

**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**

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**WRITTEN SUBMISSIONS  
ON BEHALF OF THE INFORMATION COMMISSIONER**

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*Reference to paragraph numbers in the Commissioner's Decision Notice are in the form e.g. §21 DN. Reference to pages in the open bundle are in the form e.g. [23].*

**Introduction**

1. The Commissioner provides these written submissions pursuant to paragraph 10 of the Directions of the Tribunal dated 9 June 2011, as amended by the Tribunal's email of 18 July 2011.
2. The Commissioner relies upon the position he has taken in his Decision Notice FS50320566 of 28 February 2011 [1-11], and in his Response [36-46]. The Commissioner continues to rely on those other documents and does not intend in these submissions to repeat all of the points set out previously. The purpose of these submissions is to provide an

outline of the Commissioner's position on the Appellant's appeal, particularly in view of the evidence now provided in this case.

### **The request for information**

3. The request for information which has given rise to this appeal was made by the Appellant on 6 January 2010 in the following terms:

*"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]<sup>1</sup> so that the public can assess for themselves the reliability of the technology." (the **Report**<sup>2</sup>) [106-108]*

4. In its refusal notice the Home Office relied on sections 31(1)(e), 41(1) and 43(2) FOIA to withhold the information that had been requested [114]. The Home Office's position at internal review was similar, but it also cited section 31(1)(a) [118-119]. The Home Office refused to provide the Appellant with any of the information in the Report.
5. 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**

6. 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 [139-141]. The Home Office responded substantively on 15 December 2010 [143-157], providing a copy of the Report, namely one entitled 'The National Identity Scheme, Biometric Performance Demonstration'.

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<sup>1</sup> Contrary to the Appellant's assertion at 135 [87], the Commissioner inserted these words in an attempt to provide some context for the request.

<sup>2</sup> A summary of the content of the Report is at paragraph 16 [314]

7. The Commissioner issued decision notice FS50320566 dated 28 February 2011 (the **DN**). The DN concluded at §13-30 DN that all the information withheld was exempt under section 41(1) FOIA because the Commissioner found:
  - (a) The information had been provided to the Home Office by a third party (§12 DN);
  - (b) The information had the necessary quality of confidence (§14-17 DN);
  - (c) The information had been imparted in circumstances importing an obligation of confidence (§18-21 DN);
  - (d) Disclosure of the information would result in detriment to the confider (§22 DN); and
  - (e) There was no public interest defence to disclosure of the Report which would mean that the breach of confidence was no longer actionable (§24-29 DN).

### **Grounds of Appeal**

8. In his Response [36-46] the Commissioner identified one ground of appeal in the Appellant's Grounds [12-35], namely that the Appellant contended the Commissioner had been wrong to find that there would be no public interest defence to the disclosure of the Report (**Ground 2**).
9. Since then, the Appellant appears to have broadened his grounds to argue that the Report was not obtained in confidence (see, for instance [48]). Thus this issue is addressed in brief below as **Ground 1**.
10. For completeness, the Commissioner will address each of these Grounds in turn in these submissions.

Ground 1 – the Report was not obtained by the Home Office “in confidence”

11. The Appellant appears to argue that the Commissioner was wrong to find that the Report was provided to the Home Office in confidence (see, for instance [48]).
12. The Commissioner rejects this assertion. As set out clearly in his DN and in his Response, it is not necessary for there to be a confidentiality agreement or other contractual provisions guaranteeing confidentiality for information to have the necessary quality of confidence; the information needs to have the ‘necessary quality of confidence’.
13. Moreover, in the course of the Commissioner’s investigation, the Home Office set out that IBM had legal agreements regarding confidentiality in place with the third party suppliers which took part in the tests (see, for instance, [144 & 156-157]).
14. It is also clear that there was an agreement in place between IBM and the Home Office [318-345] covering ‘Confidential Information’<sup>3</sup>. The evidence on behalf of the Home Office at paragraph 18 [314] explicitly states that it was acknowledged that the Report was ‘provided subject to an understanding of confidentiality’.
15. Another key point is that there is no direct link between the Home Office and the third party suppliers. The third party suppliers were reliant on the non-disclosure agreements in place with IBM to specifically protect their commercially sensitive information (paragraph 3, [353]). Disclosure of the information in the Report would expose IBM to unlimited liability (paragraph 40 [357]), and hence disclosure of the Report would be of detriment to the ‘confider’ (i.e. IBM) in this case.

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<sup>3</sup> Although it appears the definitions part of this agreement is not included in the bundle.

16. The Tribunal also has evidence on behalf of the Home Office about the concerns it has if the Report (or any part of it) were released [paragraphs 27-28, 316]. That evidence display a real ongoing concern that the release of information would have on the potential contractors in the future. This further supports the assertion that the information in the Report was provided in confidence.
17. There is correspondence from two of the third party suppliers involved [400-401 & 420] which sets out that they considered the information provided would be kept confidential. It is clear from that correspondence that they are keen to protect the information and that they consider it confidential.
18. In view of this, the Commissioner submits that the information within the Report has the necessary quality of confidence. Accordingly, this ground of appeal must fail.

## Ground 2

19. The Appellant appears to contend that there is a strong public interest in disclosure of the Report. From this, it appears that the Appellant is arguing that, even if the information had been provided in confidence, there would be a public interest defence to disclosure.
20. A public interest defence would only apply if the public interest in disclosure of the information *exceeds* the public interest in maintenance of the confidence.
21. For the avoidance of doubt, the public interest considerations are not about whether disclosure of the Report might interest the public. The issue for the Tribunal therefore is whether the public interest in disclosure of the Report is stronger than the public interest in preserving

- the principle of confidentiality, and the impact that disclosure would have on the interests of the confider.
22. The key to this is consideration of the exact information in the Report. The Tribunal has been provided with a copy of the Report so that it might consider the parties' arguments in detail.
  23. The Tribunal has been presented with evidence from IBM and the bidders to suggest that they considered that the information they were providing would remain confidential (see further Ground 1 above).
  24. The Tribunal also has evidence about the likely outcomes of disclosure. This is an important factor when considering the wider principle of confidentiality referred to above at paragraph 21.
  25. At [88] the Appellant asserts that the Commissioner has not had any consideration for the public interest. This is denied. It is clear that the Commissioner did take such issues into consideration (see, for instance §24-29 DN). Yet it is not the case that the Commissioner has the 'discretion to declare the absolute breach of confidence not actionable'. Rather, a breach of confidence will only not be actionable if there is a public interest defence to disclosure of the information. In this case, the Commissioner found there would be no such public interest defence.
  26. Many of the Appellant's arguments revolve around his assertions about the procurement process, the legitimacy of the Home Office's action in spending public money and the Appellant's assertion that there is a need for an independent public body to be involved in the approval stages for government projects. This appeal is not an avenue for the Appellant to seek to argue the merits of biometrics or on the procurement process.

27. 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. Accordingly, the Commissioner considers this ground of appeal must also fail.

**Conclusion**

28. The Commissioner submits that no grounds have been advanced upon which the Tribunal may overturn the DN.
29. In light of the above, the Commissioner invites the Tribunal to dismiss the appeal.

24 August 2011