MOSS v INFORMATION COMMISSIONER & HOME OFFICE (EA/2011/0081)

RESPONSE BY THE HOME OFFICE TO THE TRIBUNAL'S NOTE OF 16 NOVEMBER 2011

Issue (i)

1. The Tribunal asks, essentially, whether in the Home Office's view there is information within the closed material that would legitimately inform public debate, serious scientific debate, or peer review as to the likely efficacy of biometric recognition systems, or which might otherwise reasonably militate in favour of disclosure as a matter of public interest. The question is posed "with regard to any defence of public interest that might or would be raised by the public authority to a claim for breach of confidence".

2. The Home Office's view on this issue is set out in its Written Submissions of 23 August 2011 at paragraphs 55-70, and in particularly at paragraph 60 as follows:

> "60. The Home Office accepts that... [the effectiveness of biometric identification technology] is a matter of public debate but denies that disclosure of the Report would make any significant contribution to it, and certainly not enough to outweigh the contrary public interests in non-disclosure. ... the Home Office accepts that it does contain information about the effectiveness of certain biometric technologies in performing certain functions. Its usefulness is limited, however, since it was prepared for the particular purpose of the NBIS procurement exercise, and the testing it records was designed only to test the effectiveness of the different technologies at meeting the procurement requirements. As Mr Swain explains (in his paragraphs 29-31 [OB355-356]), it would be less useful in assessing the general capabilities of biometric technology than other published trials. The Appellant himself seems to believe that the contents of the Report cannot provide any accurate information at all about the effectiveness of biometric technology (AR2 ¶¶59-67 [OB75-77])..."

3. Paragraphs 55-70 of the Home Office's Written Submissions address a number of different arguments regarding whether disclosure could be said to serve the public interest. For all the reasons referred to there the Home Office does not consider that it would have any valid public interest defence to an action for breach of confidence in relation to disclosure of the report.

4. The Home Office is concerned because it appears to be implicit in the Tribunal's question that the extent to which the disputed information could inform public or scientific debate about the efficacy of biometric recognition systems is particularly relevant to the application of the exemption in section 41 FOIA. That is not the correct approach in this context.

5. It is important to bear in mind that section 41 FOIA is an absolute exemption and that the exercise required to be performed by the Tribunal in relation to that exemption is not the same as the public interest balancing test which applies to qualified exemptions under section 2 FOIA (i.e. beginning with a presumption in favour of disclosure). The Court of Appeal's judgment in HRH Prince of Wales v Associated Newspapers Ltd [2006] EWHC 522 (Ch) at [67-68], quoted in the Home Office's Reply in this case [OB/1/60] emphasises, in particular, that:

> "It is not enough to justify publication that the information in question is a matter of public interest...."

and that

> "... the test to be applied ...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."

6. There is an analogy to be drawn with cases involving legally privileged information (an aspect of the law of confidence), in which the Tribunal and Courts have recognised the inbuilt public interest in protecting the confidentiality of such communications. In Calland v IC & FSA (EA/2007/0136) the Tribunal observed that it was "quite plain" from earlier Tribunal decisions that "some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential". See also BERR v O'Brien & IC [2009] EWHC 164 (QB), *per* Wyn Williams J. at [53].

7. In Foreign and Commonwealth Office (EA/2007/0092) the Tribunal recognised the need for "powerful countervailing interests" if the public interest in protecting lawyer/client confidences was to be overridden, and noted, in particular, that:

> "There can be no hard and fast rules but, plainly, [the countervailing public interest] must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained.
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> 30 The interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned..."

8. No doubt there is all manner of confidential information held by public bodies and private persons which would be of interest to the community at large or would

inform public debate on a particular issue. However, the fact that information may be of interest to the public or scientific community is not a sufficient, or a good, reason, to justify breaching a duty of confidence protected by law.

9. Thus, even if the disputed information in this case would contribute to public or scientific debate on the efficacy of biometrics (which, for the reasons explained in the Home Office's submissions and in the evidence of Mr Swain, is not accepted), such a hypothetical and frankly peripheral benefit of making a minor contribution to public debate would not provide the Home Office with a successful defence to an action for breach of confidence. Nor could it outweigh the damage that would be caused to the interests of the suppliers concerned and the Home Office, and consequently the public interest in maintaining confidences and ensuring the effectiveness of government procurement processes.

10. In so far as there is a public interest in understanding how the trial conducted by IBM was carried out the Home Office agrees with the evidence of Mr Swain at paragraphs 26 and 29-31 of his witness statement. He makes the point that the joint presentation at [OB/6/362-397] ('the Sagem Report' referred to in the Tribunal's Note) discloses the aims, approach and methods used in the demonstration without disclosing the results or names of suppliers other than Sagem. Those who are interested in such matters can therefore understand what tests or methodology were used, and can be satisfied that Sagem's systems met the requirements of the Home Office.

Issue (ii)

11. In addition to submissions in respect of issue (i) above the Tribunal has granted permission for the Home Office and IC to serve any further submissions thought appropriate concerning section 31(1)(a), section 31(1)(e) and/or section 43(2) FOIA.

12. In its Reply in this case the Home Office invited 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 other exemptions [OB/1/63-64]. If the issue is determined against the IC it is possible that the IC and/or Home Office would wish to consider an appeal to the Upper Tribunal on that discrete issue. Neither the Appellant nor IC has objected to the proposal to deal with section 41 first and separately.

13. The Home Office is unsure whether by its Note the Tribunal is declining to take the suggested approach and requires full pleadings and evidence on the application of those exemptions to the disputed information. If that is so, the Home Office will need further time to prepare such evidence and submissions, in particular if – as appears from the Tribunal's note – the Tribunal wishes the Home Office to identify line by line, which parts of the disputed information are covered by which exemptions. Such an exercise will, in particular, involve consultation with IBM and the third parties referred to in the disputed information. In the interests of fairness

the Tribunal would no doubt wish the Appellant and the IC to have an opportunity to put in submissions or evidence in reply.

14. Given the extent and likely costs of that exercise, and the current state of the proceedings, the Home Office considers that it would be proportionate for the Tribunal to deal with the section 41 issue first, on the basis of the pleadings in their current form, and only if it becomes necessary, to invite the parties (including the Appellant) to make further submissions on other exemptions.

15. The Home Office's suggested approach has been made in the interests of saving time and costs, and dealing with the appeal in a proportionate manner and in accordance with the overriding objective. Naturally if the Tribunal takes a different view the Home Office will endeavour to provide submissions and further evidence as quickly as possible, but given the need to consult with the third parties affected, would ask for 21 days from any further direction to do so.