

**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
TO SUBMISSIONS RECEIVED ON OR AFTER 15 JULY 2011**

References to pages, n, in the Open Bundle received on 15 July 2011 are in the form OB1:n

References to paragraphs, n, on pages, m, in the Open Bundle received on 15 July 2011 are in the form OB1:m:n

References to paragraphs, n, in Professor Anderson's 18 July 2011 Witness Statement on behalf of the Appellant are in the form WSCantab:n

References to paragraphs, n, in IBM's 19 July 2011 Witness Statement on behalf of the Home Office are in the form WSIBM:n

References to pages, n, in IBM's 19 July 2011 Exhibits, m, on behalf of the Home Office are in the form WSIBM:Exhm:n

References to paragraphs, n, in the Home Office's 20 July 2011 Witness Statement are in the form WSHO:n

References to pages, n, in the Home Office's single 20 July 2011 Exhibit on behalf of the respondents are in the form WSHO:Exh1:n

Foreword

- 1 The Commissioner in his Response, "invites the Tribunal to dismiss the appeal" (OB1:45:33). The Home Office in their Response conclude that "the Tribunal should therefore dismiss the appeal" (OB1:57:5, OB1:64:30). The Appellant wishes to thank the Tribunal again for not accepting these craven entreaties.
- 2 The Appellant wishes to thank the Tribunal also for allowing this Response to the submissions made by the other parties on or after 15 July 2011.

- 3 The arguments presented here are supplementary to the arguments advanced in the Appellant's earlier Appeal (29 March 2011) and Responses (10 May 2011 and 31 May 2011).
- 4 The Appellant's case remains that the Home Office have shown a lack of openness in this matter and that the Commissioner has failed to conduct a proper investigation and has failed in his Decision Notice seriously to take into account the public interest.

Father William

- 5 Until 20 July 2011, when the Home Office's Witness Statements were submitted, the position was that there was no explicit confidentiality agreement between the Home Office and IBM covering the biometrics performance report.
- 6 That was the Commissioner's position (*OB1:5:19-21, OB1:42:22b*). And it was the Home Office's position (*OB1:60:15*).
- 7 Now we are all expected to stand on our heads and accept that there was an explicit confidentiality agreement (*WSHO:24*):

... within both the NIS SSG Framework Agreement and the NBIS Service Agreement there are confidentiality provisions which although recognising IPS' obligations under the Freedom of Information Act otherwise confirm an obligation of confidence in respect of the provider ...
- 8 IBM make the same point in their Witness Statement (*WSIBM:5,8*). They, too, believe that there was an explicit confidentiality agreement covering the IBM report.
- 9 The Commissioner made no reference to SSG or NBIS in his Decision Notice. Nor to IABS, which the Home Office's Witness Statement also refers to (*WSHO:1,7,9*). Nor to NIAS, which is referred to in the Home Office's response to the Commissioner's enquiries (*OB1:144*).
- 10 The Home Office seem to have withheld the evidence of three of these contracts/framework agreements from the Commissioner and from the Treasury Solicitors and thus from the Tribunal until the Appellant drew attention to NBIS and NIAS in his 31 May 2011 submission (*OB1:84-6:124-30*).
- 11 The Commissioner's §41 case is now in disarray.
- 12 *The Appellant asks the Tribunal to consider whether the Commissioner conducted his investigation thoroughly and whether his Decision should now be overturned.*
- 13 *And the Appellant asks the Tribunal to consider whether the Commissioner should have ordered disclosure of the IBM report, while granting immunity from any breach of confidence action (*OB1:50:22-7*), however unlikely it is that such an action would be brought (*OB1:53-4:50-2*).*

“Sometimes I've believed as many as six impossible things before breakfast” (the Queen in *Alice's Adventures in Wonderland*)

14 First the Appellant submitted his Complaint to the Commissioner (*OB1:133-8*) on 1 July 2010, ...

15 ... then the Commissioner wrote to the Home Office (*OB1:139-41*) on 15 October 2010 ...

16 ... and then IBM wrote to the Home Office on 19 November 2010 (*OB1:155, WSIBM:Exh4:1*) and 6 December 2010 (*OB1:156-7*), lobbying against disclosure, ...

17 ... so that back came the answer from the Home Office to the Commissioner (*OB1:143-52*) on 14 December 2010, an answer which may fairly be paraphrased as follows:

The Home Office would love to release the IBM report, that way people could see how reliable the biometrics are, unfortunately if we *did* release the IBM report, then people would see how *unreliable* the biometrics are.

18 That self-contradictory response does not seem to have been challenged by the Commissioner.

19 *The Appellant asks the Tribunal to consider whether the Commissioner conducted his investigation thoroughly and whether his Decision should now be overturned.*

20 The Home Office assert that their chosen biometrics would assist in crime detection and prevention (*OB1:144-6*) and in enforcing immigration controls (*OB1:146-7*). As long as the IBM report remains unpublished, the public have no reason to believe that ...

21 ... and every reason to believe the contrary:

21.1 No statistics on the reliability of the biometrics chosen by the Home Office have been published by them since May 2005¹. The UKPS biometrics enrolment trial report revealed that the Identix Inc. biometrics technology which was being tested was hopelessly unreliable.

21.2 In the intervening six years, the Home Office have spent hundreds of millions of pounds on initiatives which depend for their success on reliable biometrics.

21.3 And as far as the public knows, judging by what has been reported in the media, that money has been wasted. The initiatives are some of them in tatters

¹ *UK Passport Service Biometrics Enrolment Trial*,
http://dematerialisedid.com/PDFs/UKPSBiometrics_Enrolment_Trial_Report.pdf

(ePassports/smart gates at airports²), and others already abandoned (ID cards/the National Identity Register³).

- 22 The money continues to be spent^{4, 5} but still the Home Office refuse to provide the statistics which might support the case for this expenditure. And they do so explicitly because disclosure would reveal the weak points/unreliability of their chosen biometrics.
- 23 This behaviour is not in the public interest. And yet the Commissioner condones it (*OB1:49-50:11-9*).
- 24 The Commissioner's §31 case is in disarray.
- 25 *The Appellant asks the Tribunal to consider whether that is a dereliction of the Commissioner's duty to take into account the public interest.*

Only the future is certain

- 26 IBM predict that disclosure of their report would harm IBM's commercial interests and the commercial interests of the six biometrics suppliers who took part in the IBM trial (*WSIBM:32-41*). The Home Office agree (*OB1:148-50*), they add the claim that the Home Office's commercial interests would be harmed (*OB1:150*) and, scraping the barrel, they predict that the commercial interests of the biometrics suppliers who *didn't* take part in the trial would *also* be harmed (*OB1:150*).
- 27 The Commissioner does not challenge these predictions.
- 28 He could have done. And he should have done. The failure of Identix Inc.'s biometrics offerings were happily published in May 2005 in the report on the UKPS biometrics enrolment trial. If IBM and the Home Office were right, that should have harmed their commercial interests. In fact, they got themselves a new chief executive, changed their name to L-1 Identity Solutions Inc. and promptly mopped up the biometric driving licence business all across the US⁶. They are now firmly ensconced in 25 countries, including India where they are

² *Airport face scanners 'cannot tell the difference between Osama bin Laden and Winona Ryder'*, <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>

³ *Minister helps destroys [sic] the national identity register*, <http://www.guardian.co.uk/government-computing-network/gallery/2011/feb/10/national-identity-register-shredded-damian-green#/?picture=371617002&index=5>

⁴ Please see for example, *English, Welsh cops get mobile fingerprint-check tech*, http://www.theregister.co.uk/2011/07/19/npia_rolls_out_mobile_fingerprint_technology/

⁵ Please see for example, *Heathrow to get new facial recognition scanners*, http://www.theregister.co.uk/2011/07/22/new_facial_recognition_technology_to_be_introduced_at_heathrow/

⁶ L-1 Identity Solutions Inc. *Company Profile*, <http://www.l1id.com/pages/9-company>

helping to deploy the Unique Identification Authority of India's *Aadhaar* scheme⁷.

- 29 Would their commercial interests have fared even better if the UKPS trial report had not been published? No-one can tell. It's a counter-factual. No-one can say exactly what their turnover or their profits would have been. No-one can say if those figures would have gone up or gone down. All we can say is that, as a matter of fact, the company doesn't seem to have suffered fatally and has gone on to do better after May 2005 than it was doing before⁸ ...
- 30 ... so much so that Safran Group/Sagem Sécurité/Morpho have now bought L-1 Identity Solutions Inc. for \$1.6 billion⁹. What was a pile of base metal has been turned into gold. Well done, L-1. Good luck, Safran¹⁰.
- 31 The Home Office predict that it would be harder for them to do their job if the IBM report is published.
- 32 The Commissioner does not challenge that prediction (*OB1:6:26*).
- 33 He should have done. Surely one of the purposes of the Freedom of Information Act is *precisely* to improve public administration by increasing accountability through greater openness (*OB1:52-3:36-48, WSCantab:9, 15-6*).
- 34 Public administration might be improved if there was more openness. Certainly non-disclosure doesn't guarantee high quality public administration, as pointed out earlier under the heading *Forfeit of trust* (*OB1:26-8:49-56*).
- 35 Since then we have learned of severe problems with the eBorders initiative¹¹. The lead contractor, Raytheon, was fired. IBM took over, having written the original Semaphore system (*OB1:212*). The watch-list at the border (*OB1:146*) turns out to rely on bits of paper¹² being distributed to the Border Force – *this, in a £1.2 billion contract to provide a 21st century computer system*. And it turns out that banned clerics can walk straight past Border Force officers as a result.

⁷ *India's ID card scheme – drowning in a sea of false positives*, <http://dematerialisedid.com/BCSL/Drown.html>

⁸ *The genealogy of a biometrics company*, <http://dematerialisedid.com/BCSL/Genealogy.html>

⁹ *Safran Climbs After Getting U.S. Approval on L-1 Assets*, "Safran climbed in Paris trading after winning U.S. clearance for the \$1.6 billion takeover of L-1 Identity Solutions", <http://www.bloomberg.com/news/2011-07-19/safran-climbs-after-getting-u-s-approval-for-takeover-of-l-1.html>

¹⁰ *The Gallic sense of humour*, <http://dematerialisedid.com/BCSL/Garlic.html>

¹¹ *Open Borders?*, webpage: <http://www.bbc.co.uk/programmes/b012fdwj>, transcript: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/fileon4_12_07_11_border.pdf, audio: <http://www.bbc.co.uk/iplayer/console/b012fdwj>

¹² *Open Borders?*, 12 July 2011, transcript p.17: "... here we have an E-borders programme that is ultimately expected to cost the taxpayer £1.2 billion and yet the delivery method for this crucial information, to the people who need it most, appears to be scraps of paper ...".

- 36 We have learned that the smart gates at UK airports continue to be defective as at July 2011¹³.
- 37 UKBA have problems managing their contractors and so do IPS, we now learn. IPS let the cost of the Siemens passport contract more than treble¹⁴, thus contributing to the trebling of the cost in the UK of a 10-year adult passport (OB1:95-100). If IPS keep that up with the replacement CSC contract (OB1:31-2), that's £1 billion up in smoke.
- 38 'Predictably' (OB1:207-16), the situation is getting dangerous. The 12 July 2011 edition of BBC Radio 4's *File on 4*, 'Open Borders?', states that Brodie Clark's Border Force is being reduced from 20,000 officers to 16,000, he has to plug the existing gaps in the border and he has to re-institute the exit controls¹⁵ lifted in 1998¹⁶ and all he has, to replace 4,000 human beings, is the broken eBorders system¹⁷ and a lot of smart gates and ePassports that don't work.
- 39 The Commissioner's §43 case is in disarray.
- 40 *The Appellant asks the Tribunal to consider whether the Commissioner conducted his investigation thoroughly and whether his Decision should now be overturned.*
- 41 *The Appellant asks the Tribunal to consider whether there has been a dereliction of the Commissioner's duty to take into account the public interest.*

¹³ *Open Borders?*, transcript p.14: "Airports like Heathrow, Gatwick and Manchester now boast E-gates at immigration. This allows a modern passport containing a chip to be placed on an entry point at a terminal. Data is checked between a camera at the gate and the details on the passport. If the computer says yes, you're into the country. The idea, when introduced, is that the system would speed up immigration and make the UK more secure. That's far from the truth, according to one insider we spoke to ...".

¹⁴ *Passport IT system over ran by hundreds of millions*, http://www.publicservice.co.uk/news_story.asp?id=16982, "A government IT system used to help in the delivery of passports has cost the taxpayer more than four times original estimates, and ran for 12 months longer than expected, Publicservice.co.uk has learned ... Immigration minister Damian Green said a contract for the system, awarded to Siemens, was originally anticipated to cost between £80m to £100m over a ten year period ... But with the contract having come to an end, Green revealed the government had spent a total of £365m on the system, between £265m and £285m more than originally anticipated".

¹⁵ *Fit for purpose? Or bordering on the ridiculous?*, <http://dematerialisedid.com/BCSL/eOdyssey.html>

¹⁶ *Journey's end for passport checks*, <http://news.bbc.co.uk/1/hi/uk/66236.stm>

¹⁷ *UK Border Agency Annual Report and Accounts 2010-11*, Note 28: "The e-Borders contract with Raytheon Systems Limited ("RSL"), a subsidiary of Raytheon Corporation, was terminated for cause ... The delivery was split into four release projects (RPs): RP1 – carrier gateway, RP2 – development of additional core software, RP3 – roll out to ports, and RP4 various enhancements ... At termination, the RP1 Carrier Gateway was in partial operation ... The agency is, therefore not proceeding further with the development of RP2 Core software, RP3 roll out and the additional enhancements in RP4 ...", <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/annual-reports-accounts/annual-report-10-11.pdf?view=Binary>

Who was then the guilty man?

- 42 IBM have kindly submitted a sample non-disclosure agreement (NDA) as an Exhibit to their Witness Statement (*WSIBM:Exh3:1*). This provides for confidentiality between IBM and Sagem Sécurité for seven years starting on 1 August 2008.
- 42.1 There may be other agreements which provide for IBM to disclose Sagem Sécurité's secrets to the Home Office but they have not been submitted as evidence.
- 42.2 On the basis of the evidence submitted, the clear implication is that IBM have failed to abide by their agreement with Sagem Sécurité. Are IBM guilty of a breach of confidence and have they therefore laid themselves open to an action brought by Sagem Sécurité and perhaps by the other five competitors in the IBM trial?
- 43 The crucial argument IBM put forward in their Witness Statement is that they all knew – IBM knew and the biometrics technology suppliers knew – that the Freedom of Information Act exists but they thought it wouldn't be used in this case or perhaps that it didn't apply to them (*WSIBM:6*):
- IBM would view any release by the Home Office as a grave breach of the confidentiality IBM had every right to expect in a normal, productive commercial relationship with the Home Office, notwithstanding the fact that a public body is subject to the FOIA.
- 43.1 This is uncharacteristic. It does not sound like the IBM we have all got used to over the years, fully conversant with the law, and abiding by it unswervingly and without demur.
- 44 IBM's evidence is submitted by one of their commercial directors (*WSIBM:2*):
- As Commercial Director, I am responsible for overseeing the contractual relationship with the Home Office and with IBM's sub-contractors and I am therefore familiar with the programme, the contractual arrangements in place and the way the Home Office, IBM and its sub-contractors interact.
- 45 If only the witness could be cross-examined, that claimed familiarity could be explored.
- 46 Does the witness really think that it is normal practice to breach NDAs (*WSIBM:13*)?
- The report was shared with the Home Office as part of a normal commercial relationship ...
- 47 And does the witness really think that the Freedom of Information Act isn't serious and that the Information Rights Tribunal just has to rubber stamp IBM's wishes (*WSIBM:35*)?

In summary, IBM would suggest that the FOIA cannot properly, in circumstances such as these, be used to release information that is the

commercial property of IBM and, particularly, where that release would damage IBM's legitimate commercial interests.

Appeal

- 48 The Commissioner has been impeded by the Home Office and perhaps the Home Office have been impeded by IBM but, one way and another, it appears that the investigation on which his Decision Notice depends was inadequate.
- 49 On that basis, the Appellant asks the Tribunal to consider ordering the IBM report to be published in its entirety forthwith.
- 50 For six years the Home Office and its contractors have managed to get away with telling the public nothing about the reliability of biometrics. At some point, the public will move from being uninterested, to being mystified and doubtful, to being angry, about how our money is being spent.
- 51 A dignified organisation with any *amour propre* would not wait until that point to be forced to publish statistics.
- 52 This matter was raised in letters to the Permanent Secretary at the Home Office on 4 February 2009 (*OB1:179-87*) and 16 April 2009 (*OB1:188-91*) and in a letter to the chief executive of UKBA on 8 August 2009 (*OB1:207-16*).
- 53 No biometrics performance statistics were elicited then. And none has been forthcoming since. The Home Office are in danger of forfeiting the public's trust.
- 54 It is time, after six years of silence and misfeasance, for the Home Office either to publish the IBM report and make its case if it can, or to abandon its unfounded faith in biometrics and to spend our money more wisely or let us keep it.
- 55 They will find it hard to make their case:
- 55.1 They must overcome the fact that the Cabinet Office, the Dutch government and the White House now believe that identity assurance services can be deployed without using biometrics (*OB1:51:28-33*).
- 55.2 They must overcome the fact that three leading academics in the field of biometrics believe that technology tests such as IBM's tell you nothing about how biometrics will perform in the field (*OB1:75-7:59-67, OB1:282-306*).
- 55.3 They must overcome the fact that they ignored the House of Commons Science and Technology Committee (*OB1:123*), who politely urged them to publish performance figures, and they ignored the US Department of Homeland Security (*OB1:123*), who warned them that mass consumer biometrics are not yet up to the job.
- 55.4 They must overcome the fact that the institutions that *are* capable of deploying complicated computer systems nationally and internationally – the banks (*WSCantab:7-8*) and the mobile phone companies – the very institutions with

the incentive, the skills and the money to use biometrics, do *not* use biometrics, they are not reliable enough to justify the effort.

55.5 And they must overcome the fact that neither IBM nor the suppliers of biometrics systems offer any warranty on their products. They're not confident. Why should the public be confident?

56 If Whitehall were the Rolls-Royce we were all brought up to believe in, then there would be any number of sources for the Home Office to choose from and they would have published the data or pulled out of the biometrics projects by now. It turns out that Whitehall is more of a moped (*OB1:83:114-5*) and that the Home Office is so abjectly beholden to IBM that the only source of performance statistics for the biometrics the Home Office have chosen is a report shown to it under the counter by IBM, in breach of its own NDAs.

57 So be it. Let's see that report. And let's hope that that is the first step back towards Rolls-Roycehood.

Postscript – the middle-aged delinquent

58 The Home Office say in their 14 December 2010 letter to the Commissioner (*OB1:151*):

The mass role out [*sic*] of biometric systems in this country is in its infancy. Certain functions or ideas need time to bed, to overcome obstacles and weak points before they can be utilised to their maximum potential ...

59 A busy reader might misread that statement and let the idea fix in his head that *biometrics* is in its infancy.

60 The Home Office's infant is taking a long time to grow up. Six years ago, back in May 2005, the difficulties with biometrics were described as "teething problems"¹⁸.

61 For what it's worth, the web-based biometrics fanzine *Planet Biometrics* dates the start of automated personal recognition to 1974¹⁹, in which case biometrics is not an infant at all, and not a six year-old in need of rusks and gripe water either, but a 37 year-old.

¹⁸ *ID trials reveal scan problems*, http://news.bbc.co.uk/1/hi/uk_politics/4580447.stm: "Trials of ID cards have revealed problems with the scanning systems central to the project, it has emerged ... "Biometrics" such as fingerprints, iris images or face scans will be used for the cards but the trials found that not all people could use all the systems ... It was harder to scan the irises of black people and over-59s ... And some fingerprint scanners did not work with large fingers. Ministers say they were only "teething" problems and the technology is on track".

¹⁹ *Automated Personal Identification*, <http://www.planetbiometrics.com/article-details/i/62/>: "This book is a rare and exciting find in the US Library of Congress. It is one of the very earliest analyses of automated personal identity technology and was written at the birth of what we now know as the modern biometrics industry. Despite being written in 1974, the authors saw with impressive clarity many of the issues that remain today as some of the most difficult problems to solve".

- 62 Actually, the first attempts to automate face recognition seem to go back to the mid-1960s²⁰, which pretty well makes biometrics a middle-aged gent, ...
- 63 ... a middle-aged gent who cannot be allowed to speak, according to the Home Office, because if he so much as opens his mouth he will undermine the fight against crime (*OB1:144-6*), subvert immigration controls (*OB1:146-7*) and diminish the reputation and the balance sheet of the Home Office, IBM, Sagem Sécurité and any number of other biometrics suppliers (*OB1:147-51*).
- 64 So, don't be fooled – biometrics is not in its infancy.
- 65 Pakistan have been rolling out biometrics technology *en masse* since 2000²¹, not that it seems to have helped secure their borders, fight crime, counter terrorism or improve the efficiency of public services.
- 66 Mass roll-out in the UK is not in its infancy either. UKPS/IPS have been producing ePassports since 2006²². UKBA have been producing biometric residence permits since November 2008²³.
- 67 What the Home Office said in their witness statement is, therefore, not obviously true. The mass roll-out of biometrics in the UK is not in its infancy. It's more like astrology. It's been around for ages and it's not a bad idea but it just happens not to work.
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²⁰ Facial recognition system, http://en.wikipedia.org/wiki/Facial_recognition_system#Early_development

²¹ Pakistan National Database & Registration Authority, *Profile*, http://www.nadra.gov.pk/index.php?option=com_content&view=article&id=1&Itemid=3

²² National Audit Office *Identity and Passport Service: Introduction of ePassports*, <http://dematerialisedid.com/PDFs/0607152.pdf> Don't miss the NAO's Appendix Six, in which they chronicle IPS's Rolls-Royce budgeting skills: "Over the course of planning the project, the Identity and Passport Service prepared a number of cost-benefit calculations. The cost-benefit analysis considered at the third Gateway Review in June 2004 estimated the project would involve a net cost to the UK economy of between £100 million and £344 million depending on the chosen solution. By October 2005, the net cost was replaced by an estimated net benefit to the UK of £2.0 billion for the period 2003-04 to 2010-11. The final version of the business case, prepared in February 2006 was the most detailed and sought to quantify just one of the benefits ascribed to ePassports – the UK's continued participation in the US Visa Waiver scheme. This reduced the estimated net benefit to the UK economy to £89 million for the same period".

²³ No scanners to read ID cards, <http://www.guardian.co.uk/politics/2008/nov/30/idcards-civilliberties>