

**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

B E T W E E N:-

DAVID MOSS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

RESPONSE

BY THE INFORMATION COMMISSIONER

Reference to paragraph numbers in the Commissioner's Decision Notice are in the form e.g. §21 DN

Introduction

1. This Response is served in accordance with Rule 23 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the **2009 Rules**)¹.
2. Mr David Moss, the **Appellant**, is appealing against the decision notice dated 28 February 2011 with reference FS50320566 of the Information Commissioner (the **Commissioner**) which related to a request for

¹ http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091976_en.pdf as amended by http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100043_en.pdf. A consolidated version of the Rules is available at <http://www.tribunalsservice.gov.uk/Tribunals/Documents/Rules/GRCRulesConsolidated.pdf>

information made by the Appellant to the Home Office on 6 January 2010.

3. The appeal is brought under section 57 of the Freedom of Information Act 2000 (**FOIA**). The Commissioner intends to oppose this appeal. The grounds upon which he relies are set out below.

Legislative Framework

Right of access to information

4. The right of access to information held by public authorities under FOIA came into force on 1st January 2005.
5. Under section 1(1) of FOIA a person who has made a request to a 'public authority' for information is, subject to other provisions of FOIA:
 - a. entitled to be informed in writing whether it holds the information requested (section 1(1)(a) FOIA), and
 - b. if it does, to have that information communicated to him (section 1(1)(b) FOIA).
6. The duty to provide the requested information imposed under section 1(1)(b) will not arise where the information is itself exempted under provisions contained in Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempted from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (this is the **public interest test** – see section 2(2) of FOIA).
7. Section 41(1) of FOIA provides for an absolute exemption for information:

“if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under [FOIA] by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Right to make complaint under section 50 FOIA to Commissioner

8. Under section 50(1) of FOIA, any person may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I of FOIA.
9. Except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn or abandoned, the Commissioner has a duty to consider whether the request has been dealt with in accordance with the requirements of Part I of FOIA and to issue a decision notice to both the complainant and public authority.
10. Where the Commissioner decides that a public authority has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or has failed to comply with any of the requirements of sections 11 and 17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

Right to appeal to the Tribunal (sections 57 and 58 FOIA)

11. Where a decision notice has been served, the complainant or the public authority may then appeal against the Notice under section 57 of FOIA to the First-Tier Tribunal (Information Rights) (the **Tribunal**).

12. The Tribunal's powers are set out in section 58 FOIA which provides:

“(1) If on an appeal under section 57 the Tribunal considers

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, The Tribunal shall allow the appeal ...

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

Factual Background to this Appeal

13. In April 2009 the Home Office announced that IBM had been awarded a contract to ‘continue existing UKBA fingerprinting capabilities and to run the [Identity and Passport Service] database that will store the facial images and fingerprints that are needed to keep the [UK] passport in line with international standard, as well as to support the delivery of the ID card’².

14. In October 2009, Sagem Sécurité (now Morpho) issued a press release advising that it had signed a contract with IBM to supply and maintain a biometric management solution for British travel and identity documents on behalf of the Home Office’s Identity and Passport Service³. The company explained in that press release that it would be providing multibiometric facial and fingerprint recognition technology that had been ‘assessed for speed, accuracy and cost in competitive trials developed and run by IBM ...’.

Request by Complainant

² Press release issued by Home Office – Appellant’s Evidence E4.1

³ Press release issued by Sagem Sécurité – Appellant’s Evidence E5.1

15. On 6 January 2010 the Appellant wrote to the Home Office making the following request:

*“Please provide 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.” (the **Report**)*

16. There was some delay in the Home Office issuing a refusal notice under section 17 FOIA (see §§3-4 DN) and it responded substantively on 17 March 2010. In its response (the **Refusal Notice**) the Home Office relied on sections 31(1)(a), 31(1)(e), 41(1) and 43(2) FOIA to withhold the information that had been requested.
17. On 3 April 2010 the Appellant sought an internal review of the response he had received. On 17 June 2010 the Home Office responded with the outcome of the internal review. In its response the Home Office acknowledged that there had been a failure to respond to the Appellant’s request for information within the statutory time period and that it had incorrectly advised that section 41(1) was a qualified exemption⁴.
18. On 1 July 2010 the Appellant complained to the Commissioner challenging the Home Office’s decision to withhold the Report.

The Commissioner’s Investigation and Decision

19. On 15 October 2010 the Commissioner contacted the Home Office and asked for a further explanation about the exemptions cited and a copy of the withheld information. The Home Office responded substantively on

⁴ As noted above at paragraph 7, it is in fact an absolute exemption.

15 December 2010, providing a copy of the Report, namely one entitled 'The National Identity Scheme, Biometric Performance Demonstration'⁵.

20. The Commissioner issued a decision notice dated 28 February (the **Decision Notice**). The Decision Notice concluded at §33 DN that:
- a. All the information withheld was exempt under section 41(1) FOIA; but
 - b. The Home Office had failed to comply with certain procedural aspects, namely those at sections 17(1)(c) and 17(3)(b) FOIA.
21. In reaching his decision about section 41, the Commissioner considered the two elements of that section, both of which must be satisfied for information to be exempt from disclosure under section 41(1) FOIA. The Commissioner found that the information in the Report had been provided to the Home Office by a third party (IBM) (see §12 DN). As such, section 41(1)(a) was satisfied.
22. The Commissioner then went on to consider whether disclosure of the Report would constitute a breach of confidence actionable by IBM or any other person. The Commissioner decided that there would be an actionable breach of confidence by IBM or any other person because:
- a. The information in the Report had the necessary quality of confidence:
 - (a) because there was no evidence that it had been made otherwise accessible and the Home Office and IBM had suggested that it had not been (§14 DN); and

⁵ See paragraph 10 DN which confirms the title of the report in question.

- (b) given its content and the stance of IBM as regards disclosure under FOIA, the information in the Report was more than trivial (§§15-17 DN);
- b. Although there was no evidence of an explicit agreement between the Home Office and IBM that the information would remain confidential, the Home Office had stated that IBM considered that the information had been provided in confidence (§19 DN). Furthermore, the Home Office had stated that IBM considered that the information in the Report had been provided to IBM by other organisations subject to an explicit obligation of confidence and there was correspondence between the Home Office and IBM in which IBM had referred to such agreements (§20 DN). In view of this, the Commissioner concluded that there was a legitimate expectation that the information within the Report would not be disclosed by the Home Office (§§18-21 DN);
- c. While it was not necessary to demonstrate detriment to the confider, there was evidence in this case that disclosure of the information in the Report would render IBM in breach of its agreements with the third parties (§22 DN), which indicated that disclosure of the Report would be detrimental; and
- d. For the reasons set out at §§24-29 DN there was no public interest defence which would mean that the breach of confidence was no longer actionable. (As noted at §24 DN, a public interest defence would apply if the public interest in disclosure of the information exceeds the public interest in maintenance of the confidence; this was to be contrasted with the public interest test under section 2(2) FOIA⁶.)

⁶ See paragraph 6 above

The Notice of Appeal

23. In his Grounds of Appeal (the **Grounds**) the Appellant does not seek to dispute the Commissioner's findings about section 17 FOIA. The Appellant instead complains that the Commissioner was wrong not to order disclosure of the Report because disclosure of it would be important for informing the public about the Government's procurement processes and the appropriateness of them (see in particular §§9-11 Grounds).

The Commissioner's response to the Grounds of Appeal

24. Generally, the Commissioner relies on the Decision Notice as setting out his findings and the reasons for those findings. The Commissioner sets out below his response in respect of the Appellant's ground of appeal.

25. The Commissioner's decision was that the whole of the Report was exempt under section 41(1) FOIA. The Appellant has failed to explicitly argue how the Commissioner's decision on this was wrong, such that the Report should be disclosed. By referring to the public interest in his Grounds (for instance at §§7-9 Grounds) it seems that the Appellant is seeking to argue that there is a public interest defence in disclosure of the Report. The Commissioner has thus identified this point as the Appellant's ground of appeal and this Response is prepared on that basis.

26. The Commissioner does not accept that there is a public interest defence to disclosure of the Report. The Commissioner remains of the view that the public interest in disclosure of the information does not exceed the public interest in maintenance of the confidence in this particular case.

27. The Appellant appears to summarise his principal argument at §9 Grounds: that the appropriate conduct of the Government's procurement of technology is relevant in this particular case. It appears that the Appellant's appeal is very much focussed on his concerns about the procurement processes of the Home Office, in particular, as regards the procurement of technology.
28. The Commissioner rejects the Appellant's argument that the public interest in disclosure of the Report would so outweigh the public interest in maintenance of the confidences. This is because the Report gives 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. Consequently, the Commissioner disputes that the public interest defence would be applicable here. It should be remembered that the issue when considering whether disclosure is permitted (because section 41(1) FOIA does not apply) is to what extent the alleged public interest defence applies to the information in dispute (i.e. that actually in the Report).
29. It should also be noted that what is to be considered is the position at the time of the request. Accordingly, events which occurred after the time of the request (e.g. the Identity Documents Act 2010 and its provisions repealing identity cards) would not be relevant when considering disclosure of the Report pursuant to the Appellant's FOIA request in January 2010.
30. Moreover the Commissioner considers it would be of assistance to highlight at this juncture that the Appellant's 'Suggested Variation' to the Commissioner's Decision Notice is not possible. The Commissioner

notes in particular that the Appellant suggests at §21 Grounds that he suggests that the Decision Notice be varied so that 'a trusted authority should publish its independent assessment of the procurement exercise in this case'. The Commissioner can see that the Appellant has particular concerns about the way that technology is procured by Government in general and in relation to this particular case. However, the kind of varied decision notice suggested by the Appellant is not one that the Commissioner, nor the Tribunal, have any powers to issue. The Tribunal's powers are set out at section 58 (see §12 above).

Mode of hearing

31. The Commissioner notes that the Appellant has indicated on his Notice of Appeal form that he would like an oral hearing of this matter. In accordance with rule 27(2)(e) of the 2009 Rules, the Commissioner states that at this stage he would be content for this case to be dealt with without a hearing, if the Tribunal considers it appropriate.

Conclusion

32. The Commissioner submits that no grounds have been advanced upon which the Tribunal may overturn the Decision Notice.

33. In light of the above, the Commissioner invites the Tribunal to dismiss the appeal.

26 April 2011

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