IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0081

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

The Information Commissioner's
Decision Notice No: FS 50320566
Dated: 28 February 2011

Appellant: David Moss

Respondent: Information Commissioner

2nd Respondent: Home Office

Determined on the papers alone save for a half day oral hearing

Before

David Marks QC
Tribunal Judge

Andrew Whetnall
Henry Fitzhugh

DECISION

The Tribunal by a majority of 2 members to 1 dismisses the Appellant's appeal and upholds the Decision Notice of the Information Commissioner (the Commissioner) dated 28 February 2011 under reference number FS50320566.

REASONS

Introduction

1. The Appellant made a request in writing dated 6 January 2010 in the following terms:

   "Please provide a copy of the detailed report of the competitive trials developed and run by IBM [which trials tested the speed etc. of multibiometric facial and fingerprint recognition technology but by another company] so that the public can assess from themselves the reliability of the technology."

2. As can be seen, the request relates to trials carried out by IBM on the effectiveness of biometric technology. More details on the relevant technology will be set out below.

3. The relevant public authority is the Home Office. Initially, in its refusal, it relied on section 31(1)(e) (prejudice to immigration control), section 41(1) (information provided in confidence) and section 43(2) (prejudice to commercial interest) of the Freedom of Information Act (FOIA).

4. By its internal review, the Home Office maintained its refusal placing further reliance on section 31(1)(a) (which deals with prejudice to the prevention and detection of crime) of FOIA.

5. In October 2010, the Commissioner asked the Home Office for an extended explanation relating to the exemption to be relied on and for a

copy of the withheld information. The Home Office duly provided the report referred to in the request (the Report) which is entitled "The National Identity Scheme, Biometric Performance Demonstration".

6. In his Decision Notice dated 28 February 2011 bearing the reference number FS50320566, the Commissioner addressed almost exclusively the Home Office's reliance on section 41(1). In summary, that provision states that confidential information provided to a public authority by any other person is exempt. The exemption is an absolute one. The applicability of the exemption involves a two-stage process. First, the information must have been provided to the public authority by a third party. Secondly, disclosure must constitute an actionable breach of confidence but it must be shown that what would otherwise be a breach would not be actionable if the defence was that the breach was in the public interest. There therefore has to be consideration in any given case whether any such public interest defence would arise.

7. The Commissioner determined that all the information withheld was exempt under section 41(1) for the following principal reasons. First, the information had been provided to the Home Office by a third party. Secondly, the information had the necessary quality of confidence. Third, disclosure would result in a detriment to the confider. And fourth, no public interest defence existed which would mean that any breach of confidence would not be authorised.

The progress of the Appeal

8. The Appeal has taken longer to consider and resolve than the Tribunal, let alone the parties, might otherwise have wanted. The principal reasons for this are first that the underlying subject matter is both complex and controversial; the second could be said to arise out of the first reason, namely that even in a generalised way leaving aside the specific legal issues which are addressed in this judgment what can loosely be called the policy issues are equally significant and difficult.

9. The practical result has been that although initially the parties and the Tribunal originally were of the collective view that the matter could be disposed of on the papers, the Tribunal not only had to consider on several occasions the issues but also in the process after a number of panel discussions and interim directions thought it appropriate to convene a half day's oral hearing at which all the parties were represented and additional evidence and submissions stemming from the Tribunal's earlier directions and deliberations were canvassed.

10. The Tribunal wishes in the particular circumstances of this appeal to thank all the parties and their representatives for both their patience and their able assistance.

11. In this appeal the Tribunal will address solely the issues arising out of the exemption contained in section 41(1) of FOIA, i.e. the information provided in confidence. That section provides in relevant part:

> "(1) 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."

12. The duty to confirm or deny does not arise if or to the extent that a confirmation or denial that the public authority holding the information specified in the request would apart from the Act be committing an actionable breach of confidence. Both the exemption and the exclusion of the duty to confirm or deny are absolute in the sense that the balancing exercise required by s2(2) of FOIA does not apply. Whether or not a different balancing exercise in accordance with developing judicial interpretation of the law of confidence read in the

light of Article 10 of the European Convention on Human Rights applies will be discussed below.

13. The disapplication of the duty to disclose and of the duty to confirm or deny does not depend on the more usual form of balancing test employed in relation to the qualified exemptions generally throughout FOIA. Since a public interest defence is available to a claim for breach of confidence, what is required in the present case is a consideration of that type of public interest which is required in order to determine whether disclosure would constitute an actionable breach of confidence.

14. In one of its earliest decisions, namely *Derry City Council v IC* (EA/2006/0014), the Tribunal adopted as a starting point the assumption that confidentiality should be preserved unless outweighed by countervailing factors: see generally paragraph 35.

15. An appeal to this Tribunal can only be made by virtue of section 58 of FOIA if the Decision Notice in question is not in accordance with the law or to the extent that it involved the exercise of discretion by the Commissioner, he should have exercised such discretion differently.

16. The Appellant contended in his original Grounds of Appeal that the Commissioner had been wrong to determine there would be no public interest defence. He also submitted that the report was not obtained in confidence, which may have related to late emergence of the specific confidentiality provisions on which the Home Office rely.

17. The Appellant also raised ancillary issues which can be dealt with usefully but briefly at this stage.

18. With regard to these ancillary issues, the first point that is raised is that the Commissioner had not conducted a proper investigation and/or had failed properly to address the Home Office's evidence. Second, the Commissioner had erred in law in analysing and answering the question whether disclosure of information to the public otherwise than

under FOIA would be an actionable breach of confidence. The Tribunal regards that issue as being subsumed within the second ground of appeal. And third, the Appellant claims that there could be no claim for breach of confidence since disclosure would not be detrimental to IBM or its suppliers.

Appellant's Case

19. The Appellant clearly regards many of the underlying factual considerations as impinging one way or the other upon the appeal. His case that there is a public interest in disclosure of the disputed information can be summarised in his own words as follows, drawing on paragraphs 1 to 3.6 of his response of 20 September 2011:

- ". . . the Home Office and other government departments have invested hundreds of millions of pounds of public money in projects which depend wholly or partially for their success on either facial recognition or flat print fingerprinting, or both, working properly. And we know that the Home Office and other government departments plan to invest hundreds of millions of public pounds more, also predicated on the reliability of just these two biometrics"

- " . . . no report of large-scale trials published by a respectable institution over the past 10 years or so provides any confidence that these two biometrics can deliver the benefits sought from them. That goes for *technology tests* and for *scenario tests . . .* no reports at all have been published which systematically examine the success or otherwise of these two biometrics in live use, there have been no *operational test* reports"

- "If there were any reports that justified the Home Office's investment in biometrics-dependent projects the Tribunal may legitimately expect that the Respondents would have mentioned them by now, nearly six months into the Appeal"

- “In the absence of any respectable reports suggesting that facial recognition and flat print fingerprinting are reliable enough to do the jobs required of them, the assumption made must be, to put it loosely, that “the technology doesn’t work” “

- “ . . . the United Kingdom Passport Service biometrics enrolment trial demonstrated to most observers that facial recognition and flat print fingerprinting are too unreliable to be worth investing in. The Home Office . . . carried on investing in these biometrics regardless, by their own lights without any supporting evidence, with nothing to go on – at least, nothing they have mentioned during the course of this Appeal – but wishful thinking”

- “ . . . .the Appellant enjoins the Tribunal seriously to countenance the possibility that the chosen biometrics do not work well enough to be useful to the public and to justify the Home Office’s speculative investment of our money, to adopt a scientific scepticism in which biometrics are guilty until proven not guilty”

- “There is a hypothesis there to test – that the Home Office have been and perhaps still are investing in biometrics-dependent projects without holding in their hands the evidence required to justify their confidence that the technology can deliver.”

- “If they were wasting public money until the IBM report was given to them, some time before April 2009 that is a matter of public interest. It implies that the Home Office had no businesslike reasons to fund investments in biometrics-dependent projects for 71/2 years or so.”

- “Since that time, the Home Office claim that they *do* have a report which justifies their investment – the IBM report. If even *that*

report doesn't justify these investments, then it is likely that the Home Office have continued to waste the public's money for a further 21/2 years or so to date and that, too, is a matter of public interest."

- "The IBM biometrics exercise when they evaluated the products of six suppliers is a technology test. Messrs Wayman, Possolo and Mansfield have examined all the technology tests available to them and concluded in their paper that: . . . technology testing on simulated data cannot logically serve as a proxy for software performance over large, unseen, operational datasets.""

And drawing on the Appellant's submission of 16 February 2012:

- "The Home Office has shown " . . . contempt for scientific method when they ignored the results of the UKPS biometrics enrolment trial and pressed ahead, wasting public money with mass consumer biometrics which they knew to be unreliable to do the job in hand" (para 35) ."

In short the Appellant assumes that in the absence as he sees it of counter arguments to the evidence and world experts to and from whom he cites, and in the light of expert testimony from Professor Anderson summarised below, the Home Office has been wasting public money by deploying biometric systems without adequate research or trials giving grounds for confidence that they would be operationally effective. He seeks disclosure of the disputed information in order to confirm or disprove his assumption of waste, and to take a step towards ending the commitment of further public resources. He asks whether "this is a case where a confidence should be broken in the public interest?" (Submission of 16 February 2012, para 38).

20. The Appellant added to this outline at the short oral hearing that was convened by the Tribunal by drawing the Tribunal's attention to

inferences he drew from recent controversy over the effectiveness of border controls and the part played by biometric systems. As the Tribunal is required to assess the information at the time of the request or at the latest at the date of the last internal review of the request, the Tribunal has not relied on this part of his submission, beyond noting that no alternative document summarising the effectiveness in a UK context of the two biometric methods at issue (flat fingerprinting and facial recognition) appears to have been published, and it is not clear that any monitoring has been put in place to support appraisal. Had such appraisal or publication been in place, the public interest in publication of the IBM report would, to some extent, be diminished.

21. The Appellant draws attention to a recent report on the performance of biometric technology relied on by the Unique Identification Authority of India, which depends on fingerprint and iris recognition, although his view was that the reported results seemed too good to be true, and that it would be wise to await independent verification.

22. The Appellant also argued at the oral hearing that publication of the Report (which he conceded could if necessary be in redacted form to protect any real commercial confidentiality or security dimension) would provide the Home Office with an opportunity to bolster public confidence in the biometric systems. His case was that the methods of the trials and the results should be published. If the results had been positive, the Home Office would be better placed to argue that expenditure on biometric systems had been justifiable. However he qualified this to some extent by restating his belief that there will be a difference between testing on "simulated data sets" and the practical success of technology and software in the field, when it comes to matching the faces or fingerprints of those seeking entry against very large data sets. The Appellant's hypothesis, and that of some of the experts he cites, is that simulated data sets fail to serve as a proxy for "software performance over large unseen operational data sets."

23. The Tribunal as a whole pauses here to note in the majority view, it has not been greatly assisted by the length and density of the materials submitted in the appeal by the Appellant. On the one hand, it is of course right that a litigant in person without legal training should be afforded some latitude in the manner in which submissions are made to the Tribunal. However there must be a corresponding responsibility to impose a degree of self-discipline with regard to the length of submissions and supporting evidence. Submitting everything that may or may not be thought to be relevant may well in the end be counterproductive.

Home Office account of the factual background

24. The following history is taken from the witness statement of Jackie Keane, a Senior Civil Servant and currently the Programme Director of the Immigration & Asylum Biometric System (IABS) since May 2011.

25. As is perhaps well known, the Identity Cards Act 2006 provided for a National Identity Cards scheme and a personal identification system as well as a European Union travel document linked to a data base known as the National Identity Register (NIR). The Identity & Passport Service (IPS) formerly the UK Passport Service retained responsibility for issuing passports but was also given ownership of the National Identity Scheme (NIS).

26. In 2007 and 2008, bidders were invited to apply for delivery of a programme to implement delivery of the NIS. Five suppliers signed an NIS SSG Framework Agreement, the initials SSG referring to Strategic Supply Group, of which IBM was one. An element of the NIS included what was then referred to as the National Biometric Identity System (NBIS). The latter has now become the Immigration & Asylum Biometric System (IABS).

27. The United Kingdom Border Agency (UKBA) and the IPS undertook a joint delivery program to meet the needs of both the NIS and UKBA.

Ms Keane states that the "UKBA biometric solution was reaching capacity". IBM won the contract for the provision of the system.

28. In May 2010, the current Government disbanded the NIS. What Ms Keane calls the NBIS contract was revised in conjunction with IBM in August 2010 to deliver, as she puts it "exclusively, the biometric capability required by" UKBA.

29. As part of the tender process, IPS has stipulated that bidders needed to demonstrate their ability to fulfil and comply with service level agreements identifying the requirements of the biometric system. In due course, IBM proposed to IPS and in support of the bid, to undertake an evaluation of biometric specialist suppliers so that IBM could conduct an effective evaluation, assess the suitability of software providers and products with whom they wished to work by way of partnership or otherwise in their overall bid, and to prove to IPS that IBM, in conjunction with a preferred partner, could meet the facial and fingerprint matching requirements prescribed by the NIS.

30. At paragraph 12 of her statement and following, Ms Keane states as follows, namely:

"The method of testing undertaking [sic] by IBM was not imposed or required by IPS. However, the value in IBM's approach and methodology was apparent: it provided a pre-contractual stress test of the biometric capability likely to be provided by the selected vendor. Therefore whilst the testing was independently undertaken by IBM, IPS facilitated this by the provision of anonymised data. IBM decided to build confidence in its solution by undertaking a real test with additional extrapolation rather than just a paper-based exercise."

At paragraphs 13 and 14, Ms Keane goes on in her statement to say as follows, namely:

"13. Due to the sensitivity of such testing, a number of stringent controls were established ensuring official Security Accreditation

of the test site and secure transfer of data. Security protocols were agreed between IPS and IBM setting out data handling.

14. Authorisation for the testing was obtained from the then IPS Director of Security and Integrity and the then Information Asset Owners. Moreover, the Information Commissioner's Office was consulted and an indication was given that the Commissioner was satisfied with the safeguards and that the exercise was compliant with the DPA [Data Protection Act], and that data handling risks had been mitigated."

31. Ms Keane went on in her statement to say that the IBM Report in general terms was a relative assessment of the performance of the different suppliers who included a company formerly called Sagem Sécurité (now called Morpho but referred to as Sagem in this majority judgment) (Sagem), which ultimately secured the sub-contract agreement against the NIS's service levels and the relevant UKBA data. The Report included first the necessary engineering activity needed to set up the trial, secondly, on the basis that the trial was a rapid test of a new configuration, some known engineering compromises, and thirdly, details of the setting up of the trials and discussion of the results.

32. The Report gave an assessment and ranking of the suppliers' performance under certain conditions. It also provided specific data and what Ms Keane calls "known constraints, etc." She describes the results as being "highly contextual". More details about the Report's content will be set out below.

33. At paragraph 22 and following of her statement, Ms Keane deals with the expectation of confidentiality. She states that IPS was aware that IBM was undertaking a testing exercise, first, to determine who IBM would select as a preferred biometrics sub-contractor, should IBM itself be successful in its own bid, and second, to provide data to IPS to demonstrate that IBM could meet the requirements including the

service levels stipulated. The whole exercise was undertaken by IBM and IPS had no engagement or involvement with the third party suppliers. It was known by IPS that the data within the Report remained the property of IBM.

34. Ms Keane adds that the Home Office recognised at the time, and duly maintained the view that it is not open to the Home Office to waive any such expectations of confidence and disclose the IBM Report. She points to and exhibits confidentiality provisions in the NIS SSG Framework Agreement and the NBIS Service Agreement which, although recognising IPS' obligations under FOIA, otherwise creates an obligation of confidence regarding the providers. The entire Tribunal has examined these clauses and subject to what is said below finds there is no need to provide further particulars of these provisions. It is enough to say that the said Agreements are available on the IPS website.

35. Ms Keane emphasises the importance to the success of public procurement exercises that suppliers be as open as possible about their capabilities, including those of potential sub-contractors that would otherwise be concerned about commercial harm flowing from later disclosure; as a result, the public authority would be in receipt of incomplete information and procurement processes would be thereby less effective.

36. At paragraph 27, Ms Keane states as follows, namely:

"If IBM had felt unable to disclose the IBM report to IPS for fear of disclosure of its contents under FOIA that would, in my view, have limited the ability of IPS properly to assess the capabilities of IBM (and other bodies) and would have made it less certain whether they could have met the terms of the Service Level agreements."

37. Finally, with regard to Ms Keane's evidence, the Tribunal notes that she asserts that much of what is in her statement had previously been explained "in detail" to the Appellant at a roundtable meeting arranged

at his convenience on 23 February 2010. A note of the said meeting was exhibited.

38. The Home Office also provided evidence in the form of evidence from an employee of IBM, a Nicholas Swain, again by way of witness statement. Mr Swain is currently IBM's Commercial Director for the Immigration & Asylum Biometric System Program, i.e. the IABS.

39. At paragraph 6 of what transpired to be his first statement, he states:

"The Report is commercially sensitive and releasing it would harm both IBM's commercial interests and interests of the other suppliers who took part in the Demonstration. IBM would view any release by the Home Office as a grave breach of the confidentiality IBM has every right to expect in a normal, productive commercial relationship with the Home Office, notwithstanding the fact that a public body is subject to FOIA. IBM would also consider the release of the Report a serious breach of IBM's rights in relation to the ownership of this material."

40. He too refers to and exhibits extracts from the Framework Agreement between IBM and IPS referred to by Ms Keane, in so far as they relate to confidentiality obligations.

41. At paragraph 10, he says that in late 2008 and early 2009, IBM carried out a series of tests with specialist biometric software providers who were bidding to be part of the IBM solution for the NBIS project as part of the Demonstration. He confirms that neither IBM nor the specialist providers were paid to carry out these tests which were funded by IBM and the biometric software providers. The approach, methodology and test systems, he says, were designed by IBM in conjunction with the sub-contractors. These tests used data provided by the Home Office and were designed to demonstrate that the IBM solution could meet the requirement specified by the Home Office for NBIS. IBM also used the tests to assist in selecting its preferred sub-contractor.

42. The Report was shared with the Home Office but was based on the intellectual property belonging to IBM. It was therefore marked as "Copyright IBM" and the intellectual property it contained was never sold licensed or transferred to the Home Office. At paragraph 14, Mr Swain therefore says the following, namely:

"Owing to the confidential nature of the work, it was not expected that the Report would be published."

43. At paragraph 17 he says:

"The sole purpose of providing the Report to the Home Office was to demonstrate that the solution proposed by IBM, including the specialist biometric software from the selected sub-contractor, could meet the specific requirements laid down by the Home Office for NBIS. It was never intended to be used for any other purpose. In particular, it was not intended to be a general comparative assessment of different vendors' biometric software or any sort of general benchmark of their capabilities. The results of the Demonstration were kept confidential to IBM and the Home Office – they were not shared with the other suppliers. Equally, as is apparent from the events summarised above, they were not released into the public domain."

44. In dealing with the FOIA request subsequently made by the Appellant, Mr Swain states at paragraph 29 and 30 of his statement the following:

"29. IBM also believes that any public interest in the report can be better served by:

- referring to information about the overall method and approach used in testing (which IBM has already published, see paragraph 16 of this statement); and

- confirming that the selected Supplier (Sagem) meets the stated requirements (nb: the actual requirements have not been made public, see paragraph 22 of this statement).

30. As the Report was designed only to state whether the requirements were met, it could be misleading if the Report was published without those requirements being made available and understood as [sic] context."

45. He concludes by contending that IBM's ability to persuade other suppliers to enter into technology trials, demonstrations and other procurement exercises in the future is likely to be severely impaired if the request was acceded to, thereby echoing Ms Keane's contention that were the expectation of confidentiality at risk of not being maintained, then IBM would be unwilling to share this type of information with this level of detail in the future. Furthermore, disclosure of the Report would place IBM at risk of legal action from one or more of the suppliers with potentially unlimited financial exposure. There would also be damage to IBM's relationship with its own suppliers.

46. In the short oral hearing which was convened by the Tribunal, Mr Swain provided further evidence on an oral basis and was asked a number of questions by the Tribunal. The oral evidence given by Mr Swain at that hearing was given in closed session. It was preceded by the provision of two further witness statements by Mr Swain. The first provided for the purposes of the open bundle was accompanied by a second which was a non-redacted version of the first. In his open statement Mr Swain stressed that whereas the request related to Sagem's technology, the disputed report, i.e. the Report contained a great deal of information about technological solutions from other vendors which were not the subject of the request. Disclosure of this he claimed would have serious ramifications. Redaction he added would only mitigate the position to a very limited extent and therefore IBM did not endorse that solution. The question of redaction and/or partial disclosure will be addressed at the end of this judgment.

47. The Tribunal pauses here to note that following the oral hearing and after due consideration it asked the public authority and IBM to provide

it with a redacted copy showing what redactions, if any, those parties thought appropriate despite the clear express qualification referred to by Mr Swain.

48. In his further witness statement Mr Swain then helpfully identified the particular categories of information contained in the Report. These were seven in number and all according to Mr Swain could properly be viewed as being confidential in nature. They ranged from the identities of other vendors and details about sub contracts and the said parties' products to the performance of all effective parties including IBM itself and details of IBM's own methodology and pricing structures.

49. In his oral evidence Mr Swain added that IBM had invested a great deal of money in preparing the Report with the intention that it not go into the public domain. Parts of the Report he said were not flattering. Even more importantly he stressed a matter that had been referred to in his original statement, namely that the Report was in effect a test of certain specified requirements. As he put in paragraph 12 of his first witness statement:

"IBM provided the Home Office with the Report covering the methodology, results, analysis and conclusions from the demonstration, as part of its sales activity during the procurement process. The Report gave results and analysis not only for Sagem (later IBM's sub contractor ...), but also for other vendors who participated in the Demonstration, but who did not subsequently enter into a sub contract with IBM and were not otherwise involved in NBIS."

The term "Demonstration" referred to a biometric performance demonstration undertaken in support of IBM's bid for the NBIS contract.

50. Again in his first statement Mr Swain had stated that the disputed reports would be "less useful" in assessing the general capability of biometric technology generally than other published trials. In the wake of its deliberations but prior to the oral hearing the Tribunal had requested the public authority to provide more details about such "other

published trials" which Mr Swain had referred to. He now confirmed that he was referring to the NIST trials published in the relevant NIST websites. He also confirmed that NIST had published results of extensive trials in particular those of trials which had matched capability involving 18 different vendors, the results being publically published and again available for download from the NIST website. He claimed that more recently NIST had been carrying out certain programmes referring to the relevant technologies, again published online. In addition he said that there was an Indian publication dealing with biometric technology. Mr Swain therefore maintained both in his first witness statement and in oral evidence that with such information available in the public domain IBM saw no reason why it was necessary to override its confidentiality agreement to the Home Office by means of disclosure of any part of the Report.

51. Evidence has also been put in on the part of the Appellant in the form of a witness statement by a Ross John Anderson, Professor of Security Engineering at Cambridge University. Professor Anderson is a Fellow of the Royal Society, as well as a member or associate of various other similar institutions. He has an impressive curriculum vitae and is the author of what he says is a best-selling textbook, namely "Security Engineering – A Guide to Building Dependable Distributed Systems". From the contents of his witness statement, it is clear to the Tribunal that he is a man of impressive expertise.

52. The first part of Professor Anderson's witness statement expresses his concern that the Government "… was likely to be disappointed in his hopes for the efficacy of biometrics". He states that he has spoken "repeatedly" both in public and before various committees as to the potential ineffectiveness, lack of safety and possible unlawfulness stemming from the use of biometric technology.

53. At paragraph 5 of his witness statement, he says that the causes of failure are "complex", pointing to the lack of expertise held or maintained by Ministers or civil servants or those tasked with the

management of the relevant systems. He also points to the regulatory problem at various Governmental levels.

54. The thrust of his statement is explicit at paragraph 8 where he says that the Home Office "… appears not to have understood the science." He points to the fact that so-called Iris biometrics were abandoned first, followed by fingerprints and that up to the point at which biometric passports now use facial biometrics alone "en route", some "poor technology choices were made".

55. In conclusion, as can be seen from paragraph 9 of his statement, his view is that it is "in the public interest that the whole story of how the Home Office (and other Ministries and Government agencies) have mismanaged the ID card project be made public."

56. At paragraph 11 he turns to deal with a specific issue which has been already set out in this judgment with regard to the evidence provided by the public authority. This is the contention that the Report cannot be published without a breach of confidence. At paragraph 13, Professor Anderson maintains that since it was well-known that the National Identity Card Scheme has been abandoned by the new Government, "the issue of claims of damages by users should therefore not arise as there are no users." Furthermore, he says that "there is no reason to believe" that any advice in any such report as the present Report would be "technically unsound or likely to embarrass IBM". If it were, he maintains then "presumably" it would only serve to found an action by the Home Office against IBM for not having advised it to modify or abandon the scheme earlier.

The Request

57. The request is dated 6 January 2010. After referring to the awarding to IBM of the £265m contract to continue existing UKBA fingerprinting capabilities, and the signing of a contract by Sagem with IBM to supply and maintain a biometric management solution on behalf of IPS, and finally to the expression of "considerable doubt about the reliability of

biometrics based on face recognition and flat print fingerprinting", the written request states as follows, namely:

"In the view of [the matters just set out above] with £265m of our money at stake, it is important that Sagem's biometric technology works. Please provide a copy of the detailed report of the competitive trials developed and run by IBM so that the public can assess for themselves the reliability of the technology."

58. The Home Office answered by letter dated 4 February 2010. As indicated above, it stated that it considered the information exempt by virtue of various provisions of FOIA including section 41(1). A further response was sent by letter dated 17 March 2010. Reliance was also placed on the terms of section 41(1), because it was claimed that release of the Report would prejudice the ability of the parties in relation to future commercial contract negotiations. Disclosure would also put suppliers at a disadvantage when negotiating further contracts. In addition, the IPS would be at a disadvantage in relation to further procurement.

59. A lengthy response dated 3 April 2010 from the Appellant need not be set out in any detail at this stage. To all the members of the Tribunal it appears that one of its principal contentions is that the science relating to biometrics was suspect if not unsound, which in general terms justified disclosure of the Home Office's activities. This, as has been seen, is the theme of Professor Anderson's witness statement put in on behalf of the Appellant. It was also claimed that disclosure would not hinder further tenders and would not represent any form of security risk.

60. By letter dated 17 June 2010, the Home Office confirmed its refusal to disclose the information requested following an internal review.

<u>The Decision Notice</u>

61. In his Decision Notice, the Commissioner made the following points. First, there was no evidence before the Commissioner that the requested information was otherwise accessible: indeed the "stance" of IBM and the Home Office suggested that such was the case. The evidence now produced in this appeal from the Home Office and from IBM duly confirms as much. Second, the information was "more than trivial". Again, the Tribunal points to the evidence summarised above. In the words of paragraph 15 of the Decision Notice, the Report was "substantial … that was the culmination of a significant program of work which supports the argument that this information is more than trivial." Reference was made to another Tribunal decision, namely *S v Information Commissioner and the General Register Office* EA/2006/0030), especially at paragraph 36. Third, the information was imparted in circumstances importing an obligation of confidence. The evidence now before the Tribunal appears to confirm the correctness of that assertion. In the words of paragraphs 26 and 27 of the Decision Notice:

> "26. The protection provided by the duty of confidence here is to the process of testing technology on which public funds are to be spent. The Commissioner believes there to be a public interest in the ability of the public authority to carry out this process effectively as this process is intended to ensure that public funds are used appropriately. If disclosure would prejudice the ability of the public authority to carry out this process – by discouraging commercial organisations from participating in this process, for example – this would be counter to the public interest. If the public authority was unable to secure the services of the best quality and value providers, this would not be in the public interest.
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> 27. The Commissioner also recognises a valid public interest in favour of disclosure in that the issue of the Government collecting biometric information, particularly in relation to identity cards,

which were at the time of the test still in train, has been a focus of much controversy and debate. The complainant has referred to this when arguing in favour of disclosure. However, this factor must be weighed against the harm to the confider that the Commissioner has accepted could occur as a result of disclosure."

62. Fourth, with regard to the existence of scope of any public interest defence to any breach of confidence that would result through disclosure of the information in question, the Commissioner pointed out again, in the entire Tribunal's view quite correctly, that the relevant considerations were not the same as those which applied to the public interest balancing test with regard to qualified exemptions. The Notice stated that if disclosure would prejudice the ability of a public authority to carry out the process of testing technology involving the use of public funds by discouraging commercial organisations in participating in the process, the same would be counter to the public interest.

63. The Commissioner recognised a "valid public interest" in favour of disclosure in that biometric "issues" had been, and continued to be, the focus of much controversy and debate. However, that was outweighed in the Commissioner's view by the need on the part of the Government to be able to carry out procurement exercises properly and appropriately. There was therefore an appreciable detriment to the confider in the light of any possible breach of confidence.

The law

64. The first issue referred to above concerns a consideration of those situations in which an obligation of confidence can be said to arise. It is well established that the said obligation exists where there is an express confidentiality agreement. The Tribunal is of the view that the evidence in the present case clearly demonstrates that for present purposes there did exist a binding agreement in those terms.

65. In the leading case of *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415 it was established that a breach of confidence will arise first where the information itself has the necessary quality of confidence about it, second that it must have been imparted in circumstances which imported an obligation of confidence and third that disclosure would be an unauthorised use of the information to the detriment of the party communicating it. These principles were endorsed in *Campbell v MGN Ltd* [2004] 2 AC 457 where it was expressly confirmed that an action for breach of confidence no longer required a need to demonstrate "an initial confidential relationship" per Lord Nicholls at para 14.

66. Although it might be assumed from what has just been said above that there is no dispute about the above principles it is fair to refer to a number of written submissions put forward by the Appellant that appeared to take issue with the correctness of those principles.

67. First, the Appellant claims that *Coco v Clark* supra does not set out a clear test for breach of confidence largely, if not exclusively, because the outcome in any given case depends on a subjective evaluation. Second, issue is taken with the terms and effect of the judgment in *Coco v Clark* itself since the judge in that case, namely Megarry J observed that the earlier authorities did not give him any precise idea of the relevant test or tests.

68. Third, the Appellant claims that *Coco v Clark* also did not establish a clear or precise test for what constitutes a breach of confidence since it left open the question of whether detriment is or should be a necessary component in the equation. Fourth, the Appellant contended that in the case of a major government department and a substantial commercial organisation such as IBM nothing short of an express confidentiality clause would be required to confer the necessary degree of confidentiality. Fifth, it was claimed, that in any event *Coco v Clark* did not apply to the type of case such as the present, namely a case in which there was information relating to public administration and/or information held by a public authority nor did the principles reflected in

or endorsed by *Campbell v MGN* supra. Sixth, it was claimed that in case law since *Coco v Clark* even in the light of *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 sometimes referred to as the *Spycatcher* case and *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 there not only is a presumption in favour of disclosure in the public sector but there could even be said to be a presumption in favour of disclosure in all cases.

69. Lastly, it was contended that there exists a public interest defence to a claim for breach of confidence if the public interest in disclosure is equal or greater than the public interest against disclosure.

70. The Tribunal rejects the first six of these contentions, leaving the extent of a public interest defence to a claimed breach of confidence for discussion in the light of the subsequent case law set out below. As to the first contention, to the extent that it suggests that the test in *Coco v Clark* is incapable of being applied on a consistent basis, such a contention is entirely rejected. Even though it is not quite clear what is meant by the reference to subjectivity, again to the extent that the application of the test in that case involves a degree of subjectivity the Tribunal is not prepared to find that the test is otherwise unclear or not binding on the Tribunal. Much the same answer can be given to the second contention. As pointed out above the formulation propounded by Megarry J has been upheld on numerous occasions at the highest judicial level.

71. As for the third contention although the court in *Coco v Clark* did leave open the question of detriment that factor of itself in no way diminishes the force of the applicability of the basic principle in the decision itself. In any event the Tribunal is firmly of the view that disclosure of the entire text of the disputed information in this case would cause detriment, although to an extent the detriment can be contained or avoided by suitable redaction.

72. The fourth contention is rejected on the simple basis that the formulation in *Coco v Clark* has been frequently applied in the widest possible range of factual circumstances not least those involving large and substantial commercial vehicles. See e.g. *Dunford & Elliott Ltd v Johnson and First Brown Ltd* [1978] FSR 143 and *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1.

73. Nor is the test in *Coco v Clark* to be confined as the fifth argument contends to a particular set of facts which would exclude public authorities and/or public administration. Apart from there being many examples involving such factors, e.g. *X Health Authority v Y* [1988] RPC 379 and *Attorney-General v Jonathan Cape Ltd* [1976] QB 752 the matter is also being considered by the Tribunal: see e.g. *HEFCE v IC and Guardian News* (EA/2009/0036). The Tribunal therefore rejects the suggestion that the principles in *Campbell v Mirror Group Newspapers* do not apply in the instant type of case on the basis that such principles are inapplicable to the information which relates to public administration and/or public authorities. As indicated above the *Campbell* case stands for the proposition that information can be confidential even in the absence of a pre-existing confidential relationship. It provides no support for the Appellant's contentions. In addition the Tribunal rejects any contention that personal information can be exchanged in confidence between parties with no prior confidential relationship unless the information concerns public administration or if one of both of the parties is a public authority. Again even in this Tribunal it has been found that information can be confidential even if there was no prior confidential relationship but where the information related to public administration, see e.g. *Jenkins v IC and DEFRA* (EA/2006/0067) and see also *McBride v IC and MoJ* (EA/2007/0071).

74. In his sixth and penultimate contention the Appellant made in effect a double submission to the effect that not only is there a presumption in favour of disclosure in the public sector but in addition the same

reflects a general presumption of disclosure in all cases. Again the Tribunal unanimously respectfully disagrees. In *Attorney-General v Guardian Newspapers Ltd (No 2)* supra the House of Lords particularly in the form of the speech of Lord Goff emphasised that in all cases disclosure of confidential information may be justified but only if the public interest in disclosure outweighed the public interest against disclosure. Moreover, the House of Lords again primarily via the medium of that speech stressed the same applied to all types of confidential information: see in particular page 282.

75. As to the seventh contention this appeal is predominantly concerned with whether and if so to what extent the public interest element which applies to the preservation of confidentiality should be outweighed by any other countervailing public interest which could be said to favour disclosure.

76. The present state of the law is that the presumption in favour of protecting confidence is strong, but does not amount to a presumption against disclosure in all cases. There has been an evolving area of judicial interpretation of the extent to which, if at all, the rights under Article 10 of the European Convention on Human Rights are engaged when an absolute exemption under FOIA would, on a traditional interpretation, bar or circumscribe an obligation to disclose or conversely a right to receive information held by a public authority. We turn to this below. So far as the evolution of case law before the European Convention on Human Rights (ECHR) was applicable is concerned, any distinction along the lines of public as against private information, such as is drawn in the speech of Lord Goff, is to the following effect, namely that whereas in the case of the latter, the public interest in maintaining confidences will be invariably sufficient on its own to outweigh any countervailing public interest in disclosure, in the case of a Government secret in general terms some additional public interest is required. This, however, is a far cry from the creation

of any form of overriding presumption in favour of disclosure contended for by the Appellant.

77. In any event enough has been said already in this judgment to make it clear that the present appeal is not at all concerned with information that could be remotely be characterised as a Government secret. In the *Attorney-General* decision the information concerned secret intelligence and national security matters. Here the information requested is information created by private companies as part of a tendering process, which may or may not be the best available guide to the efficacy of biometric technologies in which the UK Government has invested. There is, as the Information Commissioner accepted, some public interest in making that information available to the public. There is also some detriment to the supplier which could be contained, if not eliminated, by redaction. There is also potential prejudice to the future conduct of tendering procedures, although again there is potential for containing such damage by redaction. The question which has been subject to prolonged discussion by the Tribunal panel is where the balance should fall in this particular case.

78. The Appellant also claims that the decision in *HRH Prince of Wales v Associated Newspapers* supra has reaffirmed the alleged presumption in favour of disclosure. As will be seen the Court of Appeal in that decision did not refer to any presumption: rather it propounded the relevant test in terms of whether in all the circumstances it was in the public interest that a duty of confidence should be breached: see especially at paragraph 67 and in support of that view see also in *Napier v Pressdram Ltd* [2009] EWHC 39 (QB) aff'd [2009] EWCA Civ 443.

79. In *Attorney-General v Guardian Newspapers (No 2)* supra Lord Goff had expressed the general principle in the following terms, p 281, namely to the effect:-

"...that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others ... in the vast majority of cases ... the duty of confidence will arise from a transaction or relationship between the parties - often a contract, in which event the duty may arise by reason of either express or an implied term of that contract."

80. However, Lord Goff then went on to say that there were what he called three limiting factors which applied to the above passage. The first two are perhaps not relevant for present purposes and can be shortly stated. First, the general principle of confidentiality does not apply to information that is in the public domain. The second is that the principle also does not apply to information that is trivial or of no utility or more appropriately in terms of the present case where the information has no commercial value.

81. For present purposes the critical limiting factor is the third one, namely that in certain circumstances the public interest in maintaining the confidentiality in question may be outweighed by the particular public interest or interests in favour of disclosure.

82. Section 41(2) of FOIA refers to the requirement that disclosure of the requested information would constitute an actionable breach of confidence. Public interest can be a defence to such an action. The basic ingredients of such a defence have already been touched on. First, the public interest in disclosure may outweigh both private and public interests which favour protection. Second, even if the balancing exercise finally militates in favour of disclosure it may be that only limited or partial disclosure should be granted or allowed. Third, and in the light of the Human Rights Act 1998 and the rights enshrined in the European Convention on Human Rights, particular regard should be had to the rights for respect to private and family life and home as

confirmed in Article 8 and the right to freedom of expression guaranteed by Article 10: a similar balancing exercise must be carried out with regard to what can be regarded as more human rights-related public interest.

83. These elements can therefore be said to constitute a public interest defence to an actionable breach of confidence. Their existence and perhaps their application can be justified by the following passage again drawn from Lord Goff's speech in *Attorney-General v Guardian Newspapers (No 2)* at p 282 although there is no specific reference to the third element set out above, namely that dealing specifically with European Convention rights. Lord Goff stated:

"The third limiting principle is of far greater importance. It is that, 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. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against the countervailing public interest favouring disclosure. Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that the man cannot be made "the confidant of a crime or a fraud" ... But it is now clear that the principle extends to matters of which disclosure is required in the public interest ... it does not, however, follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required: see *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892. A classic example of a case where limited disclosure is required as a case of alleged iniquity in the Security Service".

84. In its written submissions the Home Office has referred the Tribunal to certain passages in *Coppel, Information Rights: Law and Practice (3rd edition 2010)* particularly at 20-024 where the editors have drawn attention to the fact that not only in each case a decision has to be reached on the particular facts in question but also in general terms to the circumstances in which a public interest defence to a claim for breach of confidence might enjoy success and which can be characterised in one or more of three ways: first, where there is a public interest in the disclosure of iniquity, second, where the public interest lies in the public not being misled and third, where there is a public interest in disclosure of matters of public concern.

85. As already indicated and as will be seen further below, the parties' respective contentions have focused predominantly on the third of these headings. Nonetheless the Tribunal is of the unanimous view that it is important to consider each of these three heads in turn as to their principal constituents.

86. As to the first although the term "iniquity" has tended to find expression in the case law the fact of wrongdoing is not a necessary prerequisite. Even an allegation of wrongdoing will justify exposure in the public interest if the allegation is a credible one from an apparently reliable source. See generally *Attorney-General v Guardian Newspapers Ltd (No 2)* supra especially at p 283: see also *Cream Holdings Limited v Banerjee* [2005] 1 AC 253 and in the Tribunal case of *S v Information Commissioner and General Register Office* supra.

87. As to the second head there clearly exists a public interest in the public not being misled. As *Coppel* supra at 25-026 puts it this head is also informed by free speech considerations. On the facts of the present case, if the biometric tests tended to confirm in their entirety the reliability of biometric technologies adapted by the UK the public would not have been misled by claims that they were likely to be effective, but the contrary would tend to support a public interest in disclosure under the second head.

88. The third head relates to the public interest which can legitimately be said to relate to the disclosure of matters of public concern. Here again there may well be an element of free speech in particular in the form of press coverage. See e.g. *Fraser v Evans* [1969] 1 QB 349 especially at 363.

89. In *London Regional Transport v Mayor of London* [2001] EWCA Civ 149 [2003] EMLR 4, the case concerned an award procedure for a Public Private Partnership Arrangement for upgrading and maintaining the London Underground infrastructure. A preferred bidder had been selected but no agreement had been signed. The form of the arrangements for the work were particularly sensitive from a political point of view and contentious in terms of the said arrangements being able to provide and deliver safety and value for money: so too was the conduct of the award process. The Mayor of London who was very critical of the scheme wished to publish parts of an independent consultants' report on the procedure. London Regional Transport (LRT) sought to restrain publication. The consultants and Government together signed an agreement with bidders which specifically provided for information to be kept confidential.

90. The judge at first instance, Sullivan J, determined that it was necessary to balance the interests relating to confidentiality against the relevant public interest. He found that in the case before him disclosure should not be prevented. The Court of Appeal agreed. It considered that disclosure should be ordered even if disclosure in the face of an express agreement required an exceptional case to be made out: the latter was not a point which it found necessary to decide. In the view of the present Tribunal, what was significant, however, was that all sensitive information including prices had been blanked out of the version of the report that was proposed to be published. Both judgments, i.e. those of Sullivan J and that of the Court of Appeal referred to a number of factors that can properly be regarded as material to balancing the public interest in disclosure against other

factors militating against disclosure. Sullivan J emphasised the "very considerable" public interest or public debate on the value for money issue relating to the particular project. Robert Walker LJ also noted that this represented "a very important" public interest. It is fair to add that Sullivan J also concluded that the fact of disclosure might lead to legal challenges by the disappointed party was not a consideration against disclosure. The Court of Appeal endorsed the use of a proportionality test as applied in determining whether there had been a violation of Article 10 of the European Convention and which provides by Article 10(2) for confidentiality based exception.

91. In the view of the present Tribunal there are a number of striking features of the decision which deserve particular mention insofar as they relate to the present appeal. First, as already referred to there was great political sensitivity about the particular project. Second, both courts emphasised that disclosure was sought by a public official seeking to advance the public interest. The second factor at least is on any view absent in the present case, although recourse can naturally be had to an argument based on public interest alone. Third, if as in the present case, the information sought is akin to what is or is related to a tendering process or otherwise comprises information which is closely related to a tendering process the same of itself has a particular weight. Even without an express confidentiality agreement, tender-related or similar related information can justifiably be considered as having a degree of confidence about it at least pending an award of contract. Again in the Tribunal's view it is highly arguable that quite apart from the express obligation of confidentiality not only does a duty of confidence arise and remain in place throughout such a process but also any disclosure during that period would generally be both unauthorised and prejudicial at least until a final tender had been submitted. In the present case the contract has been let and it has been recognised in Government guidance that post-contractual considerations, especially as to contract requirements and performance, as opposed to pricing structure or the intellectual

property of the various bidders, may not merit the same protection as at the pre contractual stage.

92. Another relevant aspect of the Court of Appeal's judgment in the *London Regional Transport* case is that it offers a framework for the approach to redaction of information where there is both a public interest in disclosure and a private interest argument against. In place of the test of whether a reasonable recipient's conscience would be disturbed by disclosure of confidential information, Sedley LJ, agreeing with the analysis of Robert Walker LJ based in part on the human rights legislation, observes that a less elastic and more structured set of tests can be applied to "recognise the legitimacy of disclosure, undertakings notwithstanding, if the public interest in the free flow of information and ideas will be served by it." (see paragraph 55). This places on the decision maker a need for a "structured inquiry: Does the measure meet a recognised and pressing social need? Does it negate the primary right or restrict it more than necessary? Are the reasons given for it logical?" (paras 53-62)

93. The reasoning in the *London Regional Transport* case was applied in *Jockey Club v Buffham* [2003] QB 462 where the issue which underpinned the public interest in issue related to the integrity and fairness of bookmaking to the betting public with the relationship of bookmakers to trainers and the racing community as a whole coupled with the effectiveness of the Jockey Club's regulatory role over the sport. The information had been obtained from a whistleblower who had obtained it in breach of an express confidentiality obligation. In *Derry City Council v IC* supra this Tribunal concluded that the accountability of public funding for an airport used by a private operator was sufficiently weighty to outweigh the confidentiality that attached to negotiations between the public authority and the airline operators. cf *S v IC & The General Register Office* supra.

Detriment

94. This factor has been mentioned above. On the assumption that the Appellant contends that the showing of detriment is a necessary ingredient with regard to an actionable breach of confidence the Tribunal is content to adopt the view of the view of the Tribunal in another decision already referred to, namely *HEFCE v IC & Guardian News* especially at paras 37-43 to the effect that it is appropriate to determine that detriment has been incurred in relation to a case involving confidential commercial information.

95. In the present case, the public authority alleges that disclosure of the Report would be sufficiently detrimental to IBM. The Commissioner himself so determined this at paragraph 22 of his Decision Notice. In the view of the majority of this Tribunal such a determination is abundantly supported by a consideration of Mr Swain's evidence particularly in his first witness statement at paragraphs 6, 12-13, 17-18, 26-27 and 32-40. Moreover, the Appellant has not adduced any evidence to challenge this assertion. The Appellant however has not had sight of the disputed information. It therefore falls to the Tribunal to assess whether a redacted version of the information could significantly reduce the likely detriment from disclosure, while retaining enough information on the likely performance of biometric technology to inform public debate: in other words, are biometric technologies likely to be reliable and did the Home Office and/or the Border Agency have sufficient grounds for confidence in them at the time of investment?

96. Insofar as Professor Anderson and/or the Appellant contend the confidentiality agreements in relation to the biometric industry are now somewhat restricted in their effectiveness to cases where the confider's liability is limited to a liability of negligence alone, the Tribunal finds this is not a sufficient reason for neglecting the possibility of detriment from unredacted disclosure.

<u>Confidentiality</u>

97. As indicated above, two principal contentions are put forward and are now addressed at this stage of the judgment. The first concerns the question of confidentiality.

98. As the Home Office has pointed out the Appellant does not in general terms appear to dispute that the requested information was obtained by it from another party, i.e. IBM. However, in relation to whether disclosure of the Report would give rise to an actionable breach of confidence, the Appellant (taking into account his grounds of appeal and his Reply to the Commissioner's response) does appear to take issue or at least question the Commissioner's finding that the information was provided to the Home Office subject to any obligation of confidence.

99. In his Reply the Appellant expressly doubts whether there was a "confidentiality agreement" between the Home Office and IBM. In particular he claims that the word or expression "Restricted" on the document does not without more create the necessary degree of confidentiality. There is and has to be he says an express non-disclosure agreement. The Tribunal's finding of fact is that there was such an express agreement. The Appellant may have misdirected his initial arguments because the relevant agreement was not produced until well into the proceedings.

100. The first element of the three fold test set out in *Coco v AN Clark* supra [1968] FSR 415 is therefore satisfied. See also *Campbell v MGN Ltd* [2004] 2 AC 547 especially at paragraph 14 per Lord Nicholls. The Commissioner determined that the circumstances under which the requested information was produced to the Home Office did import an obligation of confidence. He pointed to three particular factors. First both the Home Office and IBM considered and understood that the information would be and was provided in confidence and would remain so. Second, there was clear and effectively incontrovertible evidence that the information provided to IBM by other organisations was subject to an express obligation of confidence that IBM could and

would be subject to an action for breach of confidence if that obligation was breached. Third, the report was as indicated above marked "Restricted". The Tribunal duly finds that it is difficult to see how the Commissioner's determination in this respect could be challenged. The law is clear to the effect that an explicit confidentiality agreement is not required. The evidence in this case which has been submitted clearly shows that the Home Office regarded itself as being subject to a duty of confidence when it received the information.

Home Office: any public interest defence?

101. The Appellant contends that the Home Office would be entitled to raise a justifiable defence of public interest in the event of a claim against it for breach of confidence. In essence he claims that disclosure of the Report would be important for informing the public about procurement processes in particular those engaged in by the Home Office and the extent, if any, to which such processes were or are appropriate.

102. The Tribunal agrees with the content of the Home Office's written reply to the original notice of appeal to the effect that the test for such a public interest defence is perhaps best set out in the leading case of *HRH Prince of Wales v Associated Newspapers Limited* [2008] Ch 57 per Lord Phillips CJ at 67 and 68 in the following terms:

"67. There is an important public interest in the observance and duties of confidence. Those who engage employees, or 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 wide publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act came into force the circumstances in which the public interest and publication overrode a duty of confidential were very limited. The issue is 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 a 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 its loyal 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.

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."

103. The Home Office and the Commissioner submitted that there were no cogent public interest factors which militated in favour of publication. It is in the public interest that the duty of confidence which arose and exists between the Home Office and a major commercial supplier should not be breached.

104. Subject to what is said above, the Tribunal discerns four basic contentions which the Appellant makes in this regard. First, he points to issues about the appropriateness of the procurement exercise which led to the appointment of IBM. Second, as indicated above he expresses doubt over the reliability of particular types of biometric data. Third and related to the second proposition he points to the fact that large sums of public money have been expended on plans for the NIS

and other biometric sites and projects. Fourth, he invokes the general public interest in increased accountability and transparency.

105. As in the first of these points the Tribunal by a majority finds a convincing answer in the observation put forward in the Commissioner's reply in describing the Report as including information about competition trials developed and run by IBM and also about other systems, whether successful or unsuccessful, regarding similar projects and activities.

106. The Tribunal pauses here to say that it has seen the Report as closed information in the appeal. The majority in the Tribunal is firmly of the view that the description in general terms set out above is an accurate depiction of the Report's contents. In the circumstances the Tribunal again by a majority confirms the characterisation of the Report advanced by both Respondents to the effect that its disclosure would not assist in furthering the resolution of any doubts which might otherwise arise about the "appropriateness" of the Home Office's procurement policies and manner in which the same is exercised.

107. Moreover, it is pointed out with some force that the Appellant has not provided any evidence to the effect that the procurement process was not otherwise compliant in terms of UK and EU procurement law and practice.

108. The second contention reflects what can be said to be one of the main, if not the core theme, of the Appellant's appeal.

109. The Tribunal is prepared to assume that there is a general public interest of the type described by the Appellant. However, in its findings the Tribunal by a majority finds that a generalised interest of that kind is outweighed by a consideration of the likely damage that would be caused by the disclosure of the kind of information here in question as held by a major government department such as the Home Office with the attendant degree of confidentiality attached to it.

110. The Tribunal by a majority can see no answer to the Respondents' contentions that there is an extremely weighty public interest in ensuring that the Home Office is and should be allowed enough time and space effectively to carry out the process of testing technology on which substantial public funds have been expended or are likely to be expended. The reality underlying that public interest is that were disclosure of the sort requested here to be made this would in all probability discourage commercial organisations from participating in any similar procurement exercises to the detriment of the Home Office's ability to carry out its function and thus to the detriment of the public interest at large.

111. In any event the Tribunal by a majority is impressed not only by the absence of the facts which serve to distinguish the *London Regional Transport* case and which have been set out above but also by the overwhelming strength of the Home Office and IBM's contentions that the Report is, as Mr Swain put it, in his first witness statement a report which demonstrated that a particular solution formerly provided by IBM including involving specialist biometric software from a specified selected sub contract could meet some specific requirements, namely those laid down by the Home Office for NBIS. In particular according to Mr Swain it was not intended to be a general comparative assessment of different vendors' biometric software or any sort of exercise which he described as a general benchmark of those vendors' capabilities. As the Home Office put it in its most recent written submissions, prior to the short oral hearing, the effectiveness of biometrics is simply not comparable to the disclosure of confidential information which reveals serious mismanagement of large amounts of public money or which addresses corruption in sport quite apart from the fact that disclosure would not legitimately inform public or scientific debate on the efficiency of biometric recognition systems.

112. The Tribunal by a majority, therefore, finds that the subject matter of the information sought does not fall within any one or more of the three categories set out in *Coppel* referred to above.

113. For the sake of completeness, the Tribunal again by a majority also finds that the present case does not constitute a case of "Government secrets" in any sense or meaning of that phrase. Here the subject matter is of a confidential nature but is a commercial exercise conducted by a non-Government entity, namely IBM involving the suppliers. The Home Office would be a potential defendant to any action for breach of confidence brought by IBM and/or those suppliers. In the case of a Government secret invariably the claimant is the Government itself.

114. The Tribunal by a majority is also impressed by the related argument put forward by the Home Office in its response that disclosure might in addition well amount to an interference with the relevant property rights and privacy rights of IBM and indeed any other entities or companies whose identities would otherwise be disclosed pursuant to the provisions and input of article 8 ECHR and article 1 of the First Protocol to the ECHR.

115. Finally, it is often said that a showing or a well-founded allegation of iniquity or impropriety might undermine reliance on the type of public interest which has just been defined. As indicated above, no such showing is made out in the present case.

116. The Appellant not unnaturally points to the amount of public money that has been expended in relation in particular to the NIS and other schemes. The Tribunal by a majority does not find the isolation of that factor in itself or in any way material. Its significance is if anything outweighed by the public interest highlighted in the detailed evidence provided in this case by and on behalf of the public authority.

117. The Tribunal by a majority reaches the same view with regard to the Appellant's fourth point which is no more than a generalised reliance on a due degree of accountability and transparency.

118. With regard to both the principal grounds of appeal therefore the Tribunal by a majority is entirely satisfied with the thrust and content of the Decision Notice in particular at paragraphs 26 to 27 that there is a public interest in ensuring that the Home Office can effectively carry out the process of testing technology with regard to which public funds are to be expended. The Tribunal by a majority is equally satisfied that the process is intended to be and did in fact ensure that such funds were applied appropriately.

119. The minority view of the Tribunal differs on these points. Following the approach of Sedley LJ in the *London Regional Transport* case cited above, the minority believes that there is a proportionate case for disclosure of a redacted report which includes those parts of the disputed information which describe the method of the biometric trials and their results in summary form. This would include the range of success of the two biometric technologies tested at detecting seeded duplicates in the data sets, including both false negatives and false positives and an outline of the analysis given for failures. It would include disclosure of the standards of performance set for the trials as well as the summary of results. Public information about the prospects for the two technologies at the time of the trials would thereby be enhanced, and the Home Office would put into the public domain the material which was the basis of its confidence that investment was justified. The scientific community would also be able to debate the method and outcome, introducing an element of peer review which seems for the time being to be missing. (This view depends on an absence of or conflicting interpretations of material information about the adoption of technologies in a UK context, the field trials by UMIST and others being interesting but not on point.)

120. In order to reduce the detriment to those who participated voluntarily in the trials but were not successful, their identities and descriptions of their products would be redacted, together with any information describing the substance of security precautions (essentially those taken by IBM and Sagem the successful team) and any information that might assist anyone with malign intent to evade or defeat the biometric border controls put into operation. (As indicated at the outset of this judgment, the Tribunal did not address or take evidence or receive submissions on the Home Office case under section 31(1)(e) FOIA (prejudice to immigration control)). As the detriment to the providers would be substantially mitigated by this process, the furthering of public debate without prejudice to genuine intellectual property and competitiveness in future tendering exercises would, in the view of the minority, be substantially achieved. The results would be contextual, in that the results described relate to hardware and software tuned to the particular requirements set by the Home Office procurement team for the circumstances of the intended use of biometrics at the time of the trials. A maturing market would understand this, and the prospect of discouragement from participation in future tendering procedures has, in the minority view, been greatly exaggerated. The damage to the ability of Government procurement to secure participation in transparent trials or successful tendering exercises in future would also be substantially mitigated. This approach appears to the minority to be consistent with Government policy on the appropriate general level of transparency concerning service delivery and procurement, both as it stood at the time of the IBM Report and as it stands now.

121. Since before the implementation of FOIA, Government Guidance indicated that it would change the extent of appropriate confidentiality surrounding procurement processes, and require a proper distinction between genuine commercial sensitivity and information that is properly disclosable in view of the public interest in value for money

and effectiveness.[1] More recently transparency is a theme of the Coalition Government ICT strategy published in March 2011 which aims, inter alia, at "a continued commitment to greater transparency through regular and open reporting. The approach includes:

- mandatory open standards
- spending controls to ensure that new ICT solutions comply with strategy objectives
- transparency to ensure the continued comparison of common ICT services so that government gets the best price.

122. So far as it concerns the law on confidentiality, the minority view is to a large extent built on the rationale of the Court of Appeal decision in *London Regional Transport* case. There may or may not be a similar risk of failure in the projects underlying that case and the present case. Without revealing the disputed information in some form the public will be no wiser for at least as long as there is no explicit monitoring of the biometric technologies in action. The apparent absence of such monitoring lends force, in the minority view, to the case for publication of a redacted account of the biometric trials in the form described. (The redactions which have been offered without prejudice to their position or that of IBM by the Home Office, deleted the performance information which is central to the Appellant's case, so does not achieve the proportionality the minority view seeks and would be unlikely to satisfy the Appellant).

123. The minority view, however, accepts that there may well be a possible legal difficulty with its approach which emerged late in the process of deliberation with the appearance of the Court of Appeal judgment in *Kennedy v Charity Commission and Information Commissioner* [2012] EWCA Civ 317. This decision in turn drew on the Supreme Court's decision in *Sugar v BBC* [2012] UKSC 4. Both cases had some

[1] For example in *Department of Health v Information Commissioner, EA/2008/0018*, the Tribunal noted at paragraph 79 et sec the existence of Guidance from the Office of Government, Commerce, OGC (*Civil Procurement) Policy and Guidance version 1.1*

similarity with the present case in that they concerned the interpretation of absolute exemptions in FOIA in the light of decisions of various chambers of the European Court of Human Rights concerning the right to receive or impart information under Article 10 of the European Convention on Human Rights. They may or may not have a bearing on the approach described by Sedley LJ in the *London Regional Transport* case, which also relied on Article 10 being imported into the judicial interpretation of the law of confidence. Interpretation will depend on the facts of each case, and it would be redundant to describe the somewhat complex arguments here. In the minority's view, the recent Supreme Court and Court of Appeal decisions can be very summarily characterised as finding that Article 10 (1) was not engaged in either of the cases in question, thus rejecting some of the argument of the First-tier Tribunal decision in the *Kennedy* case which had advanced the case for an evolving interpretation of absolute FOIA exemptions in the light of Article 10 case law. Even the First-tier Tribunal decision had recognised that there is no unqualified right to receive information which a public authority is unwilling to impart and which is appropriately protected under national law.

124. Again, in the minority's view, it is beyond the reach of this Tribunal to say how far if at all the judgments of superior courts would alter or amend the evolving approach of the UK courts and tribunals to the law of confidence. Each case will be decided on its own facts and arguments. It would be unfortunate if different standards emerged for information that has already been leaked, where a "social guardian" holds it and wishes to publish, and cases where the information is still held securely by a public authority unreasonably unwilling to disclose. The boundaries to disclosure under FOIA will not be the only deciding factor. There will also be voluntary disclosure, and public authorities will no doubt seek to comply with new guidance on open standards and open procurement. There are also the requirements under European Procurement Regulations. To the extent that such requirements are neglected or ECHR rights are genuinely at issue, there will be other

means of challenge apart from those under FOIA. The important policy point, in the minority view, is that it should not be too easy for contractual confidentiality to obscure public accountability for the effectiveness of public services commissioned from the private sector or reliant on private provision.

Other Grounds

125. Largely on account of the length of the Appellant's various written submissions the Tribunal has been invited to address what the Home Office, at least, has identified as a number of possible other grounds.

126. The Tribunal by a majority is anxious to point out that it determines this appeal on the findings set out in the preceding sections of this judgment apart from the sections setting out the minority view. However, should those reasons be found to be or in fact be inappropriate it is nonetheless minded to dismiss the appeal in relation to what could be regarded as additional grounds or arguments.

127. First, as referred to at the outset of this judgment it is claimed that the Commissioner has conducted an inadequate investigation. The Tribunal is of the view that even if the same constituted a proper ground of appeal (which the Tribunal does not accept) then the Tribunal finds it impossible to see what specific reasons there are for this contention. The Tribunal has had the benefit of further evidence provided by and on behalf of the public authority which it is fully entitled to consider under its statutory remit under FOIA with regard to the appellate process. In the Tribunal's view as indicated above that evidence shows perfectly clearly that there can be no question over the degree of detail that has been elicited from the public authority as to the relevant facts in the manner contended for by the Appellant.

128. Secondly, the Appellant points to what he says is a discretionary power in the Commissioner to clothe the Home Office with immunity and there has been failure to exercise such discretion. The Tribunal with respect completely fails to follow this argument. There is no such power vested

in or enjoyed by the Commissioner whose powers and role are entirely stipulated by statute. What he has done in this case is to apply those powers in a completely proper and customary way.

129. There are a number of additional points which the Appellant relies on as to why there is here a public interest in disclosure in which he contends why in his view the public interest or interests against disclosure are weak or non-existent.

130. Overall, they amount to taking issue generally with the Home Office's contention that disclosure would not inform public debate when weighed against the consideration of confidence that exists in this case. The Tribunal by a majority has already made it clear that it fully supports the Commissioner's determination in this regard. (The minority questions the Home Office submissions that the disputed information would contribute to public or scientific debate on the efficacy of biometrics, but the benefit would be in its words "hypothetical", "frankly peripheral" and "minor").

131. One specific argument raised by the Appellant is that disclosure would somehow improve the Home Office's performance. Again the Tribunal, (by majority, the minority dissenting) remains somewhat perplexed by the content and extent of this submission. If as indicated above the procurement process was fully compliant with the UK and European law it is hard to see what room for improvement there could properly be said to be. Pointing to earlier alleged lapses by the Home Office is not in the Tribunal's majority view material nor is a reference to the size and likely budgetary entitlement of the Home Office.

Partial disclosure

132. As indicated earlier in his original written statement Mr Swain affirmed that the stance of IBM is that there should be no redaction but by way of a minimum requirement he was prepared to accept that information regarding suppliers and references to suppliers other than Sagem

should be redacted without prejudice to the general contention that there should be no redaction at all.

133. Even at the oral hearing the Home Office continued to contend that whilst some partial disclosure might be possible there remained no valid public interest which would provide the Home Office with a defence to an action of breach of confidence regarding any part of the Report.

134. The Tribunal has since been provided with the suggested redacted version of the Report. If the same is not wholly clear in this judgment, the majority of the Tribunal remains firmly of the view that despite the suggested redactions made, the Home Office's contentions that the public interest would not be served by such disclosure are made out. The submitted version detracts from the fact that it remains to all intents and purposes an expressly confidential document specifically agreed to remain confidential between the parties as well as a specific type of exercise of the type characterised by Mr Swain and therefore of no consequential informative value to the public. The minority agrees that no useful purpose would be served by the disclosure of the redacted text provided by the Home Office, but on the basis that the redactions are so extensive as to defeat the purpose of the Appellant in requesting that biometric technology performance information should be put into the public domain.

Conclusion

135. For all the above reasons in relation to section 41 the Tribunal by a majority dismisses the Appellant's appeal.

David Marks QC
Tribunal Judge

Dated: 24 April 2012

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)
GENERAL REGULATORY CHAMBER
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

RULING ON APPLICATION FOR PERMISSION TO APPEAL TO UPPER TRIBUNAL BY A SINGLE JUDGE

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1. The single Tribunal Judge has read the Appellant's formal application for permission to appeal to the Upper Tribunal dated 21 May 2012. This is accompanied by a 24 page document entitled "Application for permission to appeal 21 May 2012".

2. In Section D of the former document in the section entitled "D: Reasons for applying for permission to appeal and the outcome you are seeking: please state what error(s) of law you consider the Tribunal has made and what outcome you are seeking ...". The following passage appears, namely:
"Making the appeal entails accusing the EA 2011 0081 panel of perversity and the Appellant doesn't believe for one moment that they really are

perverse. But that is what is entailed by the perversity of the situation we all find ourselves in, cf. paragraph 8 of the 24 April 2012 Decision attached".

The Tribunal finds no error of law in that passage or indeed in any part of the section within Section D of the formal permission to appeal as distinct from a generalised accusation of perversity based on alleged failures by the Tribunal to assess properly or at all the factual matters which are set out at length in the 24 page document referred to.

3. In the said 24 page document in the initial section headed "Abstract" the following passage appears, namely:

"The Appellant alleges that the Home Office's defective decisions are blatantly iniquitous. The Tribunal gives no reason for dismissing that allegation and has misdirected itself further by failing even to mention in its Decision the Appellant's other allegation, that the Home Office have been misleading the public for years about the reliability of "biometrics"."

An allegation of iniquity and the other matters mentioned in the second sentence of the above cited paragraph are not grounds which constituted errors of law as distinct from errors of fact. Insofar as the allegation of iniquity is made the same is revisited later in the 24 page document particularly at paragraphs 63 and following in a section headed "Iniquity". The Appellant there cites from paragraphs 115 and 116 of the Tribunal's Decision in which paragraphs the Tribunal referred to the principle that a showing or a well founded allegation of iniquity or impropriety might undermine reliance on the type of public interest which had been considered by the Tribunal but that "no such showing is made out in the present case."

4. In the circumstances the allegation of iniquity made by the Appellant is one which takes issue with the Tribunal's finding or findings of fact as distinct from alleged errors of law.

5. In paragraphs 140 to 155 of the 24 page document there is a section headed "Findings of fact, questions of law and procedure".

6. There is nothing in the said paragraphs which does any more than revisit certain questions of fact which are disputed by the Appellant and therefore nothing in the said paragraphs which can be said in any way to represent allegations that the Tribunal has committed errors of law.

7. In the circumstances the application for permission to appeal to the Upper Tribunal is refused.

Signed:

David Marks QC
Tribunal Judge **Dated: 11 June 2012**