

B E T W E E N :

DAVID MOSS

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

**REPLY TO THE NOTICE OF APPEAL
BY THE SECOND RESPONDENT**

Introduction

1. On 3 May 2011 the First-tier Tribunal (Information Rights) ('the Tribunal') ordered that the Home Office be joined as a party to this appeal if so advised, and directed that the Home Office, if so joined, should serve a Reply to the Notice of Appeal on or before 22 May 2011.
2. The Home Office were confirmed as the Second Respondent by the Tribunal on 9 May 2011.
3. The background to the appeal and relevant extracts from the legislation are set out in the Information Commissioner ('IC')'s Decision Notice of 28 February 2011 and the IC's Reply to the Notice of Appeal dated 26 April 2011. The appeal concerns a request for information made by the Appellant on 6 January 2010 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.”

4. The Home Office withheld that information as exempt under sections 31(1)(a), 31(1)(e), 41(1) and 43(2) FOIA. In the Decision Notice the IC concluded that the exemption provided by section 41(1) FOIA was applied correctly and that the Home Office was not required to disclose the information. As that finding related to the entirety of the information in question, it was not necessary for the IC to go on to consider the other exemptions relied on by the Home Office.
5. The Home Office supports the position of the IC in this appeal and invites the Tribunal to dismiss the appeal. Insofar as the Tribunal may disagree with the IC’s conclusion on section 41(1) FOIA, the Home Office seeks to maintain its reliance also on sections 31 and 43 FOIA.

The issue

6. 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). The Appellant invites the Tribunal to reach a conclusion on that matter and suggests that the Decision notice could be varied to provide for ‘a trusted authority’ (the Appellant suggests the Office for National Statistics) ‘to publish its independent assessment of the procurement exercise in this case’.
7. As the IC’s Response points out, the appropriateness or otherwise of the Home Office’s procurement exercises are not matters within the jurisdiction of the Tribunal. The Tribunal’s role is to determine whether the Decision Notice was in accordance with the law (i.e. FOIA) or involved an incorrect exercise of discretion by the Commissioner. While the general public interest in transparency and accountability may be relevant to the Tribunal’s assessment under FOIA, 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.

8. The only legal issue in this case is whether the IC was correct to find that the requested information was, at the time of the request, exempt information under section 41 FOIA, i.e. information obtained by the public authority from any other person, the disclosure of which would constitute an actionable breach of confidence. 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.

9. The Appellant does not appear to dispute that the requested information was obtained by the Home Office from another person, i.e. IBM. In relation to whether its disclosure in response to the request would give rise to an actionable breach of confidence, the GoA, taken together with the Appellant's Reply to the IC's Response, suggest that the Appellant:
 - (i) takes issue with the IC's finding that the information was provided to the Home Office subject to an obligation of confidence; and
 - (ii) considers that the Home Office would have a defence of public interest to a claim for breach of confidence.

Obligation of confidence

10. In his Reply to the IC's Response, the Appellant questions whether there was a 'confidentiality agreement' between the Home Office and IBM. He argues that:

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

11. However, 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.

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...”

13. In the present case the IC concluded that the circumstances under which the requested information was provided to the Home Office imported an obligation of confidence. In particular, the IC noted that:
 - (i) both the Home Office and IBM considered that the information was provided in confidence and would remain confidential;
 - (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; and
 - (iii) the Report in question was marked as ‘Restricted’.

14. On that basis, the IC concluded that IBM would have held a legitimate expectation that the Home Office would maintain the confidentiality of the information.

15. The IC was correct to do so. The circumstances described, and the nature of the information, confirm that it was viewed as confidential by IBM and the Home Office, and by those third parties who had provided information to IBM. Contrary to the GoA, the absence of an explicit confidentiality agreement is not an indication of the absence of a duty of confidence. The Home Office considers that it was placed under a duty of confidence when it received the information and that the information is fairly and reasonably to be regarded as confidential.

Public interest defence

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.
17. The test for such a public interest defence has been established by the Courts. In *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) Lord Phillips CJ, handing down the judgment of the Court of Appeal, stated, at [67-68]:

‘There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. 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. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament,

there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.

68 For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. 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.'

18. In the present case, the Home Office submits that there are no strong public interest factors in favour of publication and that, in all the circumstances, it is in the public interest that the duty of confidence arising between the Home Office and a major commercial supplier should not be breached.
19. The Appellant argues that disclosure is in the public interest. 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; (ii) doubts over the reliability of particular types of biometric data; (iii) large amounts of public money having been spent on the plans for the national identity scheme and other biometrics schemes; and (iv) a general public interest in increasing accountability and transparency.
20. As the IC points out in his Response, however: *'the Report includes information about competitive trials developed and run by IBM and about the systems of the successful and unsuccessful bidders. In this context it is unclear what exactly the Appellant considers the Report will shed any light on as regards procurement processes, either in general or those processes in this particular case'*.
21. Thus, even if there was some legitimate doubt about the 'appropriateness' of the Home Office's procurement exercise leading to the appointment of IBM, disclosure of the requested information would not assist in clarifying those doubts. The Home Office is, in any event, confident that its procurement process was fully compliant with UK and EU public procurement law. The

Appellant has not provided any evidence to the contrary. If the procurement process had been flawed, it is likely that one of the unsuccessful bidders would have challenged it; that has not happened.

22. While the Home Office would accept that there is a legitimate scientific debate about the use of certain types of biometric data, and that there is a general public interest in transparency and accountability in relation to significant public expenditure, in this context those general matters do not outweigh what the Court of Appeal has referred to as the 'important public interest in the observance of duties of confidence'.
23. In addition to the general important public interest in respecting duties of confidence it is also relevant to note the public interest in ensuring that the commercial interests of the Home Office, as one of the largest government departments, are not damaged by the unexpected or inappropriate disclosure of material provided under circumstances giving rise to a duty of confidence. As the IC noted in the Decision Notice, paras 26 and 28, there is a public interest in ensuring that the Home Office can effectively carry out the process of testing technology on which public funds are to be spent. That process is intended to ensure that public funds are spent appropriately. If commercial organisations were discouraged from participating in that exercise or from providing commercially confidential material for that purpose, it would prejudice the Home Office's ability to carry out that important function, contrary to the public interest.
24. Any consideration of the public interest based on the right to freedom of expression under Article 10 ECHR (as Phillips LCJ's reasoning in *HRH Prince of Wales v Associated Newspapers Ltd* suggests is the case for the public interest defence to a breach of confidence) must also take into account the fact that disclosure would amount to an interference with the privacy and property rights of IBM and the other companies identified in the information, under Article 8 ECHR and Article 1 of the First Protocol to the ECHR (see *Veolia ES Nottinghamshire Ltd v Nottingham County Council* [2010] EWCA Civ and *Nottinghamshire County Council v Information*

Commissioner & Veolia ES Nottinghamshire Limited & UK Coal Mining Limited
[EA/2010/0142]).

25. In the absence of any evidence of wrongdoing or misapplication of public funds, or some other compelling public interest in favour of disclosure, the Home Office does not consider that disclosure would be a justified interference with the ECHR rights of IBM or the other affected companies. In particular, it is hard to see how such disclosure could be said to be 'necessary in a democratic society'.
26. The IC found in the Decision Notice that disclosure would harm IBM, since that company is itself subject to undertakings of confidentiality given to other organisations in relation to the content of the requested information. The detriment that would be caused to the confider of the information, and the prejudice that may thereby be caused to the ability of the Home Office to secure the services of the best quality suppliers, are important public interest factors weighing against disclosure.
27. Overall, the Home Office submits that the IC was right to observe in the Decision Notice that an obligation of confidence should not be overridden on public interest grounds lightly and that there must be specific and clearly stated factors in favour of disclosure to outweigh the public interest in the maintenance of confidences.
28. In this case there is no public interest factor, or combination of factors, sufficiently strong to outweigh the protection the law affords to material provided under a duty of confidence. The Home Office would therefore not have a valid public interest defence to a claim for breach of confidence, meaning that the absolute exemption in section 41 FOIA is engaged.

Other exemptions

29. As referred to above, in the event that the Tribunal disagrees with the IC on the application of the exemption in section 41 FOIA, the Home Office would seek to

maintain its previous reliance on the exemptions in sections 31 and 43 FOIA. However, the Home Office would invite the Tribunal to determine the section 41 issue as a preliminary issue, since if that is determined in the IC's favour there will be no need to go on to consider any other exemptions.

Conclusion

30. The Grounds of Appeal do not establish that the Decision Notice was “not in accordance with the law” or that the IC “ought to have exercised his discretion differently”. The Tribunal should therefore dismiss the appeal.

31. The Appellant has requested an oral hearing. However, given the relatively small amount of information in issue and the well-established legal principles to be applied by the Tribunal to information covered by section 41 FOIA, it would be disproportionate and would involve significant unnecessary cost if the case were to be determined at an oral hearing. Like the IC, the Home Office would therefore invite the Tribunal to determine the appeal on the papers.

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19 May 2011