Sagem Sécurité (now Morpho), to provide the biometrics technology to be deployed as part of the NIS. The contract was agreed as the result of a selection exercise performed by IBM, the Home Office's NIS contractor in this case.
- 11 The Appellant's Request asked the Home Office to publish IBM's report of the selection exercise.
- 12 The Appellant hasn't seen the report, of course, but assumes that it contributes materially to the Home Office's case for investing public money in biometrics.
- 13 In a situation where the Home Office haven't made the case in favour biometrics and there is cogent evidence against them, the Home Office should want to publish the IBM report, they may even have a duty to publish it, to justify spending public money on biometrics. And in that situation, the public have an interest in seeing the report, they may even have a right to see it, and to be comforted that their money is being spent wisely.
- 14 If the Home Office can't make their case, why are they spending our money? No business would invest in a project without having a case, without good reason to expect a return. To do so would be to behave irresponsibly. By proceeding, the Home Office seem to be ignoring the scientific evidence. The Home Office told the House of Commons Science and Technology Committee that they required a maximum false non-match rate for flat print fingerprinting of 1 percent, otherwise the NIS could not proceed. Trials suggest that the figure is actually about 20 percent, and yet they proceeded. That is illogical. That leaves the Home Office in the undignified position of looking as though they believe biometrics technology salesmen, but not technology trials, or maybe they believe Hollywood films like *Minority Report*⁵, not realising that they are fiction.
- 15 The failure to publish the IBM report could lay the Home Office open to a charge of misfeasance. They could be seen to be in breach of:
 - The duty to behave openly
 - The duty to husband public money carefully

⁵ <http://www.imdb.com/title/tt0181689/>

- The duty to be businesslike
 - The duty to behave responsibly
 - The duty to behave scientifically
 - The duty to behave logically and
 - The duty to behave with dignity
- 16 The NIS has subsequently been cancelled. But the Home Office continue to spend hundreds of millions of pounds on biometrics for ePassports, permits for non-EEA residents, visa applications for non-EEA nationals and smart gates at airports. Despite the cancellation of the NIS, it remains important for the Tribunal to consider this Appeal.
- 17 The Appellant wishes to record his suggestion that an appropriate body, perhaps the Office for National Statistics, should be involved at the approval stage for government projects which involve new technology that has not been certificated, or for which the certificate has not been revoked, to certify that the expenditure is businesslike, responsible, scientific and logical.
- 18 For six years since May 2005 when Atos Origin published their report⁶ on the UK Passport Service (UKPS) biometrics enrolment trial, the Appellant has ploughed an admittedly lonely furrow, trying to get people to question their baseless faith in mass consumer biometrics. Then a paper⁷ came to light written by three academics, arguably the leading authorities on biometrics in the Western world, arguing that the level of uncertainty in biometrics is so great, the statistical control is so poor, the repeatability and reproducibility of biometrics trial results is so low that:
- ... technology testing on artificial or simulated databases tells us only about the performance of a software package on that data. There is nothing in a technology test that can validate the simulated data as a proxy for the “real world”, beyond a comparison to the real world data actually available. In other words, technology testing on simulated data cannot logically serve as a proxy for software performance over large, unseen, operational datasets.
- ... Test data from scenario evaluations should not be used as input to mathematical models of operational environments that require high levels of certainty for validity.
- 19 They seem to be saying that there is no point conducting biometrics trials, the results tell us nothing, if you require high levels of certainty in your investment argument, which you do if you’re spending hundreds of millions of pounds of public money, the trial results will not provide that certainty, the argument will be invalid.

⁶ http://dematerialisedid.com/PDFs/UKPSBiometrics_Enrolment_Trial_Report.pdf

⁷ *Fundamental issues in biometric performance testing: A modern statistical and philosophical framework for uncertainty assessment* by James L Wayman, Antonio Possolo and Anthony J Mansfield, http://biometrics.nist.gov/cs_links/ibpc2010/pdfs/FundamentalIssues_Final.pdf

- 20 So now that's four of us who are sceptical. Sceptical that any quantified and logically valid case can be made for investing in biometrics. And if the Home Office's case is not quantified and logically valid, they have no business making it.
- 21 The Appellant's Request to have the IBM report published was rejected by the Home Office and by the Commissioner. He Appeals to the Tribunal to overturn the Commissioner's Decision and order the report to be published forthwith.

The Response

- 22 It would be fair to say that the Commissioner in his Decision Notice and his Response, and the Home Office in their Response, spend no time considering the false non-match rates and receiver operating characteristic curves that constitute biometrics and they spend little or no time considering the public interest.
- 23 So little are they concerned with the waste of public money and what it is wasted on that they both asked the Tribunal to dismiss the Appeal, a request the Tribunal rejected.
- 24 They both cite exemptions from disclosure of the IBM report under clauses 31(1) and 43(2) of the Freedom of Information Act and then don't bother to make their case. To save time, the Appellant has included a refutation of the Respondents' non-existent case at the end of this Response.
- 25 Instead, they devote their energies and their acrobatic logic to the cause of proving that the IBM report can't be disclosed without a breach of confidence which would lay IBM open to unlimited damages claims. That exempts the Home Office from disclosing the report under clause 41(1) of the Act.
- 26 The Commissioner can at his discretion, in the public interest, declare the breach of confidence immune from action but, with little reason given and no attention paid to the public interest, decides not to exercise it.
- 27 The Appellant invites the Tribunal to consider whether the Commissioner should have exercised his discretion.
- 28 All the effort goes into considering the rights of the Home Office, of IBM, of Morpho and of other unnamed biometrics technology suppliers and arguing that those rights must be upheld. No effort goes into considering the rights of the public.
- 29 In trying to establish that disclosure would be a breach of confidence, the Respondents are hampered by their discovery that there is no confidentiality agreement between the Home Office and IBM.
- 30 The Appellant has found a relevant contract between the Home Office and IBM which includes 15 pages of a confidentiality agreement and invites the Tribunal

to consider if the Commissioner has made a wrong finding of fact and the Home Office should have revealed this contract.

- 31 In the circumstances, given that the Commissioner and the Home Office consider that there is no confidentiality agreement between the Home Office and IBM, they are reduced to trying to conjure a duty of confidence out of the air.
- 32 The Respondents have failed to establish a duty of confidence in this case. The Appellant argues that both Respondents have misinterpreted the law as regards duties of confidence and applied it wrongly, and that the Home Office have also misrepresented it.

Duty or obligation of confidence

- 33 Indistinguishably from the Commissioner before them, the Home Office say (*HOResp:11*):

... it is not correct that an obligation of confidence only arises where there is an express confidentiality agreement. The well-established threefold test in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 makes it clear that a breach of confidence will arise where: (1) the information itself has the *necessary quality of confidence* about it; (2) it must have been *imparted in circumstances importing an obligation of confidence*; and (3) disclosure would be an unauthorised use of the information to the detriment of the party communicating it.

- 34 Things are looking bleak for the Appellant, the threefold test is “well-established” and the test “makes it clear” when a duty of confidence arises.
- 35 Or are they? Bleak, that is.
- 36 Megarry J says in his judgement:

The circumstances of the disclosure in this case seem to me to be redolent of trust and confidence. Business men naturally concentrate on their business, and very sensibly do not constantly take legal advice before opening their mouths or writing a letter, so that business may flow and not stagnate. I think the court, despite the caution which must be exercised before implying any obligation, must be ready to make those implications upon which the sane and fair conduct of business is likely to depend.

- 37 The Appellant disagrees with not a word of that judgement. But another judge whose receptors do not detect the same redolence would presumably not find that the information had the necessary “quality of confidence”. To call this making it clear how a well-established test works is something of an exaggeration on the part of the Home Office, an exaggeration which Megarry J would disapprove of, in the opinion of the Appellant. Megarry J is much more diffident.
- 38 He really is more diffident. Look at this:

However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential. From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence.

- 39 The Home Office say the test is well-established and they base that on a Decision in which the judge himself says, unfortunately for the Home Office, that he was unable to derive any very precise idea how to establish when information has been imparted in circumstances “importing an obligation of confidence”.
- 40 Megarry J goes on in his Decision to discuss confidential information providing a springboard for commercial success. That does not concern us here, let us note simply that his Decision in *Coco v A N Clark (Engineers) Limited* does not provide the Home Office or the Commissioner with a reliable springboard for detecting duties of confidence wherever they like.
- 41 Suppose that this Decision was a magic wand for creating duties of confidence. It isn't. But suppose that it was. Even then, the Respondents' case would be dubious.
- 42 The Decision is attached to the realm in which the plaintiff (was he really called “Coco”?) and the defendant make mopeds and would-be moped-riders buy them. This is the private sector. And the private sector is different from the public sector in ways we shall see in a few paragraphs. Markedly different. The Decision arguably has no relevance to the public sector, which is the sector we are considering. Why do the Respondents cite it? They shouldn't have done. It's irrelevant.
- 43 The Home Office next say, in their dogged attempt to establish a duty of confidence, that (*HOResp:12*):

In *Campbell v MGN Limited* [2004] 2 AC 457 at paragraph 14, Lord Nicholls said:

“14. This cause of action [i.e. breach of confidence] has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 , 281. Now the law imposes a ‘duty of confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential...”

44 Lord Nicholls did, indeed, say that. But note that ellipsis at the end of the quotation. That's not all Lord Nicholls said. He went on to say, completing the paragraph, that⁸:

... Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

45 Quite clearly, Lord Nicholls is talking about "respect for private and family life". He says so. Explicitly. Two paragraphs later, at para.16. His Decision is not in the realm of public administration. Its relevance is disputed. The Home Office would have the devil of a job explaining why they cited it.

46 This business of truncating the quotation where they did is the Home Office in slithy tove-mode. A mode which the Tribunal will have no trouble recognising.

47 In case the Tribunal does have any trouble recognising it, the Appellant refers to Appeal No. EA/2008/002⁹ heard on 1 August 2008. In that case, the Home Office claimed not to hold some information that was the subject of a Freedom of Information Request. They did sort of hold it, they said, but they couldn't disclose it without writing a report programme. Since the programme didn't yet exist, it was as though they didn't hold the information. That was their argument. It's clever. But not wise. Slithy. Even the Commissioner contested that defence and the Tribunal was having none of it.

48 They did it to the House of Commons Science and Technology Committee, too, when they tried to argue that the UKPS biometrics enrolment trial wasn't really a biometrics enrolment trial.

49 Here they are again, up to their old toves' tricks.

50 Lord Nicholls's Decision is all about an old man empathising with a beautiful young model and her drug-taking, her lies to the press, the travails of rehabilitation, the erratic human sympathy of the redtops when reporting celebrities and strip searches.

51 Morpho is a French company and we have no idea what to expect of them of course, but unless personal standards at the Home Office declined remarkably under the Permanent Secretaryship of Sir David Normington, it is hard to see what this drugs and lies Decision, and as we later discovered midnight bags of

⁸ <http://www.bailii.org/uk/cases/UKHL/2004/22.html>

⁹ http://www.informationtribunal.gov.uk/DBFiles/Decision/i203/homeOffice_webDecision_15Aug08.pdf

uncut diamonds and a hint of cannibalism¹⁰, has to do with IBM choosing biometrics technology for the NIS.

52 The Home Office quote Lord Nicholls quoting Lord Goff of Chieveley. Why didn't the Home Office quote Lord Goff directly? You don't need to detour via Birkenhead and Stoke d'Abernon to get to Chieveley. Not if you're starting from Monckton Chambers.

53 Why? Because Lord Goff's Decision is the opposite of what the Home Office want. The Home Office want the tests for a duty of confidence to be "well-established" and "made clear" and Lord Nicholls wants the limiting constraint of the need for a contract to have been "firmly shaken off". What Lord Goff says is¹¹ (p.27):

I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when ...

54 Off to a bad start, then, *pace* the Home Office and *pace* Lord Nicholls instead of "well-established" and "made clear" and "firmly shaken off" we have "not in any way definitive", and it soon gets worse:

I would also, like Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.* [1969] R.P.C. 41 at p. 48, wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence.

55 Not only have the Home Office had one of the wheels fall off their moped – perhaps detriment isn't necessary after all to establish a duty of confidence, a point which the Commissioner recognises even if the Home Office don't, so much for the tests being well-established, the two respondents have different tests – but Lord Goff is correcting their paraphrase of Megarry J, they've got him wrong, says Lord Goff. Here is Megarry J. If only the Home Office had read him more carefully:

Some of the statements of principle in the cases omit any mention of detriment; other include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists. I need therefore say no more than that although for the purposes of this case I have stated the propositions in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form.

56 More than that, Lord Goff says:

¹⁰ <http://dematerialisedid.com/BCSL/eOdyssey.html#interpol>

¹¹ <http://www.bailii.org/uk/cases/UKHL/1988/6.html>

... the duty of confidence applies neither to useless information, nor to trivia.
There is no need for me to develop this point.

- 57 Here is a new test for the existence of a duty of confidence, not mentioned by the Home Office, although it was mentioned by the Commissioner (*ICODecNot:14-17, ICOResp:22(b)*). Information cannot be considered confidential if it is useless or trivial.
- 58 There was no need for Lord Goff to develop the point in the case of *Spycatcher*. But oddly enough, there is a need to develop it in this case.
- 59 The Appellant brought the Tribunal's attention to a paper on biometrics performance measurement in his earlier Response (*DMResp1:63-67*)¹².
- 60 The Appellant gave the impression that the paper is written by just one person. Pressure of time, trying to get the Response out, apologies.
- 61 In fact, it is written by three academics, Messrs Wayman (San José State University), Possolo (US National Institute of Standards and Technology) and Mansfield (UK National Physical Laboratory). Arguably, they are the pre-eminent experts on biometrics, and on probability and measurement as they affect biometrics, in the Western world.
- 62 Their report is an authority. And among other things it says that:

Is there any hope of inductively extending the results of our technical test more broadly to any other algorithms or databases? A Type B systematic uncertainty evaluation after consideration of changes in the unit of empirical significance and statistical controls over its tangible elements might be of value, provided that the specifics of the changes could be given, but we should not sanctify such a "guesstimate" in an emperor's cloak of imagined analytic rigor.

... technology testing on artificial or simulated databases tells us only about the performance of a software package on that data. There is nothing in a technology test that can validate the simulated data as a proxy for the "real world", beyond a comparison to the real world data actually available. In other words, technology testing on simulated data cannot logically serve as a proxy for software performance over large, unseen, operational datasets.

We lack metrics for assessing the expected variability of these quantities between tests and [we lack] models for converting that variability to uncertainty in measurands [the quantities intended here are false positives and negatives, failure to acquire and enrol, and throughput].

¹² *Fundamental issues in biometric performance testing: A modern statistical and philosophical framework for uncertainty assessment*,
http://biometrics.nist.gov/cs_links/ibpc2010/pdfs/FundamentalIssues_Final.pdf

... each specific recognition technology (iris, face, voice, fingerprint, hand, etc.) will have specific factors that must be within a state of statistical control. This list of factors is not well understood, although ample work in this area is continuing. For example, recent analysis of iris and face recognition test results shows us that to report false match and false non-match performance metrics for such systems without reporting on the percentage of data subjects wearing contact lenses, the period of time between collection of the compared image sets, the commercial systems used in the collection process, pupil dilation, and lighting direction is to report “nothing at all”. Our reported measurements cannot be expected to be repeatable or reproducible without knowledge and control of these factors.

... the test repeatability and reproducibility observed in technology tests are lost in scenario testing due to the loss of statistical control over a wide range of influence quantities.

... Our inability to apply concepts of statistical control to any or all of these factors will increase the level of uncertainty in our results and translate to loss of both repeatability and reproducibility.

... Test data from scenario evaluations should not be used as input to mathematical models of operational environments that require high levels of certainty for validity.

We can conclude that the three types of tests are measuring incommensurate quantities and therefore [we] should not be at all surprised when the values for the same technologies vary widely and unpredictably over the three types of tests.

- 63 For the avoidance of doubt, please note that in the case of each quotation, Messrs Wayman, Possolo and Mansfield are talking specifically about biometrics technology, not technology in general.
- 64 What they are saying is that the current state of the art of biometrics is so primitive, there is so much uncertainty, there is so little statistical control, that performance tests tell you nothing. At the end of a performance test, you have some results, and all you know is that those are the results. The results tell you nothing about how the biometrics system being tested would perform in another test or in the real world.
- 65 Coming from such an authoritative source, these findings are a bit of a blow to the biometrics industry.
- 66 They suggest that the Home Office’s decision to invest public money in biometrics technology could not have been made rationally, the decision has more the character of an impulse purchase¹³.

¹³ <http://dematerialisedid.com/PressRelease28.html>

- 67 It suggests also that the IBM report on their biometrics technology selection exercise is useless. Or trivial. It cannot tell the reader what to expect if and when the packages tested are used in anger in the real world. If that is the case, if the report is useless or trivial, then it can't be the object of a duty of confidence.
- 68 At this stage, the Home Office's goose is looking well and truly cooked.
- 69 In fact it's got a bit more of a roasting to take from Lord Goff, but before we get to that the Appellant can already hear the slithy toves saying that *his* goose has been cooked, too, in the process. Because if the IBM report is trivial, then the Home Office are (*cue tired expressions of feigned surprise, crocodile tears of regret and reluctance*) under no obligation to disclose it, there's no point.
- 70 Not so fast, toves. Suppose that the Tribunal's Decision is Promulgated and says that the Commissioner is quite right, for the wrong reason, the report does not have to be disclosed, because it's useless, then what will that look like to the reasonable *Telegraph* leader-writer on the Clapham omnibus?
- 71 It will look as though the Home Office decided to spend £650 million of taxpayers' money (*DMResp1:15*) based on a report that is useless. It will not look good. Not in equity.
- 72 It is, in fact, a genuine mystery why the Home Office *did* decide to invest our money in biometrics. The UKPS biometrics enrolment trial suggested that the technology is wildly unreliable and the US Department of Homeland Security warned that the technology is not ready yet to support a national identity management system.
- 73 So why take the risk? Did the Home Office confuse the film *Minority Report* with fact? Did they decide to believe the technology salesmen rather than their own trial and rather than their peers in the US? It all looks very undignified.
- 74 The Wayman/Possolo/Mansfield paper was delivered at a conference in March 2010 with the cream of the world's biometrics experts in attendance. That is two months after the Appellant's Freedom of Information Request was submitted and the Commissioner is quite rightly picky about who knew what when (*ICOResp:29*). So when did academia know about the uselessness of biometrics performance testing?
- 75 The answer is, at least as early as June 2004. NIST = the US National Institute of Standards and Technology¹⁴:

The USA PATRIOT Act 2001 specifies at section 403(c)(1) that NIST has to certify a technology that verifies people's identity:

¹⁴ <http://dematerialisedid.com/BCSL/Towel.html>

“The Attorney General and the Secretary of State jointly, through the National Institute of Standards and Technology (NIST), and in consultation with the Secretary of the Treasury and other Federal law enforcement and intelligence agencies the Attorney General or Secretary of State deems appropriate and in consultation with Congress, shall within 2 years after the date of the enactment of this section, develop and certify a technology standard that can be used to verify the identity of persons applying for a United States visa or such persons seeking to enter the United States pursuant to a visa for the purposes of conducting background checks, confirming identity, and ensuring that a person has not received a visa under a different name or such person seeking to enter the United States pursuant to a visa.”

That's what the Act says and, in all honesty, NIST cannot possibly comply. How are they supposed to know if the biometrics used in any particular case are a reliable proxy for someone's identity? It's completely out of their control. They can't put their name to it. So what NIST say in their certificates, according to their June 2004 review of flat print fingerprinting technology, is:

“For purpose of NIST PATRIOT Act certification this test certifies the accuracy of the participating systems on the datasets used in the test. This evaluation does not certify that any of the systems tested meet the requirements of any specific government application. This would require that factors not included in this test such as image quality, dataset size, cost, and required response time be included.”

There it is, the irreducible inanity of today's mass consumer biometrics is certificated.

- 76 The Home Office should have known as early as June 2004 that biometrics performance tests prove nothing but they didn't. Why not?
- 77 Why didn't the Home Office Scientific Development Branch¹⁵ (HOSDB) tell the decision-makers? The Appellant doesn't know, the Tribunal would have to ask HOSDB as the Commissioner doesn't seem to have done.
- 78 Why didn't PA Consulting (please see Attachment), the Home Office's long-time advisors on identity management, tell the decision-makers? The Appellant doesn't know, the Tribunal would have to ask PA Consulting as the Commissioner doesn't seem to have done.
- 79 Why didn't IBM tell the Home Office that biometrics performance tests are useless? The Appellant doesn't know, the Tribunal would have to ask IBM as the Commissioner doesn't seem to have done.
- 80 Why didn't the National Policing Improvement Agency (NPIA) tell the Home Office that biometrics performance tests are useless? The Appellant doesn't know, the Tribunal would have to ask the NPIA as the Commissioner doesn't seem to have done.

¹⁵ <http://dematerialisedid.com/BCSL/HOSDB.html>

- 81 Lord Goff is leading us into deep waters. We cannot make any progress without more facts. The Commissioner has not sought those facts. The Home Office has not provided them.
- 82 We can't make any progress, but Lord Goff is steaming ahead, there's no stopping him. He considers the public interest (p.29):
- ... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure ... which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.
- 83 That is what the Tribunal is doing here, trying to balance the arguments in favour of disclosure (considerable) and the arguments against disclosure (none left standing so far).
- 84 On this point, the Home Office quote Lord Phillips CJ on *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch):
- Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". It is a test of proportionality ...
- The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.
- 85 So the test has changed. The presumption is now in favour of disclosure. The Appellant is grateful to the Home Office for citing this Decision. But the result is the same – it's up to the court to decide where the balance lies, in favour of disclosure or against it. It is not up to the Respondents to try to get the Appeal dismissed.
- 86 The Home Office have failed to prove that there is a duty of confidence in the first place. But supposing there is one, are they seriously suggesting that a democratic society is one in which the public don't care if public servants waste public money and in which public servants needn't even be embarrassed by that revelation?
- 87 Lord Goff considers a form of limited disclosure (p.29), such as the Variation suggested by the Appellant that the Office for National Statistics should be involved in project approval (*DMApp:18-24*):

Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made the "confidant of a crime or a fraud" (see *Gartside v. Outram* (1857) 26 L.J.Ch. 113 at p. 114, per Sir William Page Wood V.-C.). But it is now clear that the principle extends to matters of which disclosure is required in the public interest (see *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241, 260 per Ungoed-Thomas J., and *Lion Laboratories Ltd, v. Evans* [1985] 1 Q.B. 526, 550, per Griffiths L.J. (as he then was)). It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required (see *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892). A classic example of a case where limited disclosure is required is a case of alleged iniquity in the Security Services.

88 Perhaps the disdain for the Appellant's suggested ONS Variation evinced by the Commissioner and the Home Office is misplaced (*ICOResp:30, HOResp:6*). The Appellant's confidence is beginning to grow, with Lord Goff so obviously on his side.

89 It's 23 years since Lord Goff's Decision, and still he is teaching the Respondents how to do the job properly. He makes this point, distinguishing the public and private sectors. In the public sector, the presumption is in favour of disclosure, he says. Elsewhere, the presumption is reversed (pp.29-30):

... although in the case of private citizens there is a public interest that confidential information should as such be protected, in the case of Government secrets the mere fact of confidentiality does not alone support such a conclusion, because in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism. From this it follows that, in such cases, there must be demonstrated some other public interest which requires that publication should be restrained.

90 No wonder the Home Office didn't want to quote Lord Goff directly if he's going to say things like that. And as to the Commissioner, perhaps he could reflect on that presumption of disclosure more, and the conflicting of duties of confidence to avoid disclosure less (*DMResp1:12*).

91 The bulk of Lord Goff's Decision concerns the nature of a duty of confidence. How does it come into existence? What happens when it is breached? Has it then been extinguished? What restitution can there be? Megarry J raised some of the same questions. Both authorities found some of the questions hard to answer, reluctantly left them open and gratefully noted that they didn't need to answer them for the purposes of the matters in hand.

92 The Respondents, by contrast, suffer from none of these philosophical doubts. They are happy to make lurid non-specific threats of claims for unlimited damages (*ICODecNot:22*) landing on IBM's doormat:

The public authority states that a breach of these agreements could expose IBM to unlimited liability.

- 93 What do the respondents know that Megarry J and Lord Goff do not?
- 94 They are shameless enough even to try a bit of pre-emptive shroud-waving, suggesting that prospective suppliers might refuse to engage with the Home Office's £10 billion budget. Gentlemen, please, if you know how to stop suppliers from approaching them, tell the Home Office.
- 95 Neither the Commissioner nor the Home Office say that there is anything confidential in the IBM report. IBM may well have confidentiality agreements with the competing biometrics technology suppliers. But that doesn't mean that IBM have included the exact proprietary way in which each supplier scores a biometric match, for example, in their trial report. Why would they?
- 96 The Home Office say that (*HOResp:13(ii)*):
- ... there was evidence that the information provided to IBM by other organisations was subject to an explicit obligation of confidence and that IBM could be subject to action for breach of confidence if the information was disclosed ...
- 97 IBM are nothing if not diplomatic. They know, just as we all know, that reports are read by all sorts of people after they are issued. They will have taken precautions not to divulge any trade secrets in their report. Has the Commissioner seen any trade secrets in his copy of the IBM report? If not, there is no breach of confidence and the relevance of the Home Office's point is questionable.
- 98 IBM are nothing if not motivated by profit. If they are commissioned to write a technology selection report, they will write a technology selection report. They will not write a procedures manual for the operation of that technology, that would be a separate assignment with a separate charge. The report to be disclosed is unlikely to include matters of national security.
- 99 And the biometrics technology suppliers are not blushing flowers. They meet at exhibitions. And at conferences. They compete for the same business. Staff move between the companies. They are happy enough to have their results published after most trials. They know the rules of engagement.
- 100 Look at Figure.20 on p.46 of NIST's trial of facial recognition technology¹⁶. The results demonstrate clearly that Cogent Inc. is "better" than Sagem Sécurité/Morpho (if you believe that tests mean anything in the biometrics world). Cogent and Morpho haven't sued NIST. Look at the results of the international Fingerprint Verification Competition 2006¹⁷. Suprema Inc. of Korea came top. Not Sagem Sécurité/Morpho. The organisers of FVC2006 haven't been sued.

¹⁶ <http://www.frvt.org/FRVT2006/docs/FRVT2006andICE2006LargeScaleReport.pdf>

¹⁷ http://bias.csr.unibo.it/fvc2006/results/open_resultsMT.asp

- 101 If anyone is tempted to ask why IBM didn't choose Cogent and Suprema, why did they choose "second best", remember that according to the leading academics in the field, these trials prove nothing useful. The question is why IBM chose any supplier at all.
- 102 IBM lectured on its biometrics technology evaluation methodology at an international conference hosted by NIST and attended by all of IBM's peers, i.e. all of IBM's competitors. IBM did not sue themselves (*DMResp1:56*).
- 103 The upshot is that a lot of the information likely to be in the IBM report is "otherwise accessible" and is therefore not confidential.
- 104 The Respondents both argue that duties of confidence can be conjured out of nowhere. Megarry J and Lord Goff's Decisions, the very authorities they call on, stand in the way of the Respondents making their case. It is tempting to suggest that we could stop there and the Tribunal instruct that the IBM report be published in full immediately. But there are still a few points made by the Respondents to consider.
- 105 Before that, one final point on the duty or obligation of confidence.
- 106 Suppose that these duties could be discerned almost anywhere.
- 107 The Safran Group press release at the heart of this information rights matter before the Tribunal states that (*DMApp:E5.1*):
- "Sagem Sécurité will provide multibiometric facial and fingerprint recognition technology that was assessed for speed, accuracy and cost in competitive trials developed and run by IBM, using in excess of 10 million images".
- 108 Where did IBM get in excess of 10 million images from, to conduct their trial with? Whoever they got them from, it is likely, so say the Respondents implicitly, that the provider had a duty or obligation of confidence to the people whose biometrics they are. A confidence that has been breached by disclosing them to IBM.
- 109 At the Appellant's 23 February 2010 meeting with certain staff of, and consultants to, the Home Office "someone said that IBM's 10 million images comprise two fingerprints each from 5 million people, that the data was supplied to IBM by the Home Office, and that the trial will be discussed at an upcoming NIST conference" (*DMApp:E1.1 23 February 2010*).
- 110 If the facts are as stated at that meeting, then the Home Office have committed in excess of five million breaches of confidence. They may regret the defence their legal team has devised.
- 111 No doubt another precedent would be found to establish that the Home Office *do* have the right to disclose unwitting people's biometrics to IBM without breaching any confidence.

112 But in that case, breaches of confidence can appear and disappear according to preference, there is considerable latitude, judging by the way the Home Office and the Commissioner use the duty or obligation of confidence doctrine in their Responses.

113 It is dangerous for the Home Office and the Commissioner to use the doctrine in this way. They open the Home Office to five million charges of breach of confidence. And they open themselves to the accusation of playing, of creating and extinguishing duties of confidence whenever they want, whimsically.

Confidentiality agreements

114 The Home Office are happy to suggest that retaining IBM to choose the best biometrics technology to support the NIS was comparable to two like-minded engineers coming together to design a new moped.

115 That is the *reductio* of the faith we were all brought up in, that the British Civil Service is a Rolls-Royce, *ad absurdum*.

116 It is obviously impossible to convey on paper the speechless apoplexy that this grotesque irresponsibility of the Home Office's induces in the Appellant and should surely induce in the Tribunal and in the reasonable leader-writer for the *Telegraph*.

117 But we can provide some diagnosis of the cause of the apoplexy. In November 2009, the Home Office issued a so-called "framework agreement" for the NIS, a document which would be recognised by any reputable stock exchange as a false prospectus¹⁸ and the company refused admission to the list. In it, they say:

In delivering its mission of "Safeguarding identity" IPS aims to be the trusted and preferred provider of identity services.

118 That is a reference to the paper the Home Office issued in June 2009, *Safeguarding Identity*¹⁹, where we find:

3.6. Our intention is that, at the core of the information used to prove identity will be biometrics, such as photographs and fingerprints ...

3.29. The NIS will deliver the means to prove identity quickly and effectively, and provide a secure and straightforward way to safeguard personal identities from misuse. The NIS will securely 'lock' a person's biographic information to their unique facial and fingerprint biometrics on a National Identity Register (NIR).

3.30. From 2009, the first identity cards will be issued to British citizens, with their biometrics stored in a chip on the card as well as on the NIR. From 2012, anyone applying for or renewing a passport

¹⁸ <http://dematerialisedid.com/PDFs/DEP2009-2942.pdf>

¹⁹ http://dematerialisedid.com/PDFs/13439_Safeguarding_Identity_w_opt.pdf

in the UK will also enrol their fingerprint biometrics on the NIR and will be able to choose whether they want a biometric passport, an identity card or both ...

3.32. The vision for the NIS is that it will become an essential part of everyday life; underpinning interactions and transactions between individuals, public services and businesses and supporting people to protect their identity ...

- 119 The Home Office were relying utterly on certain mass consumer biometrics technologies being reliable enough to become essential to everyday life. And they now ask us to believe that the choice of those biometrics was akin to designing a moped engine, that the “sane and fair conduct of business”, to quote Megarry J, should not be impeded by negotiating confidentiality agreements, the selection exercise would be quite properly conducted in a penumbra of considerations and beliefs and wishes and general impressions which might or might not amount to a duty of confidence.
- 120 Surely, in the realm of public administration, Megarry J needs to be reversed. The *only* sane and fair way to conduct business is to call for the lawyers and to document the contract. That’s if you really want to be the “trusted and preferred provider of identity services”.
- 121 It’s so grotesque that the Appellant doesn’t believe it. Or at least, the Appellant would require much more evidence than has been openly submitted to the Tribunal so far, before believing that the selection exercise was not covered by any confidentiality agreement. It requires some detective work to prove that there are no contracts. It is not clear that the Commissioner has done his job.
- 122 The Appellant could just about believe it of the Home Office. Morale in the Identity & Passport Service (IPS), the executive agency of the Home Office responsible for the NIS, is said to have collapsed. Understandably. The Home Office were openly described at a meeting the other day, held at the Treasury, for prospective suppliers to the Identity Assurance service currently being launched for a certain and expensive death in a few years time, by the Cabinet Office, as
- “... still reeling”.
- 123 But after 30+ years in IT, the Appellant cannot believe it of IBM. IBM have not become a hugely profitable and admired business with 100 years of success behind them by forgetting to put confidentiality agreements in place. The Home Office might. It’s extremely unlikely, but they might. IBM just wouldn’t. IBM do contracts. IBM do not do vague-sense-of-confidence-in-the-air. IBM deal in authentic mahogany, not the respondents’ wimpish Formica replicas.
- 124 The Home Office’s 7 April 2009 press release (*DMApp:E1.1 7 April 2009*), announcing the contracts awarded to IBM and CSC, refers to something called “NBIS”, the National Biometric Identity Service:

John Granger, General Manager, IBM Global Business Services, said:

"IBM is pleased to have been selected as the preferred bidder for the National Biometric Identity Service (NBIS) and is working with the Identity and Passport Service (IPS) to finalise the contract to signature.

125 The NIS, of course, has been cancelled with all hands lost and nothing to show for it. NIS documents have accordingly been moved to the Home Office's archive website²⁰ where they appear under the following nearly literate rubric:

This contract enabled the formation of the National Identity Register (NIR) for the National Identity Service (NIS).

The purpose of the NIR was to store biographic and biometric information, including fingerprints or digital facial images (photographs), on one database. The aim of the NBIS contract was to provide a shared biometric matching and storage service to support IPS, the UK Border Agency and the Foreign & Commonwealth Office. The NIR and NIS has now been cancelled.

126 That archive includes the NBIS agreement between IBM and the Home Office dated 1 May 2009. The agreement has 36 schedules divided into 54 PDF documents. That's more like what one would expect – a long and detailed contract.

127 The contract²¹ includes a 15-page Section G, clauses 47-51, all devoted to "confidentiality, data and intellectual property". If that contract covers IBM's biometrics technology selection exercise, then we may be home and dry:

SECTION G – CONFIDENTIALITY, DATA AND INTELLECTUAL PROPERTY

47. Confidentiality

47.1 Except to the extent set out in this Clause 47 or where disclosure is expressly permitted elsewhere in this Service Agreement, each Party shall (and in the case of the Supplier, shall procure that the Subcontractors shall):

47.1.1 treat the other Parties' Confidential Information (and in the case of the Supplier, the Customer Confidential Information) as

²⁰

http://webarchive.nationalarchives.gov.uk/20110106102951/http://ips.gov.uk/cps/rde/xchg/ips_live/hs.xsl/1801.htm

²¹

http://webarchive.nationalarchives.gov.uk/20110106102951/http://ips.gov.uk/cps/files/ips/live/assets/documents/00_NBIS_Terms_v0.98_redacted_v1.pdf

confidential and keep it in secure custody (which is appropriate depending upon the form in which such materials are stored and the nature of the Confidential Information contained in those materials) ...

47.2 Clause 47.1 shall not apply to the extent that:

47.2.1 disclosure is a requirement of Law placed upon the Party making the disclosure, including any requirements for disclosure under the FOIA or the EIRs pursuant to Clause 49 ...

- 128 NBIS provides for disclosure following Freedom of Information Requests. If NBIS is the right contract, then it looks as though disclosure of the IBM report is unproblematic.
- 129 There would be other problems, though. The NIS has been cancelled. How come we are still shelling out £650 million to IBM and CSC (*DMResp1:15*)? Did someone forget to cancel NBIS when they cancelled the NIS? How do the politicians of the coalition government allow this to happen? Does the real power lie with our unelected and unaccountable miserable moped of a Civil Service?
- 130 Then again, NBIS may not be the right contract. By the time of Safran Group's 7 October 2009 press release (*DMAApp:E1.1 7 October 2009*) NBIS is no longer referred to. It has been replaced by NIAS, the National Identity Assurance Service. Is there a NIAS contract? Does that have a confidentiality clause or two?

Sagem Sécurité chosen by IBM to support United Kingdom's National Identity Assurance Service (NIAS)

- 131 Perhaps the contract we are looking for is the rules of engagement for IBM's biometrics technology trial. There must have been some. Has the Commissioner asked to see them? Has he seen them? Could the Appellant see them? Or the Tribunal? They must make some mention of confidentiality. It's not just IBM. Safran Group also are unlikely to have forgotten about confidentiality.
- 132 There must be some sort of contract covering the biometrics technology selection trial. The Home Office say so (*HOResp:6*). Let's see it:

The Grounds of Appeal ('GoA') focus largely on the question of whether the procurement exercise relating to the contract between IBM and the Home Office was conducted appropriately (see, e.g., GoA, ¶¶9, 10, 11, 12, 16, 17, 24).

Housekeeping

- 133 A few more errors and derelictions to clear up.
- 134 The Home Office repeat the Commissioner's paraphrase of the Appellant's Freedom of Information Request (*HOResp:3*). They say that the Request was for:

“a copy of the detailed report of the competitive trials developed and run by IBM [that tested the speed, accuracy and cost of multibiometric facial and fingerprint recognition technology developed by Sagem Sécurité] so that the public can assess for themselves the reliability of the technology.”

135 That interpolation in square brackets is the Commissioner’s own, he is putting words in the Appellant’s mouth which make it look as though the Appellant believes that only Sagem Sécurité’s (now Morpho’s) offerings were tested. In fact, the Appellant believes that several suppliers took part.

136 Then the Home Office try to muddy the waters a bit more (*HOResp:7*):

... the appropriateness or otherwise of the Home Office’s procurement exercises are not matters within the jurisdiction of the Tribunal ... these proceedings are not concerned with whether the Home Office’s procurement exercise was carried out in accordance with the law, or whether the Appellant’s opinions on the merits of national identity cards and the official use of biometric data are justified.

137 The Tribunal are no doubt heartily grateful that the competence of the Home Office is not their responsibility.

138 The Home Office have made it abundantly clear that their selection exercise is under no jurisdiction at all, not even the jurisdiction of logic.

139 But it is they, the Home Office, who raised the matter by arguing that they couldn’t do their job properly if the IBM report was published (*ICODecNot:26, HOResp:23*). That puts the matter into the ring and invites the obvious counter-punch that they haven’t done their job properly even *with* the IBM report not being published. The knock-out blow is the Appellant’s sensible suggestion that if the Home Office and its agents and contractors were a lot more open, then they might be a lot more competent. That is one of the objectives of the Freedom of Information Act, surely, an objective ignored by the Respondents, who seem to regard it as a machine for creating exemptions for disclosure. Openness is a great discipline.

140 Note also that the Appellant’s objections to national ID cards form no part of his Appeal in this case. That is a mischievous fabrication of the Home Office’s. Either that or it’s just slapdash. The Appeal concerns biometrics only, whether used in ePassports, residence permits, visa applications, smart gates, school registers, or whatever. The private sector can waste its money on biometrics all it likes, but the public sector should not waste public money on technology thought to be unpredictably unreliable based on performance reports judged by leading academics to tell the reader nothing useful enough to justify an investment decision.

141 Then the Home Office say this (*HOResp:8*):

As section 41 FOIA is an *absolute* exemption, the question of whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information, under section 2(2)(b) FOIA, does not arise. The public interest in disclosure of the information is only relevant insofar as public interest considerations can amount to a defence to a claim for breach of confidence.

142 Quite right, and no-one has said any different, but the Commissioner does have discretion to declare the absolute breach of confidence not actionable. He hasn't made that declaration. There again, no breach of confidence has been demonstrated. But if it had been, then arguably he should exercise his discretion and that is a legitimate matter for the Tribunal to consider.

143 The Tribunal may consider that the Commissioner should have exercised his discretion in recognition of the public's rights. The public have rights, too, just like the Home Office and IBM and Morpho and the other biometrics technology suppliers.

144 The Home Office say (HOREsp:16):

The Appellant considers that disclosure of the Report would be important for informing the public about the Home Office's procurement processes and the appropriateness of them. On that basis, his argument must be (although it is not stated as such) that the Home Office would have a public interest defence to any claim for breach of confidence.

145 Note "although it is not stated as such". Because then they say (HOREsp:19):

The Appellant argues that disclosure is in the public interest.

146 Well which is it?

147 This is lamentable.

148 They go on to say:

He makes a number of points, which can be summarised as: (i) questions over whether the procurement exercise leading to the appointment of IBM was conducted appropriately ...

149 The Appellant has never objected to the appointment of IBM, the Home Office have just made that up.

150 The Home Office seem to be better represented by the Commissioner than they are by the Treasury Solicitors.

151 That's true. But of course, it isn't the job of the Commissioner to represent the Home Office.

152 And following the logic of the Appellant's case, it's actually the Appellant who is representing the Home Office best, because it is the Appellant who is trying to help the Home Office to get its misfeasant house in order, please see Attachment.

Public interest

153 The public know about Morpho getting the biometrics contract only because Safran Group issued a press release in Paris. No press release was issued by the Home Office nor by IPS, nor by the UK Border Agency (UKBA), another of the Home Office's executive agencies.

154 There was a lack of openness there, on the part of the Home Office and its agents.

155 There remains a lack of openness in the refusal to publish the IBM selection report.

156 The public has a right to expect openness in this case. The £265 million contract with IBM and the £385 million contract with CSC, another contractor, depended and may still depend on the reliability of Morpho's biometric services. That's £650 million of public money, 650 million reasons why the public could expect openness and 650 million reasons why the Home Office and its agents were wrong not to issue a press release about the award of the Morpho contract.

157 There are other costs. Costs in addition to the £650 million already identified. These biometric services are needed for ePassports, which depend on facial recognition, a biometric. The Appellant has demonstrated that UK passport-holders are paying three times the natural price for a 10-year adult passport and part of the reason for that over-charging is the incorporation of biometrics into the ePassport, please see Attachment.

158 The biometrics are also needed for visa applications, which depend on flat print fingerprinting, another biometric. UKBA have contracts with CSC (again) and VFS Global to fingerprint millions of visa applicants every year all over the world. If the biometrics aren't reliable, then that is a waste of money. Public money. Public money which could be saved. A saving which would be in the public interest.

159 It's not just openness and money. The Home Office and its agents were warned by several authoritative people that biometric technology is not yet reliable enough to do the jobs the NIS required of it. Those warnings were ignored. Warnings from the House of Commons Science and Technology Committee. Warnings from the US Department of Homeland Security. Warnings from five more academics and practitioners²²:

²² <http://dooooooom.blogspot.com/2007/11/biometrics-are-not-panacea-for-data.html>

Professor Ross Anderson
Dr Richard Clayton
University of Cambridge Computer Laboratory

Dr Ian Brown
Oxford Internet Institute, University of Oxford

Dr Brian Gladman
Ministry of Defence and NATO (retired)

Professor Angela Sasse
University College London Department of Computer Science

Martyn Thomas CBE FREng

160 All of these warnings were ignored. The Home Office proceeded anyway. The public has a right to know why. What did the Home Office base their decision on? It doesn't seem businesslike. It seems irresponsible, unscientific and illogical. If the Home Office can't make their case in public, do they have a case? Have they chosen to believe only the biometrics technology salesmen who are, after all, *parti pris*? Have they been duped?

161 It should help the Home Office, as well as the public, to publish the IBM report, and it is iniquitous not to publish it.

Section 31(1) FOIA

162 The Commissioner and the Home Office have seen fit to delay their Section 31(1) case for non-disclosure.

163 Here is the Appellant trying to get in first with an argument in favour of disclosure.

164 The Respondents' case must depend on the assumption that Morpho's biometrics technology will help to prevent and detect crime, apprehend and prosecute offenders, administer justice, assess, and collect taxes, duties and other imposts, and operate immigration controls.

165 We can't just assume that the technology will help. There must be some argument to support the investment.

166 The Home Office will have trouble getting that argument off the ground given that the Cabinet Office believe they can deliver a national identity assurance service without using biometrics (*DMResp1:30*).

167 The Home Office have only two biometrics to work with.

- 168 Face recognition is hopeless, the *Telegraph*²³ know that, see *Airport face scanners 'cannot tell the difference between Osama bin Laden and Winona Ryder'*, and so does everyone else.
- 169 So now the Home Office are down to just one biometric, flat print fingerprinting.
- 170 The business schools of the world tested flat print fingerprinting to stop impostors from taking their entrance exams and dropped it after two years²⁴. They are now testing palm vein biometrics, which are not on the Home Office's menu.
- 171 The Tribunal should know that we're not talking here about traditional fingerprinting, the fingerprinting with 100 years of success behind it, "rolled prints", taken by police experts, using ink.
- 172 We're talking instead about "flat print" fingerprinting, a glorified photo-copying process, quick, cheap, clean and utterly unreliable. The Appellant asked the FBI²⁵ why flat print fingerprints are so unreliable. They said it's because they're flat. No image is taken of the sides of the finger, which means they miss 40% of the detail (the minutiae).
- 173 Tests suggest that flat print fingerprinting has something like a 20% failure rate²⁶. That is, 20% of the time, the computer says no, you're not you. Flat print fingerprints will be no use as evidence in court.
- 174 Tests prove nothing, of course, according to Messrs Wayman, Possolo and Mansfield. That's going to make it hard for the Respondents to mount a case in support of 31(1). Unless the Respondents can demonstrate that they know more about biometrics testing than the three academics. Which is unlikely. Because no-one does.
- 175 Not even criminals. If the Home Office can't predict how reliable flat print fingerprinting would be, knowing what they know from the IBM report, neither can criminals. Which suggests that 31(1) should not be an impediment to disclosing the report.
- 176 UKBA may come to the Respondents' assistance and say that biometrics have helped them to turn down lots of unsuitable visa applicants and catch lots of criminals. Were these successes exclusively thanks to biometrics? How much did they cost? Is it worth it? Would UKBA get better value from making

²³ <http://www.telegraph.co.uk/news/uknews/law-and-order/5110402/Airport-face-scanners-cannot-tell-the-difference-between-Osama-bin-Laden-and-Winona-Ryder.html>

²⁴ <http://www.gmac.com/gmac/NewsandEvents/DeansDigest/2008/June2008/>

²⁵ <http://forum.no2id.net/viewtopic.php?t=29965>, please see comment at Mon, 26 Oct 2009 23:39:34 GMT

²⁶ <http://dematerialisedid.com/Evidence/Biometrics.html#trialresults>

extensive use of the Interpol²⁷ and EU databases of lost and stolen passports and wanted and suspected criminals and terrorists? Would they get better value if they installed PKI facilities at border crossings and authenticated every passport on entry and exit?

Section 43(2) FOIA

177 The Commissioner and the Home Office have similarly seen fit to delay their Section 43(2) case for non-disclosure.

178 Same thing, herewith a first draft argument in favour of disclosure.

179 The 43(2) exemption applies if anyone's commercial interests would be damaged by disclosure, anyone's including the Home Office's.

180 The Home Office's commercial interests would be promoted by cancelling their £650 million of contracts with IBM (NBIS) and CSC (new and unnecessary passport application system). They could cancel their contracts with CSC and VFS Global for registering the biometrics of visa applicants overseas. They could also cancel all the other associated expenditure on ePassports, biometrics enrolment centres in the UK and overseas, subventions to the FCO, biometrics verification equipment, telecommunications, database management systems, etc ...

181 The Home office could improve its p&l by cancelling the loss-making Passport Validation Service (PVS).

182 The Home Office could also improve its financial position if it took control of PA Consulting, who have been running rings round the Home Office for a decade, please see Attachment, and who threaten now to repeat the trick with the Cabinet Office and their identity assurance project.

183 It might be thought that releasing the IBM report would depress sales for the biometrics technology suppliers. But the BBC's *ID cards scheme dubbed 'a farce'* story²⁸ and other similar pieces in the media after the UKPS biometrics enrolment trial results were published somehow left everyone still convinced that biometrics work:

Plans for a national ID card scheme have been branded "farcical" after suggestions it might misidentify people with brown eyes or men who go bald.

184 Nothing seems to depress their sales, there is always another wishful thinker ready to be parted from his taxpayers' money.

²⁷ <http://dematerialisedid.com/BCSL/eOdyssey.html#interpol>

²⁸ http://news.bbc.co.uk/1/hi/uk_politics/4348942.stm

185 Disclosing the IBM report might improve the British taxpayers' financial position. That may not weigh heavily with the Commissioner or the Home Office but some of us retain an eccentric interest in it.

186 All other arguments apart, it will be futile for the Respondents to try to make a 43(2) case. It relies on being able to say what the Home Office's or any other organisation's income would have been if the report had not been disclosed. Who can say? No-one. It's a counter-factual. So the respondents cannot demonstrate that anyone's income would go down. Down from what?

Attachment – PA Consulting

Business BCSL
Consultancy
Services Ltd

58 Vineyard Hill Rd London SW19 7JH

<http://DematerialisedID.com>Email: BCSL@blueyonder.co.ukTel. 020 8946 1705 Fax 020 8286 4010 Mobile 079 3177 8052

Open letter¹

Alastair Bridges
Executive Director Finance
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Your ref. PG/10/202/8511

21 October 2010

Dear Mr Bridges

THE £23 PASSPORT

I refer to your letter dated 16 September 2010², received three weeks later on 7 October 2010.

You identify a bad mistake of mine in a letter to the Treasury dated 17 August 2010³ where I asserted that passport fees have been used for years to fund the failed National Identity Service. I withdraw that assertion and I apologise to both the Identity & Passport Service and the National Audit Office.

A ten-year adult British passport currently costs £77.50. A case can be made that it should only cost about £23. Your letter is intended to explain that huge difference. “I hope you find this information useful,” you say. Unfortunately, no. Your letter amounts to saying no more than that the price has gone up because the price has gone up. The Treasury asked you to answer on their behalf. You have failed.

“Below is a breakdown of the elements that make up the adult passport fee for the past ten years,” you say, before providing 20 years of data, most of which is not broken down.

There are certain questions which it would be useful to answer. Several of these are listed in my letter to the National Audit Office dated 14 October 2010⁴. How can you claim that biometrics based on facial geometry is a useful innovation? Or the introduction of RFID? Will PKI actually be used at border crossings anywhere in the world? What is the

¹ http://DematerialisedID.com/BCSL/23_medicine.html

² <http://dematerialisedid.com/BCSL/IPS20100916.html>

³ <http://dematerialisedid.com/BCSL/23.html>

⁴ <http://dematerialisedid.com/BCSL/NAO.html>

point of authentication by interview? Given that IPS only have 68 (or 64) interview offices for the entire country, are you serious about authentication by interview? Given that we are not going to have flat print fingerprints in passports after all, and there is no National Identity Register to maintain, why do we need CSC's £385 million new passport application system⁵, why not just cancel the contract, what value does it add?

IPS were at one stage planning to use private sector companies with a national network of high street shops^{6,7} to register everyone's flat print fingerprints. There must have been costs budgeted for, to manage that network and collect the biometrics. Those costs will not now be incurred. Again, as with the questions above, the effect should be to reduce the price of a passport.

The Identity Cards Act 2006 is still on the statute book. Section 37 requires you to produce a cost report every six months. The last cost report was produced in October 2009⁸. There should have been two more since then. Are you breaking the law, not having produced them?

10 years. 20 years. Broken down. Not broken down. £77.50. £23. No answers to the question posed. Three weeks for the letter to get to me. Your Christian name is typed "Alistair" instead of "Alastair". Breaking the law. Not breaking the law. It's not good, is it, Mr Bridges.

No doubt morale at IPS is low. It must be a shock realising that there is nothing to show for the £292 million⁹ James Hall spent on the National Identity Service. The new Digital Delivery Identity Assurance Project being touted by Directgov¹⁰ makes no reference whatever to IPS, it is as though IPS no longer exist. At a meeting of prospective suppliers to the DDIAP, one supplier after another asserted that they could not be seen to be involved if any connection was made with IPS. A representative from DWP agreed with them. The 2009-10 statutory accounts were signed in June, four months ago. Since then, also no doubt traumatic, five members of your Board have disappeared¹¹ and IPS are still operating without an Executive Director of Operations¹².

I put it to you, Mr Bridges, that IPS is in a bit of a state. A negative brand, like Watneys. A sick/ill organisation that can't do anything right, not even post a letter, let alone answer a question. IPS – the sick man of Whitehall.

You seem to have left Globe House. That's a good first step on the road to recovery. Time now for a name change, get rid of the word "identity". Make a clean breast of all the biometrics nonsense¹³. Your Chief Executive has an MBA from the London Business

⁵ <http://www.whitehallpages.net/news/archive/185894>

⁶ <http://dematerialisedid.com/BCSL/Segments.html>

⁷ <http://dematerialisedid.com/BCSL/Pharmacy.html>

⁸ http://www.ips.gov.uk/cps/files/ips/live/assets/documents/IPS_Cost_report_2009_v5.pdf

⁹ http://www.publicservice.co.uk/news_story.asp?id=14065

¹⁰ <http://gdigital.direct.gov.uk/>

¹¹ Hall, Davis, Crothers, Hunt, Gaskell

¹² http://www.ips.gov.uk/cps/rde/xchg/ips_live/hs.xsl/42.htm

¹³ <http://dematerialisedid.com/Register/regBiometrics.pdf>

School. She must know that GMAC tested flat print fingerprinting for two years and then dropped it, it's not reliable enough¹⁴. GMAC didn't even bother to *test* facial geometry, everyone knows it doesn't work and it must drive you mad at IPS having to pretend that it does. Give yourselves a break, for goodness sake, the nightmare of pretence is over.

Above all, IPS must be seen to be doing its job, issuing passports. You can't have PA Consulting issuing press releases like this¹⁵, it's demeaning:

PA wins gold at the 2010 MCA awards

...

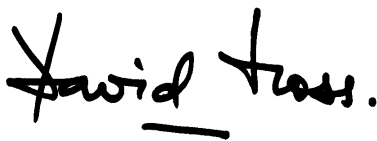
The winning project involved working with the IPS to procure a new passport provider. This complex and high-profile project required a redesigned passport which met the new international regulations for travel documentation, with enhanced security features to keep ahead of the threat of counterfeiting and the capability to store additional biometric information.

The team supported IPS and managed the £400m procurement process from start to finish.

If PA managed the process from start to finish, what were IPS doing? How much were PA paid to do IPS's job? How much were IPS paid *not* to do their job?

Why does a passport cost £77.50 and not £23? If there's no good reason, then, as part of your re-launch, along with your new name and address, the renunciation of biometrics and [the defenestration of PA](#), how about putting the price down? Demand would go up and, who knows, IPS might be welcomed once again into communion with your fellow human beings.

Yours sincerely



David Moss

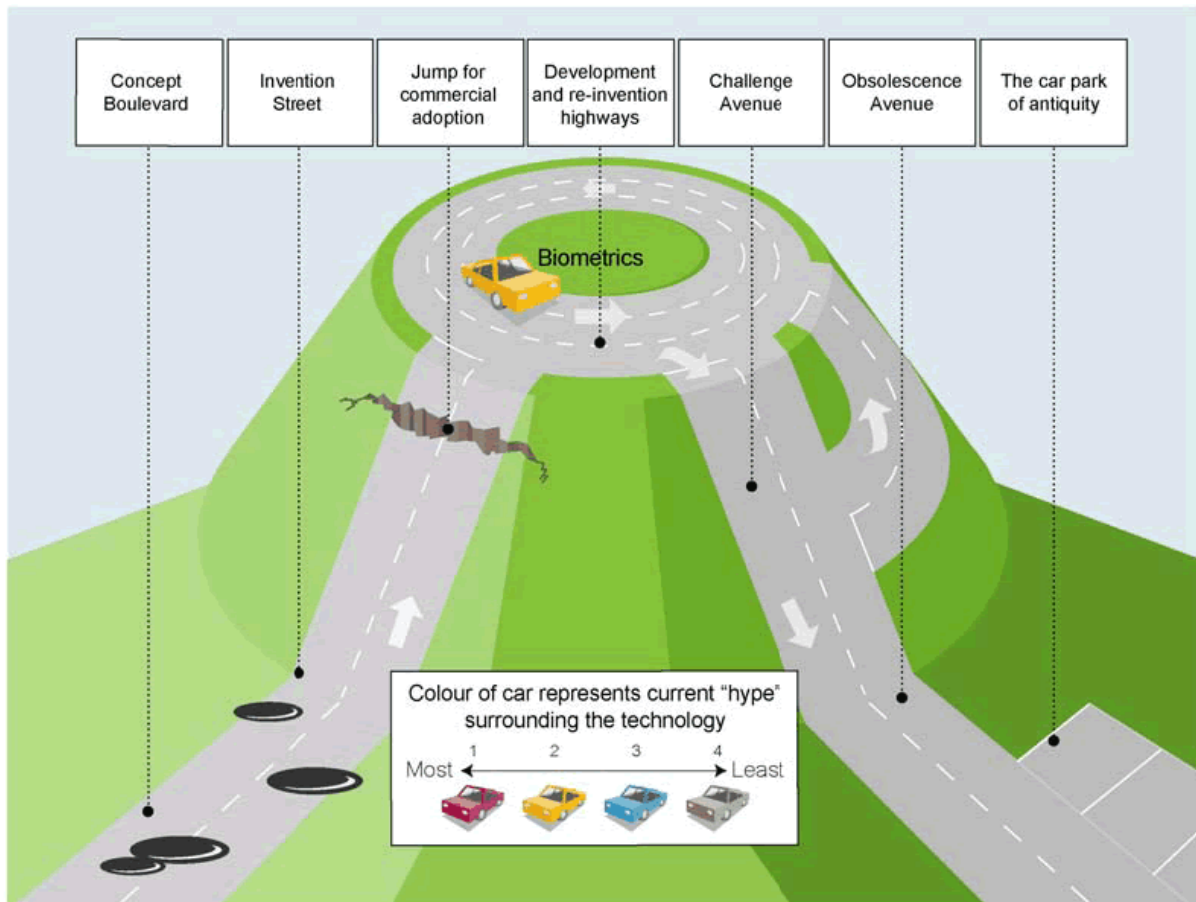
cc Rt Hon Theresa May MP, Home Secretary
Rt Hon Danny Alexander MP, Chief Secretary to the Treasury
Sir David Normington KCB, Permanent Secretary, Home office
Sarah Rapson, Chief Executive, Identity & Passport Service
Susan Ronaldson, Director, National Audit Office

¹⁴ <http://www.gmac.com/gmac/NewsandEvents/DeansDigest/2008/June2008/>

¹⁵ <http://www.paconsulting.com/our-experience/pa-wins-gold-at-the-2010-mca-awards/>

Annex – The defenestration of PA Consulting

The innovation highway, by PA Consulting¹⁶



This example of PA Consulting's facetious approach speaks for itself. How long before they, too, are consigned to the Car Park of Antiquity? The sooner the better if IPS are to regain their mental health.

They consider biometrics to be mostly hype. That doesn't stop them charging IPS and the UK Border Agency¹⁷, among others, for advice on the deployment of biometrics.

1.1.1 Q. What is the Government Gateway? What is it for?¹⁸

A. In 1999, the UK Government commissioned a report from PA Consulting looking at the cross-government infrastructure that would be required to enable the delivery of online services and joined-up government to be implemented. One of the recommendations in that report was that the UK Government should procure a central 'gateway' that

¹⁶ http://dematerialisedid.com/PDFs/foresight_biometrics.pdf

¹⁷ <http://www.paconsulting.com/our-experience/delivering-a-biometrically-enabled-visa-system/>

¹⁸ http://archive.cabinetoffice.gov.uk/e-government/docs/responsibilities/document_library/pdf/gateway_faqs_v2.pdf

would help tackle common issues such as user identity management, messaging and transaction handling.

PA Consulting have been retained for a long time to advise the government on identity management. The comprehensive failure of the National Identity Service is their failure.

Management Consultancy¹⁹ magazine and Accountancy Age²⁰ reported in July 2005 that PA have been working with the Home Office on the design, feasibility and procurement of the ID cards scheme in a team comprising 43 civil servants and 62 consultants. There is no budget, according to the Home Office, so PA's work cannot go over budget. *Simples:*

'The nature of the contract for this service is such that an outturn value is not defined; packages of work are agreed monthly. The Home Office has made no commitment to any contract value.

On the other hand:

'Although the total value of the contract will not be known until the contract is concluded, I can tell you that the estimated prices given in the successful tender by the contractor were £9.87m for the development phase of the programme and £8.87m for the subsequent procurement phase.'

The Home Office said the 'average daily cost for each consultant working on the programme was £1,093'.

Consultants are meant to be experienced and responsible. Experience teaches that computerised systems need to be tested thoroughly before they are released. To release untested code is simply irresponsible. PA Consulting failed to get that message through to the Home office, the House of Commons Science and Technology Committee were told that²¹:

It would not be realistic to rigorously test everything before the scheme goes live, to the point where the government can be sure that no further changes need to be made to the design of the scheme. Some parts of the scheme will not be tested, but will use off-the-shelf technology that has been adequately tested elsewhere.

PA's virtues as a consultancy are questionable. They don't make very good contractors either²², prisoners and prison officers alike have been endangered by their slapdash behaviour:

PA Consulting lost the memory stick containing the details of the 84,000 prisoners, as well as another 30,000 offenders on the police national computer over a fortnight ago.

¹⁹ <http://www.managementconsultancy.co.uk/management-consultancy/news/2139556/pa-consulting-paid-12m-id-cards>

²⁰ <http://www.accountancyage.com/accountancyage/news/2139802/pa-consulting-bill-id-cards>

²¹ <http://www.computing.co.uk/computing/news/2167262/id-test-plans-fuel-controversy>

²² <http://www.telegraph.co.uk/news/newstopics/politics/2777788/Strip-data-blunder-firm-of-all-its-Government-contracts-Jacqui-Smith-told.html>

And then, there's their press release:

PA wins gold at the 2010 MCA awards

PA Consulting Group (PA) has won another prestigious Management Consultancies Association (MCA) Management Award for our work with the Identity and Passport Service (IPS). The win, in the Operational Performance in the Public Sector category, was announced at the ceremony in London on Thursday 29th April, adding to PA's enviable collection of MCA trophies.

The winning project involved working with the IPS to procure a new passport provider. This complex and high-profile project required a redesigned passport which met the new international regulations for travel documentation, with enhanced security features to keep ahead of the threat of counterfeiting and the capability to store additional biometric information.

The team supported IPS and managed the £400m procurement process from start to finish. The process was completed four months earlier than scheduled and below budget. The quality and security of the passport exceeded expectations and the new passport service will generate savings in excess of £160 million (30% savings against the anticipated contract value) over the term of the contract.

Kevin Sheehan, Director of Integrity and Security at the IPS, said of the project: "This procurement has delivered a fantastic outcome for IPS by delivering a superior passport at exceptional value for money. This project exemplifies the benefit of co-operative working through bringing together IPS's world-class passport knowledge with PA's procurement expertise." Mark Brett added: "The MCA's recognition of the quality and value of this complex project demonstrates PA's expertise and leadership in public sector procurement."

PA have helped to deploy biometrics which they think are mostly hype.

They announce that they saved 30% on the anticipated contract value, commercial information which is normally denied to freedom of information requests, for example, and which, in this case, simply tells the contractors they can ask for a lot more when the contract comes up for renewal.

And Kevin Sheehan of IPS thinks it's a "fantastic outcome" and "exceptional value for money". Who could possibly disagree with Mr Integrity and Security? It is fantastic. It is exceptional to charge £77.50 for something which should cost more like £23.
