IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (GENERAL REGULATORY CHAMBER) (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No.EA/2011/0081

BETWEEN:-

DAVID MOSS

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

FURTHER WRITTEN SUBMISSIONS ON BEHALF OF THE INFORMATION COMMISSIONER

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1. Introduction

1. These written submissions are filed on behalf of the First Respondent, the Information Commissioner ("the Commissioner") in response to the invitation from the Tribunal in paras.3 and 4 of their Directions dated 12th December 2011 ("the Directions") to file further brief written submissions on certain issues that the Tribunal had identified.

2. These submissions are intended to supplement, rather than repeat, the submissions made by the Commissioner in his Response and Written Submissions dated 24.8.11.

3. The Commissioner notes that in relation to several of the Tribunal's questions these are principally matters for the Home Office to address or are matters which are more productively addressed first by the Home Office and only then (if appropriate) by the Commissioner. The Commissioner's role is to consider, in the course of his investigation that leads to a decision notice, the arguments and evidence submitted to him by the requester and the public authority. In assessing whether there has been compliance with Part I of FOIA the Commissioner has neither the expertise nor resources to engage in his own wider enquiries (save, occasionally, for example, as to whether a public authority

holds information or the cost of searching for information). This is particularly so in a case like this where the disputed information is of a highly technical nature.

Para.3(i) the issues raised by what is called issue (i) in the recent Home Office Submissions and in particular what can be called the role of informing the public interest in relation to information imparted to government in confidence (and in particular the requested information in this case) and/or otherwise constituting a government secret (see eg and cf Coppel: Information Rights (3rd ed.), particularly at paras.25-10 to 25-029 inclusive).

4. The exemption under FOIA, s.41 is an absolute exemption (see the inclusion of s.41 in the list of provisions under Part II of FOIA set out at s.2(3)). It is therefore not subject to the public interest test under s.2(1)(b) or 2(2)(b). Parliament could have made the s.41 exemption subject to the s.2 public interest test, but did not do so.

5. Section 41(1)(b) provides that, where s.41(1)(a) is satisfied the information will be exempt where "the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person". In considering what was meant by "actionable breach of confidence" the Tribunal held in *HEFCE v Information Commissioner & Guardian News and Media Ltd*, EA/2009/0036, at [30] (and see generally the discussion at [21-30]) that a public authority:

> "... must establish that disclosure would expose it to the risk of a breach of confidence claim which, on a balance of probabilities, would succeed. This includes considering whether the public authority would have a defence to the claim. Establishing that such a claim would be arguable is not sufficient to bring the exemption into play."

6. The applicability of the exemption under s.41, therefore, has to be considered in the light of the principles both in law and equity in relation to breach of confidence. Section 41 is intended to operate so that FOIA does not result in anyone's confidence being (actionably) breached and, conversely, public authorities not putting themselves (or others) in breach of their obligations of confidence as a result of purported compliance with their obligations under FOIA.

7. Whether there is a public interest defence in relation to a disclosure of information has to be assessed by reference to the equitable and legal principles of confidentiality, not by reference to the public interest test under FOIA, s.2. The public interest defence to an action for breach of confidence now takes account both of ECHR Article 10 rights to

freedom of expression and, conversely, rights under Article 8 (privacy) and Article 1 of the First Protocol (right to property) in relation to confidential information. The principle statement of the modern approach to the public interest defence is in *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57, per Lord Phillips of Worth Matravers CJ at [67-68]:

> "67 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.
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> 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."

8. The public interest defence will be different in a number of respects to the FOIA, s.2 public interest test, *inter alia*: (1) there is no assumption, as there is in relation to a qualified exemption under FOIA, in favour of disclosure - indeed the reverse is true as there will be a presumption against disclosure; and (2) significant weight will be attached to the importance in a democratic society of maintaining confidences. The Commissioner therefore broadly agrees with the Home Office's submissions at paras.5-7 of their Response to the Tribunal's Note of 16th November 2011.

9. The law of confidence, in particular, has accepted that the public interest defence may be made out where breach of a confidence would serve the public interest in: (1) iniquity (i.e. wrongdoing) being disclosed; (2) the public not being misled; or (3) matters of public concern being disclosed. In the present case only the last of these categories is potentially in play. The Commissioner has not been convinced that the disclosure of the requested

information would be necessary to address a pressing social concern that would sustain a public interest defence under the third heading.

10. The Commissioner considers that this is a case where the confidence is that of IBM (or of suppliers who imparted the information to IBM). This is therefore a case where the Home Office owes a duty of confidence to a third party. This is not a case of "government secrets" (as described in Coppel at paras.25-028 to 25-029).

Para.3(ii) In particular to what extent, if any, the fact of disclosure in this case including partial disclosure would in fact inform public debate on the reliability of the relevant biometric technology.

11. This question raises issues about the then current state of the debate on biometric technology (as at the time of the request and/or refusal, i.e. early 2010) and the assessment of the relative contribution to that debate that disclosure might provide. The Commissioner lacks the knowledge or expertise usefully to comment on the state of such a debate (and therefore the potential contribution that disclosure might provide) and does not have the resources to acquire such knowledge or expertise. The Commissioner respectfully suggests that the Home Office is better placed to assist the Tribunal on this issue. The Commissioner will do what he reasonably can to assist the Tribunal in the light of the Home Office's position.

12. As to partial disclosure, the Commissioner would repeat the submission just made. The Commissioner would add that when considering the s.41 exemption he addressed the disputed information as a whole, rather than considering it line by line. This was because the Commissioner did not consider that, on the face of it, there was any part of the IBM report that obviously fell outside the scope of s.41. Again, it is respectfully suggested that it is the Home Office that can address this question in the first instance.

Para.3(iii) submissions and if so advised any appropriate evidence, again, the same to be relatively brief on what is called issue (ii).

13. As set out at para.31 of the Decision Notice, given his findings on s.41 the Commissioner did not consider the claimed exemptions under FOIA, ss.31(1)(a), 31(1)(e) or 43(2) ("the Other Exemptions"). The Commissioner's stance on those exemptions remains one of neutrality.

14. Given his stance of neutrality and the fact that the Home Office appear to claim the Other Exemptions in relation to the whole of the disputed information, the Commissioner has not considered it proportionate to go through the IBM report line by line to assess the applicability of the Other Exemptions. The Commissioner respectfully suggests that any submissions could only usefully be made as to which parts of the IBM report might be exempt pursuant to the Other Exemptions if and when the Home Office identifies such parts.[1]

Para.3(iv) in particular, submissions or evidence, if so advised, but again, in brief form regarding the "other published trials" referred to in paragraph 60 of the Home of Office's submission of 23 August 2011.

15. The Commissioner has no substantive submissions to make on this issue, still less evidence to provide. Again, this appears to be an issue for the Home Office to address, or at least for the Home Office to address in the first instance, as it is they who referred to the "other published trials". The Commissioner will consider any submissions or evidence provided by the Home Office.

Para.4(i) Whether disclosure could be effected [on the basis that]all information relating to suppliers other than the successful sub-contractor be removed.

16. As noted above, the Commissioner has not gone through the IBM report on a line by line basis considering whether information on unsuccessful bidders could be removed. The Commissioner would, however, observe that:

    1) The suggestions by Mr Swain at para.41 of his witness statement are made on the basis that they are ones that he "would not endorse" and would mitigate the harm to only "to a very limited extent".

    2) This is an issue to be more proportionately addressed when the Home Office (presumably together with IBM or the suppliers) identify what information actually "relates" to the unsuccessful suppliers – the full extent of such

[1] The Home Office's letter to the Commissioner of 14th December 2010 (pages 143-152) provides "examples" of types of information in relation to which the Other Exemptions are said to apply, but does not specify individual passages of the disputed information (and neither do the Home Office's Response or Written Submissions).

information may not otherwise be obvious to the Commissioner or the Tribunal.

3) This exercise could well result in the redaction of a substantial amount of the IBM report rendering the rest meaningless or of little value in service of the public interest favouring disclosure.

4) To the extent (and only to the extent) that any information in the report appears in the NIST presentation (pages 362-397) confidentiality *may* have been lost in such specific information, although this would depend on how widely circulated the NIST presentation was at the material time.

Para.4 (ii) *Whether disclosure could be effected [on the basis that] the identity of the suppliers be redacted from any information released.*

17. Again, the Commissioner considers that this is an issue that the Home Office is better placed to address or at least to address first. The Commissioner does, however, note that: (1) in a market where there are a limited number of suppliers a particular supplier may well remain identifiable even after their name has been removed from the disputed information; and (2) any harm that would arise from having relevant information in the public domain (even if not attributable to a particular supplier) would still seem to arise.

Para.4(iii) *Whether disclosure could be effected [on the basis that] there be redacted any other passages apart from (i) to (ii) in the light of reliance being placed by the public authority upon each of the following exemptions, namely section 31(1)(a) and/or section 31(1)(e) and/or section 43(2) of FOIA.*

18. Again the Commissioner repeats his stance in relation to the Other Exemptions set out in response to para.3(iv) above.

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