IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

Ref: EA/2011/0081

B E T W E E N :

DAVID MOSS

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

SUBMISSIONS BY THE SECOND RESPONDENT
FOR HEARING, 24 FEBRUARY 2012

Introduction

1. These submissions set out the Home Office's position on the matters identified in the Tribunal's Directions of 12 December 2011 ("the Directions").

2. The Tribunal has detailed pleadings and lengthy written submissions in this case, as well as a significant amount of evidence and other documentary material. In accordance with the Directions these submissions are relatively brief. Naturally the Home Office is willing to provide more detailed submissions on any particular point at, or following, the hearing.

3. The headings in these submissions reflect the relevant paragraph number in the Directions.

3(i) - role of informing the public in relation confidential information

4. In its Note dated 16 November 2011 the Tribunal asked whether there was information within the closed material that would legitimately inform public or scientific debate on the efficacy of biometric recognition systems. The question was 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".

5. The Home Office responded by written submissions on 28 November 2011. The content of those submissions is not repeated here. Essentially, the Home Office submits that:

   (i) if it were to publish the information without consent it would not have a valid public interest defence to a claim for breach of confidence brought by IBM or its suppliers. The information is covered by the exemption in section 41 FOIA, which is absolute and not subject to any further public interest "balancing" test under FOIA;

   (ii) the disputed information is unlikely to inform public debate as to the efficacy of biometrics to any significant degree, given the narrow and specific purpose for which the information was prepared by IBM, its limited scope, and having regard to other information that is already in the public domain; and

   (iii) even if the disputed information were to have some value in terms of informing public or scientific debate, that would not provide ground for a valid public interest defence to a claim for breach of confidence. The fact that something may be of interest to the public does not mean that it is *in the public interest* that the obligation of confidence owed by the Home Office to IBM and its suppliers should be overridden, as the Court of Appeal's judgment in *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) at [67-68] makes clear.

6. The Directions refer the parties to Coppell on *Information Rights* (3rd) at §§25-010 to 25-029.

7. §§25-010 to 25-023 of Coppell are concerned with the three "essential" elements necessary for an actionable breach of confidence. The Home Office's position on those matters has been set out in some detail already and the Home Office does not understand the Tribunal to be inviting further submissions on those points.

8. The scope of the public interest defence in the law of confidence is dealt with at §§25-024 and following. The commentary supports the Home Office's submissions on this point. In particular, at §24-025 the author[1] states that:

[1] The relevant chapter is authored by Mr Richard Spearman QC.

"The circumstances in which a public interest defence to a claim for breach of confidence may enjoy success can conveniently be considered under three headings, which may, of course, overlap:

- *— first, the public interest in the disclosure of iniquity;*
- *— secondly, the public interest in the public not being misled;*
- *— thirdly, the public interest in the disclosure of matters of public concern."*

9. As the more detailed commentary at §§25-025 to 25-026 makes clear:

   (i) the "paradigm instance" in which the defence of public interest operates is where upholding a duty of confidence would cover up wrongdoing or iniquity; and

   (ii) the public interest in the public not being misled "typically...comes into play if a public figure misleads the public, where the media may be entitled to put the record straight".

10. Neither factor is present in this case. Although the Appellant has made various assertions, there is no evidence before the Tribunal to suggest that the disputed information is being withheld to cover up wrongdoing or that any public official has misled the public in relation to the content of the information.

11. As to the third instance where the defence may operate, §25-027 of Coppell cites several cases where an obligation of confidence has been overridden in order to disclose "matters of public concern". The main examples given relate to information containing serious criticism of the value for money of a proposed public/private partnership project on the London Underground[2]; information from a whistleblower about the integrity and fairness of bookmakers[3]; and information relating to public subsidy for an airport.[4]

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[2] *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, which at first instance Sullivan J. described as "a most exceptional case".

[3] *Jockey Club v Buffham* [2003] QB 462, where the information included "relationships between all or any of the following: bookmakers, trainers, racing stables, jockeys and known criminals [and] action taken or not taken by the Jockey Club in relation to corruption".

[4] *Derry City Council v IC* (EA/2006/0014), an early Information Tribunal case where the public interest factors in favour of disclosure included that the airport was publicly subsidised but had never succeeded in covering its costs, giving rise to "legitimate questions...as to whether ratepayer's money had been well spent over the years" and where there had been "concerns raised in the past as to whether the effect of the [contract that comprised the disputed information] was to give State aid to Ryanair contrary to EC Treaty Article 87".

12. While the concept of "matters of public concern" is plainly a broad one, the public interest in disclosure of information that may make a minor addition to the public debate (such as it is) on the effectiveness of biometrics is simply not comparable to disclosure of confidential information which reveals serious mismanagement of large amounts of public money or corruption in sport.

13. Thus, even if the disputed information in this case would legitimately inform public or scientific debate on the efficacy of biometric recognition systems, that is not a matter that falls within any of the three sets of circumstances identified in Coppell "in which a public interest defence to a claim for breach of confidence may enjoy success".

14. §§25-028 to 25-029 of Coppell concern "government secrets". That terminology is also used in the Directions. However, those sections of Coppell are of no relevance because this is a case that concerns the private, commercial confidences of IBM and its suppliers, not information produced by the workings of government. Those sections of Coppell, and the case law to which they refer, deal with circumstances where the government is the claimant (usually in the form of the Attorney-General) seeking to restrain publication of confidential government information. That is not the case here: the Home Office is the potential *defendant* to an action for breach of confidence brought by IBM and/or its suppliers in respect of their commercial confidences.

3(ii) – to what extent, if any, public disclosure, including partial disclosure, would in fact inform public debate on the reliability of the relevant biometric technology

15. The Home Office's position on this issue is set out in its Written Submissions of 23 August 2011 at paragraphs 55-70 and its submissions of 28 November 2011.

16. The Home Office has given further consideration to the point in the light of the Directions. Its view remains that the disputed information is unlikely to inform public or scientific debate as to the efficacy of biometrics to any significant degree, in particular because of the "highly contextual" nature of the report (Jackie Keane w/s, para. 17).

17. The point is addressed further in the second witness statement of Mr Swain, served (in open and closed version) with these submissions. Mr Swain's evidence, which the Tribunal is invited to accept, is that general public knowledge and debate on the

effectiveness of biometric technology would not be significantly informed by disclosure of the disputed information, in particular because of the targeted purpose and very specific factors underlying its production.

3(iii) – submissions and evidence on issue (ii), i.e. concerning the application of sections 31(1)(a), 31(1)(e) and/or section 43(2) FOIA

18. The Home Office has invited the Tribunal to consider section 41 FOIA as a preliminary issue since that was the only exemption considered in the IC's Decision Notice and doing so may avoid the additional exercise of going on to consider the application of the other exemptions the Home Office relies on in the alternative.

19. However, in the light of the Tribunal's Directions, and for the avoidance of doubt, the Home Office's position in relation to those additional exemptions is as follows:

(i) on section 31(1)(a) (prejudice to prevention or detection of crime) the Home Office relies on:

(a) the explanation given in its letter to the IC dated 14 December 2010 at [OB/144-146]; and

(b) its written submissions of 23.8.11 at §§73-79;

(ii) on section 31(1)(e) (prejudice to the operation of immigration controls) the Home Office relies on:

(a) the explanation given in its letter to the IC dated 14 December 2010 at [OB/146-147]; and

(b) its written submissions of 23.8.11 at §§80-82;

(iii) on section 43(2) (prejudice to the commercial interests of any person, including the public authority holding the information), the Home Office relies on:

(a) the explanation given in its letter to the IC dated 14 December 2010 at [OB/147-152];

(b) its written submissions of 23.8.11 at §§83-89; and

(c) the evidence of Jackie Keane and Nicholas Swain.

20. The Home Office is in discussion with IBM to produce a confidential schedule identifying those parts of the disputed information covered by the exemptions in section 31(1) and 43 FOIA. For reasons previously explained, including the need to consult with third parties, this exercise is taking some time; the Home Office hopes to be in a position to provide the Tribunal with this information prior to the hearing.

21. For the avoidance of any doubt, the Home Office maintains that the entirety of the disputed information is exempt information under section 41 FOIA and a very substantial part of it is also covered by section 43(2) FOIA. IBM and the Home Office consider that any significant disclosure of the content of the report would be prejudicial to their commercial interests, in particular because commercial partners would be less willing to provide sensitive commercial information about their products in future procurement exercises.

3(iv) – submissions or evidence in brief form regarding the "other published trials" referred to in paragraph 60 of the Home Office's submissions of 23 August 2011

22. The reference to other published trials derives from paragraph 31 of Mr Swain's first witness statement [OB/356].

23. Mr Swain's second statement, served with these submissions, provides further details. It refers, in particular to trials published by the US National Institute of Standards and Technology ("NIST") and the Unique Identification Authority of India. There is a large amount of relevant information available on the Internet. The Home Office has not sought to burden the Tribunal with hard copies of the reports, but the Tribunal members are invited to consider, in particular, the reports available at http://www.nist.gov/itl/iad/ig/biometric_evaluations.cfm.

24. The Home Office notes that the Appellant's own website refers to a very substantial amount of public domain information about the effectiveness of biometrics: http://dematerialisedid.com/Evidence/Biometrics.html.

4 – partial disclosure

25. The Tribunal has invited the IC and the Home Office to make submissions on whether disclosure could be effected in the light of Mr Swain's evidence in paragraph 41 of his first statement [OB/357].

26. In that paragraph of his witness statement Mr Swain suggested that, as a bare minimum, information relating to suppliers other than SAGEM should be removed and/or the identity of the suppliers should be redacted from any information released. However, as he made clear in his evidence, such redaction would only mitigate the harm to a *very limited extent* and IBM did not therefore endorse that solution as a sufficient one to protect its commercial interests and those of its suppliers. The Home Office agrees.

27. The Home Office and IBM have given careful further consideration to this point in the light of the Directions and considered whether some limited form of the information could be disclosed when the information identified by Mr Swain is redacted, together with those parts of the report covered by the exemptions in sections 31(1) and 43(2) FOIA.

28. As set out above, the Home Office maintains that the IC was correct in this case to find that the entirety of the disputed information is exempt information under section 41 FOIA. The response to paragraph 4 of the Tribunal's directions is therefore that, while some partial disclosure would be practically possible, there is no valid public interest reason which would provide the Home Office with a defence to a claim for breach of confidence in respect of any part of the report; as a matter of law any disclosure of the disputed information would therefore be contrary to section 41 FOIA.

29. If and in so far as the Tribunal concludes that the IC's Decision Notice was wrong in law as regards the application of section 41 FOIA to the disputed information, the Home Office is in the course of preparing a schedule for the Tribunal's use, which identifies the information covered by sections 31 and 43 FOIA. As described above, a very substantial part of the disputed information is covered by section 43 FOIA.

30. Any submissions made by the Home Office on the partial disclosure proposed by paragraph 4 of the Directions are made entirely without prejudice to the Home Office's primary case that all of the information is exempt under section 41 FOIA.

31. If the Tribunal is minded to allow the appeal to the extent of ordering partial disclosure the Home Office would respectfully ask the Tribunal to issue its judgment in confidential draft and allow the Home Office to consult its commercial partners and make representations on the extent of any such proposed disclosure.

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