IN THE FIRST-TIER TRIBUNAL **Ref: EA/2011/0081**
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

B E T W E E N :

DAVID MOSS

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

WRITTEN SUBMISSIONS
OF THE SECOND RESPONDENT

[*Square brackets refer to pages in the open bundle 'OB' or closed bundle 'CB'.*]

Introduction

1. The background to the appeal and relevant extracts from the legislation are set out in the Information Commissioner ('IC')'s Decision Notice of 28 February 2011 **[OB1-11]** and the IC's Reply to the Notice of Appeal dated 26 April 2011 **[OB36-46]**. The appeal concerns a request for information made by the Appellant on 6 January 2010 for:

> "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][1] so that the public can assess for themselves the reliability of the technology."

2. The Home Office withheld that information as exempt under sections 31(1)(a), 31(1)(e), 41(1) and 43(2) FOIA. In the Decision Notice the IC concluded that the exemption provided by section 41(1) FOIA was applied correctly and that the Home

[1] The Home Office notes the Appellant's submission **[OB86-87]** that this is a gloss by the IC and does not fully describe the content of the Report or the information the Appellant was seeking. There does not however seem to be any suggestion that the IC considered the wrong Report.

Office was not required to disclose the information. As that finding related to the entirety of the information in question, it was not necessary for the IC to go on to consider the other exemptions relied on by the Home Office.

3. The Home Office supports the position of the IC in this appeal and invites the Tribunal to dismiss the appeal. In so far as the Tribunal may disagree with the IC's conclusion on section 41(1) FOIA, the Home Office seeks to maintain its reliance also on sections 31 and 43 FOIA.

The issues

4. The Appellant's case has evolved over the course of his Grounds of Appeal ('GoA') and three Replies ('AR1', 'AR2', and 'AR3'). The Home Office understands his submissions to be broadly as follows.

5. In relation to section 41(1) FOIA the Appellant appears to accept that the requested information was obtained by the Home Office from another person but submits that the appeal should be allowed because:

   (i) The IC has conducted an inadequate investigation, failed to seek or find relevant evidence, and failed to challenge the Home Office's evidence.

   (ii) The IC has applied the wrong legal principles in determining whether the disclosure of the information to the public (otherwise than under FOIA) by the Home Office would constitute an actionable breach of confidence.

   (iii) In any event the information is not confidential because it lacks the quality of confidence and was not imparted in circumstances importing an obligation of confidence and because it is trivial and / or useless.

   (iv) Even if the information is confidential there would be no claim for breach of confidence because disclosure would not be detrimental to IBM or its suppliers.

(v) The Home Office would have a defence of public interest to any claim for breach of confidence and / or there are or ought to be other reasons why such a claim would not be actionable.

6. In relation to section 31(1)(a) and (e) FOIA the Appellant appears to submit that the exemption does not apply because:

(i) Biometric technology does not help to prevent or detect crime or operate immigration controls.

(ii) The Home Office's position is contradictory.

7. In relation to section 43(2) FOIA the Appellant appears to submit that the exemption does not apply because:

(i) The Home Office could counteract any prejudice to its commercial interests by cancelling spending on biometric technology.

(ii) Disclosure might result in savings of public money.

(iii) It is impossible to prove that anyone's commercial interests would be prejudiced.

(iv) There is evidence that disclosure would not prejudice contractors' commercial interests.

8. The Appellant also appears to make several general submissions to the effect that in any event the Tribunal should order the Home Office to disclose the requested information because:

(i) The Home Office has conducted itself unreasonably in these proceedings.

(ii) The Home Office may have committed actionable breaches of confidence.

(iii) IBM may have committed actionable breaches of confidence.

(iv) The Tribunal ought for reasons of public policy to order disclosure.

9. Finally the Appellant raises the possibility of some form of limited disclosure, though the Home Office is uncertain whether any submission is made about it.

Section 41(1)

10. The IC found (in his Decision Notice, paragraphs 11-30 **[OB4-7]**) that the Report was exempt from disclosure by virtue of section 41(1) FOIA, which provides:

> "Information is exempt 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 this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

11. The Home Office relies on that exemption and submits that the IC's decision was correct.

<u>The IC's investigation</u>

12. Throughout the Appellant's statements of case there is a suggestion that the IC has conducted an inadequate investigation, failed to seek or find relevant evidence, and failed to challenge the Home Office's evidence (AR1 ¶¶3-7 **[OB48]**, AR2 ¶¶77-80 **[OB78]**, 121 **[OB84]**, 131 **[OB86]**, AR3 ¶¶12 **[OB100b]**, 18-19 **[OB100c]**, 27-28 **[OB100d-100e]**, 32-33 **[OB100e]**, 40 **[OB100f]**, 48-49 **[OB100h]**). In particular at AR3 ¶¶48-49 **[OB100h]** the Appellant says:

> "48. ... it appears that the investigation on which his Decision Notice depends was inadequate.
>
> 49. On that basis, the Appellant asks the Tribunal to consider ordering the IBM report to be published in its entirety forthwith."

13. The Home Office does not consider that the IC's consideration of the Appellant's request was inadequate, but in any event that would not in itself be a reason for the Tribunal to allow the appeal. The Tribunal is entitled under section 58(2) FOIA to review the IC's findings of fact, and to receive new evidence and substitute its own

view for that of the IC (*Stephen v IC and Legal Services Commission* [2009] EA/2008/0057 at paragraph 26; *Guardian Newspapers Limited and Brooke v IC and BBC* [2007] EA/2006/0011, EA/2006/0013 at paragraph 14).

Legal principles on actionable breach of confidence

14. The IC and the Home Office in their statements of case have summarised the relevant principles of law. The Appellant makes a number of submissions to the effect that those principles are not accurately stated and / or not applicable to this case and that other principles should be applied. It seems to the Home Office that those submissions are broadly as follows.

(i) *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 does not establish a clear or well-established test for breach of confidence because the outcome of a given case depends on subjective evaluations that may vary from one judge to another (AR2 ¶¶36-37 **[OB71]**).

(ii) *Coco v A N Clark (Engineers) Limited* does not establish a clear or well-established test for breach of confidence because Megarry J says that the prior authorities do not give him any very precise idea of the test (AR2 ¶¶38-39 **[OB71-72]**, 91 **[OB80]**).

(iii) *Coco v A N Clark (Engineers) Limited* does not establish a clear or well-established test for breach of confidence because it leaves open the question whether detriment is a necessary element (AR2 ¶¶54-55 **[OB74]**).

(iv) The threefold test in *Coco v A N Clark (Engineers) Limited* does not apply to this case because the Home Office and IBM are both large and experienced commercial parties and in such circumstances there can be no confidentiality except in accordance with an express agreement to that effect (AR1 ¶¶3-10 **[OB48]**, AR2 ¶¶31 **[OB71]**, 114 **[OB83]**, 119-123 **[OB84]**).

(v) The threefold test in *Coco v A N Clark (Engineers) Limited* does not apply to this case because it is not applicable to information relevant to

public administration and / or because they are not applicable to information held by public authorities (AR 2 ¶¶42 **[OB72]**, 119-123 **[OB84]**).

(vi) The principles set out in *Campbell v Mirror Group Newspapers Limited* [2004] 2 AC 457 do not apply to this case because they are not applicable to information relevant to public administration and / or because they are not applicable to information held by public authorities (AR2 ¶¶43-45 **[OB72-73]**, 50-51 **[OB73-74]**).

(vii) In the private sector there is a presumption against disclosure but in the public sector there is a presumption in favour of disclosure: *Attorney General v Guardian Newspapers Limited (No 2)* [1990] 1 AC 109 *per* Lord Goff (AR2 ¶89 **[OB80]**).

(viii) Alternatively there is a presumption in favour of disclosure in all cases: *HRH Prince of Wales v Associated Newspapers Limited* [2006] EWCA Civ 1776 (AR2 ¶¶84-85 **[OB79]**).

(ix) There is a public interest defence to a claim for breach of confidence if the public interest in disclosure is equal to or greater than the public interest against disclosure (GoA ¶8 **[OB20]**).

15. The Home Office responds to these submissions in turn.

16. As to (i), the threefold test in *Coco v A N Clark (Engineers) Limited* must, like all legal principles, be applied to the facts of individual cases, and this may involve a degree of subjectivity. That does not invalidate the test itself or make it insufficiently clear to be applied by the Tribunal in this case.

17. As to (ii), the passage cited by the Appellant (AR2 ¶38 **[OB72]**) reflects the state of the authorities at the time when Megarry J came to give judgment in 1968. The test was clarified by Megarry J in that case and has since been affirmed and applied in numerous cases including by the House of Lords in *Campbell v Mirror Group Newspapers Limited* ("the three traditional requirements" *per* Lord Nicholls at page 466) and *OBG Limited v Allan* [2007] UKHL 21 ("the well-known criteria" *per* Lord Hoffmann at paragraph 111).

18. As to (iii), Megarry J does leave open the question of detriment but that does not invalidate the threefold test as a whole. The question of detriment in this case will be addressed below.

19. As to (iv), there is no reason of principle to confine the test in *Coco v A N Clark (Engineers) Limited* to any particular set of facts. It has been applied to information passed between large and experienced commercial parties in numerous cases, including *Dunford and Elliott Limited v Johnson and Firth Brown Limited* [1978] FSR 143, *Schering Chemicals Limited v Falkman Limited* [1982] QB 1, *Strix Limited v Otter Controls Limited* [1995] RPC 607, *Indata Equipment Supplies Limited v ACL Limited* [1998] FSR 248, *Inline Logistics Limited v UCI Logistics Limite*d [2001] EWCA Civ 1613. (The Tribunal is not invited to read those cases unless it is in doubt as to the applicability of *Coco v A N Clark (Engineers) Limited* to information passed between experienced commercial parties.)

20. As to (v), again there is no reason of principle to confine the test in *Coco v A N Clark Limited* to any particular set of facts. It has been applied in numerous cases to public authorities (e.g. *X Health Authority v Y* [1988] R.P.C. 379, *R v Licensing Authority ex parte Smith Kline & French Laboratories Ltd* (No 1) [1988] 2 C.M.L.R. 883, *R v Department of Health ex parte Source Informatics Ltd (No 1)* [2001] Q.B. 424) and to information relating to public administration (e.g. *Attorney General v Jonathan Cape Limited* [1976] Q.B. 752, *Attorney General v Guardian Newspapers Limited (No 2)*). (Again the Tribunal is not invited to read these cases unless in doubt about the point.) It has, moreover, been applied by the First Tier Tribunal in FOIA appeals (see, e.g., *HEFCE v IC and Guardian News* (EA/2009/0036)).

21. As to (vi), the proposition for which the Home Office cited *Campbell v Mirror Group Newspapers Limited* in its Reply is that information can be confidential even in the absence of a pre-existing relationship of confidence. That is expressed in the passage quoted and evident from the decision in that case. The only relevant aspect of the facts of the case is the absence of a prior confidential relationship.

22. It is unclear whether the Appellant submits that personal information can be passed in confidence between parties with no prior confidential relationship except if the information concerns public administration, or if one of the parties is a public authority. If that is his submission it is clearly wrong. The Tribunal itself has found information to be confidential despite an absence of any previous confidential

relationship, both in cases where the information related to public administration (e.g. *Jenkins v IC and Department for Environment, Food and Rural Affairs* [2007] EA/2006/0067) and in cases where a party was a public authority (e.g. *McBride v IC and Ministry of Justice* [2008] EA/2007/0105).

23. As to (vii), the passage cited by the Appellant does not support the proposition he makes. The principle set out by Lord Goff in that case is that in all cases disclosure of confidential information may be justified if the public interest in disclosure outweighs the public interest against disclosure:

> "... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information." (Page 282, emphasis added.)

In other words, there is a presumption against disclosure in all cases. The distinction drawn by Lord Goff between government secrets and other information is that in the case of private information the public interest in maintaining confidentiality will usually be sufficient on its own to outweigh any countervailing public interest, whereas in the case of government secrets some additional public interest is required. This does not create a presumption in favour of disclosure: the question in *Attorney General v Guardian Newspapers Limited (No 2)* is still whether the public interest against disclosure is outweighed by the public interest in favour.

24. In any event, the requested information in this case is not of the kind that Lord Goff describes as 'government secrets'. The information with which his judgment was concerned was information generated within a public authority, namely the Security Service, and was fundamentally about matters of public administration, namely secret intelligence and national security. The requested information in this case was created by a private company as part of a commercial tendering process and concerns the operation of privately created technology. The duty of confidence is owed to a private company and attaches to information belonging to that company and is therefore private information, notwithstanding that it may conceivably shed light on matters of public administration. This is therefore a case in which, according to Lord Goff's approach, the public interest in the preservation of confidentiality would on its own normally be sufficient to outweigh any countervailing public interest in disclosure.

25. As to (viii), the Appellant submits that "the test has changed" and that after *HRH Prince of Wales v Associated Newspapers Limited* "the presumption is now in favour of disclosure" in all cases. This is also a mistaken reading. The test is "whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached" (paragraph 68). This does not create a presumption in favour of disclosure. The very most that can be said is that it indicates no presumption either way except to the extent that "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" (paragraph 67). The Home Office submits that the decision is consistent with the approach in *Attorney General v Guardian Newspapers Limited (No 2)*. It has been interpreted in that way by the High Court in *Napier v Pressdram Limited* [2009] EWHC 39 (QB):

> "If there had been a duty [of confidence], I would probably not have held that there was a public interest that the duty should be overridden. That would appear to be the appropriate test to apply, in the light of the Court of Appeal's judgment in *Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 at [67]-[68]." (Paragraph 28, emphasis added.)

26. As to (ix), this is another way of phrasing the Appellant's arguments, discussed above, that there is a presumption in favour of disclosure, i.e. that disclosure should be ordered unless the public interest against disclosure outweighs the public interest in favour. As stated above, the position in law is that disclosure should only be ordered if the public interest against disclosure (i.e. the public interest in protecting confidences) is outweighed by the public interest in favour of disclosure. Thus the IC's approach was correct: if the public interest against disclosure is "equally weighty" to the public interest in favour, there should be no disclosure.

27. In any event, the Home Office submits that in this case the public interest against disclosure very much outweighs the public interest in favour of disclosure (see below).

Confidentiality

28. The IC, applying the threefold test from *Coco v A N Clark (Engineers) Limited*, found that the information in the Report was confidential (Decision Notice paragraphs 13-22 **[OB5-6]**). The Home Office submits that this was correct.

29. The Appellant's case appears to be that if the three requirements of *Coco v A N Clark (Engineers) Limited* are applicable, they are not satisfied. Although he advances a positive case on the facts, he appears to consider that the onus is on the Home Office to prove that the information is confidential (AR2 ¶86 **[OB79]**). This is wrong. The onus is on the Appellant to demonstrate that the IC's Decision contains an error of law (*Roberts v IC* [2006] EA/2006/0008, EA/2006/0009 at paragraph 14). If no new evidence had been produced by any party, the Tribunal would proceed on the basis of the facts found by the IC in his Decision (*Guardian Newspapers Limited and Brooke v IC and BBC* at paragraph 14(6)).

30. The first of the questions in *Coco v A N Clark (Engineers) Limited* is whether the information has the necessary quality of confidence. The Appellant appears to say that it lacks this quality for two overlapping reasons:

(i) Some of the contents of the Report were already in the public domain (AR1 ¶¶53-60 **[OB54]**, AR2 ¶¶99-103 **[OB81-82]**).

(ii) The contents of the Report are not inherently sensitive (AR1 ¶¶56-59 **[OB54]**, AR2 ¶¶95-102 **[OB81-82]**).

31. As to (i), the witness statement of Nicholas Swain at paragraphs 15 to 17 **[OB353-354]** answers this argument. The Tribunal can compare for itself the Report and the NIST presentation to which the Appellant refers (Mr Swain's Exhibit 2 **[OB362-397]**): the Report is far more detailed and contains a large amount of important information that is not contained in the presentation and has not been otherwise released to the public.

32. As to (ii), the Appellant's argument is not entirely clear. He stresses that some information relating to biometric technology has been released by various parties and that this has not resulted in claims for breach of confidence. In so far as this is intended to show that the Home Office would not be likely to be sued as a result of disclosure in this case, that argument is addressed below under the heading 'Public interest and other reasons'. In so far as it is intended to show that the requested information is not the sort of information generally regarded within the industry as sensitive or confidential, the Tribunal is invited to prefer the evidence of Mr Swain (especially paragraphs 6 **[OB352]**, 8 **[OB352]**, 11 **[OB353]**, 18 **[OB354]**, 22-27

[OB354-355], 36-39 **[OB356-357]**, and exhibits 4-7 **[OB399-420]**) as an accurate account of the sensitivity of such information.

33. The Appellant also speculates that IBM is not likely to have included sensitive information in the Report (AR2 ¶¶95-98 **[OB81]**). The Tribunal has the Report and is invited to accept that much of its content is sensitive. The exercise of comparing it to the NIST presentation shows that the Report contains detailed information far beyond what IBM and Sagem Sécurité were comfortable to disclose to a professional conference. The Appellant himself appeared initially to accept that the contents of the Report were likely to be sufficiently sensitive that if it were redacted 'so much text would need to be removed... that the remainder would not be helpful' (GoA ¶20 **[OB22]**).

34. Next the Appellant denies that the information was imparted in circumstances importing an obligation of confidence. This appears to be based on four arguments:

(i) The information was imparted under relevant express confidentiality agreements that permitted disclosure under FOIA (AR2 ¶¶30 **[OB70-71]**, 126-128 **[OB85-86]**).

(ii) In any event all parties knew that the Home Office was subject to FOIA and might have to disclose the information (AR3 ¶43 **[OB100g]**).

(iii) The Home Office and IBM are large and experienced commercial parties and would not rely on anything less than an express confidentiality agreement to protect confidential information, therefore in the event that there was no relevant express agreement or that any express agreement did not explicitly forbid disclosure under FOIA the Tribunal should infer that there was no expectation of confidentiality (AR1 ¶¶3-10 **[OB48]**, AR2 ¶31 **[OB71]**).

(iv) IBM's motive for desiring confidentiality was to avoid incurring liability in negligence to third parties who use the information. That is not likely to arise in this case since no third parties will use the information, therefore any confidentiality agreement or expectation of confidentiality

is irrelevant (witness statement of Ross Anderson at paragraphs 11-13 **[OB309-10])**.

35. With respect to each of (i) to (iii) it must be remembered that section 41(1) FOIA applies to information whose disclosure otherwise than under FOIA would constitute an actionable breach of confidence.

36. As to (i) in particular, this argument goes to two issues: whether there was an expectation of confidentiality and whether a breach of confidence would be actionable. The latter is dealt with below under the heading 'Public interest and other reasons'. The former collapses into argument (ii) because it is simply evidence in support of the Appellant's submission that in all the circumstances the parties cannot have expected the information they provided to the Home Office to be immune from disclosure under FOIA.

37. As to (ii), it is true that the Tribunal is entitled to take into account any effect the existence of FOIA may have had on IBM's expectation of confidentiality (and the expectations of the companies whose information IBM included in the Report). However the Tribunal must also take into account the fact that the parties would have known the terms of section 41(1) and would therefore have anticipated that their information would be exempt from disclosure under FOIA unless there was a public interest in disclosure that would provide a defence to an action for breach of confidence. That is, of course, true of confidential information provided to any private person, since the public interest defence is available to any discloser of confidential information. In other words, IBM and its suppliers would have known that the legal risk of disclosure under FOIA was identical to the legal risk of disclosure outside FOIA. The existence of FOIA could do nothing to alter their expectation of confidentiality from what it would have been if FOIA had not existed, since the purpose of section 41(1) was to preserve the existing law of confidence.

38. Mr Swain's witness statement (paragraph 22 with exhibit 6, and paragraph 26) also shows that IBM had factual as well as legal reason to believe that section 41(1) would be capable of adequately protecting its confidentiality in practice.

39. The Appellant does not appear to rely on any fact other than the existence of FOIA to establish that IBM and its suppliers cannot have expected the Home Office to keep the Report in confidence. There is always a possibility that a person to whom

information is given in confidence will release it lawfully in circumstances where the public interest justifies the release, whether under FOIA or otherwise. If this in itself were enough to prove that the confider had no expectation of confidence, then no confider could ever have an expectation of confidence and the very existence of the public interest defence would have rendered confidentiality impossible. If the Appellant makes any such suggestion, it is plainly wrong.

40. As to (iii), the Home Office submits that the Report was provided by IBM under the terms of the NIS SSG Framework Agreement, as described in the witness statements of Jackie Keane (paragraphs 5-11 **[OB312-313]**, 15 **[OB313]**, 24 **[OB315]**) and Mr Swain (paragraphs 8-12 **[OB352-353]**, 21 **[OB354]**). That Framework Agreement contained an express confidentiality agreement in the terms set out in Ms Keane's Exhibit 2 **[OB333-345]** (also provided by Mr Swain as his Exhibit 1 **[OB359-361]**). If, however, the Tribunal should for any reason find that the NIS SGG Framework Agreement was not in itself sufficient evidence that the Report was provided to IBM in circumstances imparting a duty of confidence, the Home Office relies on the evidence of Ms Keane and Mr Swain to show that the Home Office understood itself to be under such a duty (Ms Keane's paragraphs 13 **[OB313]**, 17-18 **[OB314]**, 22-25 **[OB315]**, 29 **[OB316]**), that IBM understood and intended the Home Office to be under such a duty (Mr Swain's paragraphs 6 **[OB352]**, 8 **[OB352]**, 11 **[OB353]**, 13 **[OB353]**, 21-26 **[OB354-355]**), and that IBM's suppliers expected both IBM and the Home Office to hold their information in confidence (Mr Swain's paragraphs 18-20 **[OB354]**, 26 **[OB355]**, and Exhibits 5 **[OB400-401]**, 7 **[OB420]**).

41. As to (iv), it is not altogether clear whether the Appellant adopts what appears to be Professor Anderson's argument that the Tribunal can ignore any confidentiality agreement or expectation of confidentiality that may exist because the reason for its existence (which he supposes to be the desire to limit IBM's liability in negligence) relates to facts that do not arise in this case. Any such argument is unsound. There is no evidence to support Professor Anderson's speculation about IBM's reasons for wanting the Report to be kept confidential, and even if it were correct it would have no bearing on whether a duty of confidence existed at the time of the request for information.

42. The Appellant further submits that the information contained in the Report is not capable of being confidential because it is trivial and / or useless (explicitly at AR2

¶¶56-81 **[OB74-79]**; see also AR1 ¶¶61-65 **[OB55]**, AR2 ¶¶18-20 **[OB69-70]**). He explains, with reference to some academic material, his reasons for saying that the state of biometric technology is currently such that its effectiveness cannot adequately be tested, and therefore the testing conducted by IBM and recorded in the Report, and the conclusions set out in the Report, cannot be reliable and must be useless (or, for reasons that are not entirely clear, trivial).

43. That submission is somewhat contradicted by the evidence of Professor Anderson, who says at paragraph 7 of his witness statement **[OB308]** that '[t]he banks investigated biometrics extensively from the mid-1980s to the mid-1990s'. Professor Anderson appears to regard the outcomes of those investigations as reliable evidence that biometric technology is not (or was not in the mid-1990s) effective. He also indicates at paragraph 10 **[OB309]** that he would expect the Report itself to be 'dependable'.

44. The Home Office submits that the Report was useful to it as part of the procurement exercise for which it was provided (Ms Keane's paragraph 19 **[OB314]**), and it was evidently thought sufficiently useful by IBM in its effort to win the NBIS contract, and by its suppliers in their efforts to win sub-contracts from IBM, that they jointly funded its creation (Mr Swain's paragraph 10 **[OB352]**). However if the Tribunal is in any doubt as to whether the Report was useful for its intended purpose, it need not decide that issue. To be useless within Lord Goff's meaning in *Attorney General v Guardian Newspapers Limited (No 2)* it is not enough that the information is not useful for the purpose for which it was made or imparted: it must be of no use to anybody for any purpose (as in *McNicol v Sportsman's Book Stores* [1930] MacGCC 116, cited by Scott J at first instance in *Attorney General v Guardian Newspapers Limited (No 2)* as an example of the principle: the information in *McNicol v Sportsman's Book Stores* was a betting system that was incapable of any useful application, namely a betting system based on the age of the moon).

45. Even if (contrary to the evidence) the information in the Report was useless to the Home Office and IBM, it would be useful to the competitors of IBM's suppliers (Mr Swain's paragraph 36 **[OB356]** and the Home Office's letter to the IC dated 14 December 2010 **[OB150]**) and to IBM's own competitors (Home Office letter of 14 December 2010 **[OB149]**). It would also be useful to anyone wishing to assess the risks involved in attempting to evade biometric identity checks used in the detection

of crime or in immigration control (Home Office letter of 14 December 2010 **[OB144-146]**).

Detriment

46. As mentioned above, the Appellant seeks to cast doubt on the legal submissions made by the IC and the Home Office by pointing out that both *Coco v A N Clark (Engineers) Limited* and *Attorney General v Guardian Newspapers Limited* leave undecided the question whether it is an essential element of the tort of breach of confidence that the breach cause detriment to the confider (AR2 ¶¶54-55 **[OB74]**). The Home Office is uncertain whether the Appellant advances a positive case on this point or merely wishes to persuade the Tribunal that the law of breach of confidence as a whole is uncertain. A differently constituted Tribunal in *HEFCE v IC and Guardian News* (EA/2009/0036) concluded, at paras. 37-43, that it remains appropriate to apply the requirement for detriment in cases dealing with commercial information. In any event it is unnecessary for the Tribunal to decide whether detriment is necessary unless the Appellant's submission is that it is both necessary in law and absent on the facts of this case.

47. For completeness, and since the Appellant's statements of case include a number of assertions that could be intended to show that disclosure of the Report would not cause detriment (AR1 ¶¶49-51 **[OB53]**, AR3 ¶¶28-30 **[OB100d-100e]**), the Home Office responds to any such submission that the Appellant may be thought to have made.

48. The Home Office submits that disclosure of the Report would be sufficiently detrimental to IBM and its suppliers that it would constitute a breach of confidence actionable by them. This was the IC's finding (Decision Notice paragraph 22 **[OB5]**). The Home Office relies on its letter of 14 December 2010 **[OB148-150]**, its e-mail correspondence with IBM **[OB156-157]**, Mr Swain's evidence at paragraphs 6 **[OB352]**, 12-13 **[OB353]**, 17-18 **[OB353-354]**, 26-27 **[OB355]**, 32-40 **[OB356-357]**, and his Exhibits 4 and 5 **[OB399-401]**. The Appellant has adduced no real evidence to contradict this.

49. If paragraphs 11-13 of Professor Anderson's witness statement **[OB309-310]** are intended to provide evidence that confidentiality agreements in the biometric technology industry are generally intended to limit the confider's liability in

negligence and that there is therefore unlikely to be any relevant detriment in this case, the Home Office invites the Tribunal to reject that argument. Professor Anderson has no basis on which to give evidence about IBM's motive for providing the Report confidentially. Moreover, even if his speculation were correct, and even if it were true that disclosure of the Report would not give rise to any additional risk of IBM's liability in negligence, that would not mean that there would be no detriment at all. Detriment, if it is required at all, need not be of the kind that was specifically in the contemplation of the confider.

Public interest and other reasons

50. The Appellant makes several arguments that appear to be meant as reasons why, if the *Coco v A N Clark (Engineers) Limited* test is satisfied in this case, disclosure of the Report nonetheless would not or should not constitute an actionable breach of confidence. These are:

(i) There would in reality be no claim for breach of confidence (AR1 ¶¶49-51 **[OB53]**, AR2 ¶¶99-100 **[OB81]**).

(ii) Any breach of confidence would not be actionable because the relevant express confidentiality agreement(s) contain(s) an exception for disclosure under FOIA (AR2 ¶¶127-128 **[OB85-86]**).

(iii) Parliament cannot have intended to allow the mere existence of a confidentiality agreement to be an absolute bar to disclosure. This would frustrate the purpose of FOIA. There must therefore be circumstances in which information subject to a confidentiality agreement can be disclosed (AR1 ¶23 **[OB50]**).

(iv) The IC has a discretionary power to give the Home Office immunity from such a claim and ought to have exercised it in this case (AR1 ¶¶23-27 **[OB50]**, AR2 ¶¶26-27 **[OB70]**, 142-143 **[OB88]**, AR3 ¶13 **[OB100b]**).

(v) The Home Office would have a public interest defence (see further below).

51. As to (i), the Home Office submits that this is irrelevant. Section 41(1) applies where disclosure would constitute a breach of confidence capable of being the subject of a successful claim, regardless of the likelihood that such a claim would in fact ever be brought.

52. As to (ii), as discussed above under the heading 'Confidentiality', the question for the Tribunal is whether disclosure otherwise than under FOIA would constitute an actionable breach of confidence. The fact that disclosure under FOIA would not be actionable is, if true, irrelevant.

53. As to (iii), the Home Office does not contend that the existence of a confidentiality agreement is sufficient to satisfy section 41(1). The Appellant is correct to say that 'there must be circumstances in which such agreements can be set aside' and those circumstances are that there would be a defence to a claim in breach of confidence, in particular a public interest defence. This argument collapses into (v).

54. As to (iv), the Appellant is wrong to suggest that the IC has such a discretion (and Professor Anderson, who says the same thing at paragraphs 13-14 of his witness statement **[OB309-310]** is wrong too). The IC cannot stop an actionable breach of confidence from being actionable, nor can he make the Home Office or anyone else immune to a claim for breach of confidence. He can only come to a view, as he has done, about whether or not disclosure would constitute an actionable breach of confidence. He has come to such a view in this case (in paragraph 30 of his Decision Notice **[OB7]**) and it is a view that the Home Office invites the Tribunal to uphold.

55. As to (v), the IC found that there would be no public interest defence available to the Home Office in a claim for breach of confidence (Decision Notice paragraphs 23-29 **[OB6-7]**) and the Home Office submits that he was correct for the reasons given there. The Appellant makes a number of arguments on the issue of public interest, both advancing positive reasons why he submits that there is a public interest in disclosure and also giving reasons why in his submission the public interests against disclosure are weak or non-existent.

56. One strand of argument is that there is reason to suppose that the Home Office has made bad decisions about biometric identity systems, both in the NBIS

procurement process and generally, and there is therefore a public interest in examining those decisions (GoA ¶¶10-16 **[OB21]**, 25-56 **[OB23-28]**, AR1 ¶¶14-17 **[OB49]**, AR2 ¶¶13-16 **[OB68-69]**, 156-160 **[OB89-90]**, AR3 ¶¶35-38 **[OB100e-100f]**, 55 **[OB100h-100i]**). He is supported by Professor Anderson's witness statement at paragraphs 3-9 **[OB307-309]**.

57. The Home Office does not propose to say more about its conduct of the NBIS procurement process and its management of biometric technology in general than what is set out in its Reply at paragraphs 7 **[OB57]** and 21 **[OB62]** and the witness statement of Ms Keane at paragraphs 20-21 **[OB314-315]**. It does not deny that these are topics of legitimate public debate. It is necessary, however, for the Appellant to show that the disclosure of the Report in question would make such a significant contribution to that debate as to outweigh the public interest in protecting an obligation of confidence.

58. As to the value of the Report, the Appellant's submissions are scanty (AR2 ¶¶12 **[OB68]**, 161 **[OB90]**). Professor Anderson's evidence supports him only to the extent of saying 'It is to be hoped that [the Report] will shed some light' on these issues (paragraph 10 of his witness statement **[OB309]**). The Home Office submits that disclosure of the Report would add little to the debate. Ms Keane's evidence is that it was only one of a number of factors that contributed to the award of the contract to IBM (paragraph 19 of her witness statement **[OB314]**).

59. The Appellant also argues that there is evidence that biometric identification technology is ineffective and that the Home Office should therefore not be seeking to use it at all, meaning that there is a public interest in knowing more about the effectiveness of biometric identification technology (GoA ¶¶25-48 **[OB23-26]**, AR1 ¶¶28-33 **[OB51]**, AR2 ¶¶4-8 **[OB66-68]**, 18-20 **[OB69-70]**, 164-176 **[OB90-91]**, AR3 ¶¶20-22 **[OB100c-100d]**, 35-38 **[OB100e-100f]**, 55 **[OB100h-100i]**). Much of this argument overlaps with the one mentioned above. Again Professor Anderson provides some support (paragraph 7 of his witness statement **[OB308]**).

60. The Home Office accepts that this, too, 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 Appellant again says very little to explain what he says the value of the Report would be (AR2 ¶12 **[OB68]**), but 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]**). The Home Office does not share that view but does submit that the Appellant has failed to show that disclosure of the Report would make any significant contribution to the public interest in examining the general effectiveness of biometric technology.

61. The Appellant's third argument is that disclosure would be in the public interest because it might improve the Home Office's performance as a public authority (GoA ¶¶57-60 **[OB28]**, AR1 ¶¶47-48 **[OB53]**, AR3 ¶34 **[OB100e]**). The Appellant does not advance this argument very forcefully ('might', 'should', 'perhaps'). The Home Office denies that the disclosure of the Report would have any effect on the discharge of its public duties. It would not, as the Appellant seems to suggest, embarrass the Home Office into conducting procurement procedures more carefully: the NBIS procurement was fully compliant with UK and EU law and publication of the Report would not provide any evidence to the contrary. Rather, it would make future procurement exercises more difficult, as set out below.

62. Contrary to the Appellant's submissions, there are no strong public interest factors in favour of disclosure and any public interest in disclosure is outweighed by the strong public interest in maintaining the duty of confidence between the Home Office and IBM.

63. It is in the public interest for the Home Office to be able to get value for the money it spends in awarding public contracts such as the NBIS contract. The ability to test technology is an important part of that process and depends on the cooperation of bidders like IBM and sometimes of their suppliers like Morpho, including provision by them of sensitive and confidential information. This is clear from the evidence of Ms Keane (paragraphs 26-28 **[OB315-316]**). There are also, of course, many other situations in which the Home Office relies on information provided to it in confidence.

64. The Appellant seeks to minimise this public interest in non-disclosure by two arguments:

(i) The Home Office is already so bad at public procurement that disclosure of the Report could not make its conduct of future procurements any worse (AR1 ¶¶36-48 **[OB52-53]**, AR2 ¶139 **[OB87]**).

(ii) The Home Office is such a large and attractive customer that private companies would not be deterred from dealing with it even if they were unable to rely on it to maintain duties of confidence (AR1 ¶¶49-51 **[OB53]**).

65. As to (i), this is an argument the Tribunal should not entertain. Whatever complaints may be made, with or without justification, about the Home Office's conduct of public procurements, it is self-evident that such procurements will be more difficult, less efficient, and less likely to achieve value for money if bidders provide less information, are less cooperative, or choose not to participate at all.

66. As to (ii), the Appellant has provided no evidence of this except his own opinion, and there is no evidence that he has any relevant expertise that would justify the Tribunal in giving any weight at all to that opinion. As the Home Office's submission to the IC observes **[OB148]** the international market for biometric technology is a seller's market and a company like Morpho would probably have little difficulty replacing the Home Office with other customers, whereas there are relatively few specialist providers of biometric technology for the Home Office to choose from. In any event the threat to future procurements is not just that commercial parties will choose not to bid at all. This risk cannot be excluded, but the more immediate risk is that bidders would provide less information about their capabilities and the technology they propose to use, making it more difficult for the Home Office to identify which best meets its requirements. Mr Swain, whose evidence as to the likely behaviour of IBM and similar companies is to be preferred to the assertions of the Appellant, confirms that this would be likely if the Report were disclosed (paragraphs 32-37 **[OB356-357]**).

67. There is also a public interest in refraining from doing gratuitous harm to the commercial interests of private companies, not only because of the risk that this will

deter them from fully cooperating with the Home Office and other public authorities but also because they provide employment and public revenue in the UK and make other contributions to the economic life of the country. The balancing of public interests must take into account that disclosure of a company's commercial confidential information without its permission may constitute an interference with its rights under Article 8 ECHR and Article 1 of the First Protocol to the ECHR (*Veolia ES Nottinghamshire Limited v Nottinghamshire County Council* [2010] EWCA Civ 1214, especially paragraphs 117-122, finding Article 1 of the First Protocol engaged and leaving open the question of Article 8; *Nottinghamshire County Council v Information Commissioner and Veolia E S Nottinghamshire Limited and UK Coal Mining Limited* [2010] EA/2010/0142, especially paragraphs 72-73, finding Article 8 engaged). The Home Office submits that in this case disclosure would not be a justified interference with the ECHR rights of IBM or its suppliers.

68. The Appellant denies that disclosure of the Report would do IBM or its suppliers any commercial harm and even implies that it might do them good (AR3 ¶¶28-30 **[OB100d-100e]**). Again the Tribunal is invited to prefer the informed evidence given by Mr Swain that disclosure would be harmful to IBM and its suppliers (paragraphs 34-40 **[OB356-357]**). Moreover the Home Office submits that if disclosure of the Report would not harm the commercial interests of IBM or its suppliers then they would not have sent the objections exhibited by Mr Swain (his Exhibits 4, 5, 7 **[OB399-401 and 420]**) or provided evidence in support of the Home Office in this case.

69. The Appellant attacks the reliability of Mr Swain's evidence (AR3 ¶¶44-47 **[OB100g-100h]**). The Home Office submits that there is no basis for these attacks and invites the Tribunal to regard Mr Swain's evidence as reliable and well informed.

70. The Home Office therefore submits that disclosure of the Report would be contrary to the public interest in the continuing close cooperation of private companies with the Home Office, and the public interest in avoiding gratuitous harm to the commercial interests of IBM and its suppliers and preserving their ECHR rights. These, in addition to the important public interest in the observance of duties of confidence (stressed in *HRH Prince of Wales v Associated Newspapers Limited*), are not outweighed by the countervailing interests identified by the Appellant. The

Home Office would therefore have had no public interest defence to a claim for breach of confidence at the time of the request, meaning that the information in the Report is exempt from disclosure under section 41(1) FOIA.

Other exemptions

71. In the event that the Tribunal disagrees with the IC on the application of the exemption in section 41 FOIA, the Home Office would seek to maintain its previous reliance on the exemptions in sections 31(1)(a), 31(1)(e) and 43(2) FOIA. Those exemptions are not addressed in the Decision Notice and have not been the subject of these proceedings; should it be necessary for the Tribunal to go on to consider those exemptions, the Home Office would invite the Tribunal to give directions for further evidence and submissions.

72. However, for completeness, and because the Appellant has raised certain arguments relating to the other exemptions, the Home Office would make the following observations at this stage.

Section 31(1)(a)

73. Section 31(1)(a) FOIA provides:

> "Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –
>
> (a) the prevention or detection of crime"

74. The Report is exempt under section 31(1)(a) for the reasons set out in the Home Office's submission to the IC **[OB144-146]**. The Report contains detailed information about the effectiveness of biometric technology and specifically the likelihood of various errors that can result in false identifying data being accepted as true or true identifying data not being matched to stored records. Biometric technology is used in both the public and private sectors to deter and detect crime, especially identity fraud. The information in the Report would help those engaged in such crime to evaluate the risk that biometric technology will detect their attempts to use a false identity or, in the case of those suspected of crime and sought by the police, the risk that the technology will match their identifying data to

a record of their true identity. The Report also contains information on the circumstances in which the technology performs better or worse, which could help criminals reduce their chances of being detected.

75. Section 31(1)(a) is a qualified exemption and the Tribunal must therefore balance the public interests for and against disclosure of the Report. The Home Office submits that it is plainly contrary to the public interest to provide criminals and potential criminals with information that enables them to assess more accurately the risks of being caught by biometric technology and to reduce those risks. The Appellant identifies no public interest relevant to the prevention and detection of crime in addition to those public interests he relies on with respect to section 41(1). For the reasons discussed above, the Home Office submits that the factors relied on by the Appellant are weak. The public interest in maintaining the exemption outweighs any public interest in favour of disclosure.

76. The Appellant raises two arguments that appear to relate to section 31(1)(a), though it is not clear whether they are intended to show that the exemption is not engaged at all or that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

77. His principal argument is that biometric technology is not effective to prevent or detect crime (GoA ¶¶25-48 **[OB23-26]**, AR1 ¶¶28-33 **[OB51]**, AR2 ¶¶4-8 **[OB66-68]**, 18-20 **[OB69-70]**, 164-176 **[OB90-92]**, AR3 ¶¶20-22 **[OB100c-100d]**, 35-38 **[OB100e-100f]**). The Report itself is evidence to the contrary, and the Tribunal is invited to read pages 76-83 of the Report in the Closed Bundle. However, the Appellant is wrong in any event to argue that the exemption should only be maintained if the technology is effective to prevent or detect crime. However effective or ineffective it is, the Report contains detailed information on the relative and absolute likelihoods of different types of error and on the factors that contribute to error. This information would enable criminals to adjust their behaviour accordingly (for example by concentrating on types of criminal activity that would lead to a slightly lower risk of detection or by taking measures to increase the chances of technical error). Even if the technology discussed in the Report were largely ineffective, disclosure of the Report would reduce that effectiveness still further by helping criminals to avoid detection. Moreover, the Appellant's argument is self-defeating: if the Report revealed biometric technology to be ineffective, this would reduce its value as a deterrent and encourage criminal activity.

78. The Appellant's only other comment is that the Home Office's submission to the IC is contradictory (AR3 ¶¶17-18 **[OB100c]**). This is not correct: the point being made is not that the Report reveals how unreliable the technology is but that it contains information about its relative strengths and weaknesses. Although the technology performs well, it inevitably performs better in some areas than in others. This information could encourage criminals in areas where the technology is weaker.

79. In the circumstances the exemption under section 31(1)(a) is engaged and the public interest in maintaining the exemption outweighs any countervailing interest identified by the Appellant.

Section 31(1)(e)

80. The Home Office relies on section 31(1)(e) FIOA, which provides:

> "Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –
>
> ... (e) the operation of the immigration controls"

81. The Report is exempt under section 31(1)(e) for the reasons set out in the Home Office's submission to the IC **[OB146-147]**. For reasons similar to those set out above in relation to section 31(1)(a), the information contained in the Report could help people assess the different risks involved in different methods of circumventing border controls and could also help them develop techniques for increasing the chance of errors in the operation of the technology.

82. As with section 31(1)(a), the Home Office submits that the public interest in keeping criminals and others who wish to circumvent immigration controls in ignorance of the precise strengths and weaknesses of biometric technology outweighs the public interest in disclosure. The Appellant deals with this exemption together with section 31(1)(a) and his arguments should be rejected for the reasons set out above.

Section 43(2)

83. The Home Office also relies on section 43(2) FOIA, which provides:

> "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

84. The commercial interests of the Home Office, IBM, Morpho, and the other parties that supplied information to IBM for the purposes of the Report is likely to be prejudiced by disclosure of the Report for the reasons set out in the Home Office's submission to the IC **[OB147-151]** and in the witness statements of Ms Keane (paragraphs 26-28 **[OB315-316]**) and Mr Swain (paragraphs 32-40 **[OB356-357]**). The prejudice to the Home Office would chiefly consist in the lessening of private companies' willingness to provide detailed sensitive information that would help the Home Office assess the strengths of bids for public contracts. The prejudice to IBM would principally be its exposure to litigation by its suppliers, as well as the revelation to its competitors of information that could help them improve their bids for future contracts. The main prejudice to the suppliers would be loss of reputation in so far as the Report identified any weaknesses in their products, and in any event the revelation to their competitors of sensitive details about their products.

85. The Appellant appears to deny that there would be any prejudice to the commercial interests of IBM or its suppliers (AR3 ¶¶28-30 **[OB100d-100e]**). For the reasons discussed above, this non-expert opinion should be rejected. He also (or perhaps alternatively) argues that the Home Office and the IC cannot prove any prejudice to any commercial interest since this would involve identifying what the companies' turnovers would be in a counter-factual scenario, which is, in his submission, impossible (AR2 ¶186 **[OB93]**, AR3 ¶29 **[OB100e]**). The Tribunal will be familiar with the many situations in which private companies, public bodies, and courts and tribunals come to conclusions about the likely economic consequences of future and counter-factual events, using methods ranging from common sense and the professional experience of informed witnesses to the use of detailed and elaborate mathematical modelling by expert economists. If such methods were not capable of establishing to the requisite standard that commercial interests are likely to be prejudiced, the purpose of section 43(2) would be entirely frustrated. The Home Office invites the Tribunal to find that prejudice is likely by relying on its own knowledge and experience, on the well-informed evidence of Ms Keane and Mr Swain, and on the very fact that IBM and two of its suppliers have decided that it is in their commercial interests to support the Home Office's submissions in this case.

86. As to the likelihood of prejudice to the commercial interests of the Home Office, the Appellant submits that it could counteract any such prejudice by cancelling its expenditure on biometric technology (AR2 ¶¶180-184 **[OB92]**) and that disclosure might result in an over-all saving of public money (AR2 ¶185 **[OB93]**). The Home Office denies these suggestions but submits that in any event they are irrelevant to the question of whether the exemption is engaged. The question for the Tribunal is whether disclosure would be likely to prejudice the Home Office's commercial interests. The likelihood of prejudice is not dispelled or diminished by the possibility that savings or financial gains could be made elsewhere.

87. If the Appellant's arguments are intended to show that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the Report, the Home Office invites the Tribunal to reject them. There is a clear public interest in the Home Office being able to obtain sufficient information to accurately evaluate bids for public contracts. It is not simply a matter, as the Appellant seems to argue, of the Home Office losing money. It needs to be satisfied that bidders for public contracts will be able to fulfil the requirements of those contracts: taking this case as an example, it must be able to test which of the bidders has access to technology best suited to the contract so that it does not waste public money on a procurement that will not be effective to meet its needs.

88. It is also important for the Home Office to have access to as wide as possible a market of potential contractors in the field of biometric technology and information technology generally, and it is therefore contrary to the public interest to risk harm to the commercial wellbeing of companies in that field. Such harm could also reduce their ability to innovate and improve biometric technology for use in the prevention and detection of crime, the operation of immigration controls, and other activities of public importance.

89. The Appellant has identified no countervailing public interests beyond those on which he relies in relation to section 41(1) FOIA, discussed above. For the reasons already given, these are weak and are outweighed by the public interest in maintaining the exemption under section 43(2).

Miscellaneous points

90. The Appellant puts forward several arguments that do not seem to address any exemption in particular but are apparently intended to show that the Tribunal should order disclosure of the Report regardless of any exemptions, or at least that the Tribunal should in some way take certain miscellaneous factors into account in making its decision.

91. The Appellant at various points implies, or occasionally states, that the Home Office has conducted these proceedings unreasonably or in bad faith, in particular that it has knowingly misrepresented the state of the law (AR2 ¶¶32 **[OB71]**, 46 **[OB73]**), withheld relevant evidence (AR3 ¶10 **[OB100b]**), obstructed the IC (AR3 ¶48 **[OB100h]**), behaved like a 'slithy tove' (AR2 ¶¶46-49 **[OB73]**, 69-70 **[OB77]**)[2], and has been mendacious (AR1 ¶49 **[OB53]**) or otherwise untrustworthy (AR2 ¶48 **[OB73]**). The Home Office denies any such suggestion and does not propose to trouble the Tribunal with a detailed response to each point. Such accusations are irrelevant to the matters that the Tribunal has to decide.

92. The Appellant responds to the IC's finding that disclosure otherwise than under FOIA would constitute an actionable breach of confidence by accusing the Home Office of breaches of confidence (AR2 ¶¶107-113 **[OB82-83]**) and IBM (AR3 ¶¶42 **[OB100g]**, 46 **[OB100g]**, 56 **[OB100i]**). It is denied that the Home Office has made any breach of confidence. The witness statement of Ms Keane (paragraphs 13-14 **[OB313]**) makes clear that great care was taken to ensure that data used in IBM's testing was handled in accordance with the Data Protection Act 1998 and to protect that data. In any event the Home Office submits that these allegations are entirely irrelevant to the issues that the Tribunal has to decide and should not be entertained. In particular it would be wrong for the Tribunal to take any notice of allegations against IBM when IBM has had no opportunity to address them.

93. On some occasions the Appellant's arguments concerning the public interest seem to go beyond any particular exemption under FOIA and to amount to a submission that the Tribunal ought in the public interest to order disclosure of the Report regardless of any exemptions that may apply. In particular he submits that the

[2] The Tribunal may think that there is nothing in *Through the looking-glass, and what Alice found there* to indicate that slithy toves are inherently disreputable or untrustworthy, but it is clear that the Appellant intends the term to have a derogatory sense.

Tribunal 'has work to do, to confront politicians and officials and the media with the tulipmania they are suffering from' (GoA ¶50 **[OB27]**) and at another point seems to suggest that the entire FOIA system is unduly weighted against disclosure and the Tribunal ought to alter or purposively interpret the Act in order to correct this (AR1 ¶47 **[OB53]**). Such an approach is, of course, beyond the Tribunal's power.

94. Finally and for the sake of completeness the Home Office addresses what the Appellant calls his 'variation', that is his proposal that the Report be disclosed to the Office for National Statistics (GoA ¶¶18-24 **[OB22-23]**, AR2 ¶¶87-88 **[OB79-80]**). This would not be a proper disposal of the appeal. The Tribunal has to decide whether the requested information is exempt from disclosure under section 31(1)(a), 31(1)(e), 41(1), or 43(2) FOIA. If it is not exempt, or if it is exempt under a qualified exemption but the public interest in disclosure is such that the exemption should not be maintained, the proper remedy is for the information to be disclosed to the requester. If the information is exempt then the Tribunal has no power under section 58 FOIA to do anything other than dismiss the appeal.

Conclusion

95. In all the circumstances, the Tribunal is invited to uphold the IC's decision that the information contained in the Report was exempt information under section 41(1) FOIA and therefore to dismiss the appeal.

96. Further or alternatively the Tribunal is invited (if necessary following further evidence and submissions to be provided) to find that the contents of the Report were exempt under sections 31(1)(a) and / or 31(1)(e) and / or 43(2) FOIA and that the public interest in maintaining the exemption outweighed the public interest in disclosure, and to dismiss the appeal for those reasons.

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23 August 2011