

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 10 November 2009

**Public Authority:** The Home Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### Summary

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The complainant requested a copy of the test report which relates to a specific type of speed camera which was compiled as part of the Type Approval process. The Home Office claimed that the report was exempt from disclosure on the basis that it was provided in confidence (section 41) and that disclosure would be likely to prejudice commercial interests (section 43). The Commissioner has determined that the Home Office was correct to cite section 41 and orders no steps to be taken.

#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

#### Background

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2. Type Approval is a Home Office procedure which any speedometer equipment must be subjected to prior to receiving accreditation. Type Approval is granted, in line with strict criteria, to a product that meets a minimum set of regulatory, technical and safety requirements.
3. During the process, an independent test house approved by the Home Office carries out technical testing of the equipment against requirements specified by the Home Office Scientific Development Branch (HOSDB). HOSDB's requirements cover such issues as storage, operating temperatures, portability, durability, weather proofing, and electro magnetic compatibility as well as matters such as accuracy and reliability. A copy of the test house report is submitted to HOSDB.

4. In respect of speedometer devices, Type Approval is a requirement of the Road Traffic Offenders Act 1988. This provides that safety cameras used to enforce compliance with speed limits must be of a type approved by the Home Secretary before evidence from them can be used in court.
5. The device in question in this case is the Gatso BV Type 24 + AUS (the camera) which is manufactured by Gatsometer BV. It is authorised for supply in the UK by Serco Ltd.
6. This particular speedometer device was type-approved with effect from 1 July 1992.
7. The Commissioner has previously made a decision with regard to the manufacturer's handbook for this device (Decision Notice reference FS50083358).

## The Request

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8. The complainant wrote the to Home Office on 29 November 2007:

*'Could you please supply me with copies of correspondence to and from [named individual], ex Chief Constable and ACPO Secretary who was (as far as I am aware) responsible for the Type Approval testing of the Gatso type 24, which relate to the instructions given to him for the tests being carried out and the reporting of such tests. Please also include information on his role and duties in respect of this testing, whether or not he was personally involved in the testing or just the person charged with writing the reports etc.*

*As the Information Commissioner has now deemed the Gatsometer manufacturers [sic] manual to be outside of the exemptions of commercial confidentiality could you also please send me a copy of the Type Approval test report of the Gatsometer Type 24.'*

9. The Home Office responded on 20 December 2007 advising that it held no correspondence that falls within the scope of the complainant's request. It also advised that as the person named in the request was not involved in the testing, it held no information on his role and duties in respect of this activity. In relation to the test report, the Home Office confirmed it holds this information but that it is exempt from disclosure by virtue of sections 41 (information provided in confidence) and 43(2) (commercial interests).
10. On 21 December 2007, the complainant requested an internal review of the Home Office's decision to withhold the type approval test report.
11. The Home Office wrote to the complainant on 4 February 2008 with the outcome of its internal review. In its correspondence, it upheld its decision that the information is exempt from disclosure by virtue of sections 41 and 43.

## The Investigation

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### Scope of the case

12. On 19 February 2008 the complainant contacted the Commissioner to complain about the way his request for information for the test report had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - the type approval testing of this device is governed by reference to the Speedmeter Manual which is already in the public domain;
  - it is in the public interest to know that a device has been used in accordance with the Type Approval Schedule of Conditions; and
  - each device of this nature is already covered by Patents so preventing the use of the construction of competitor devices using the same patented technology.
13. The focus of the Commissioner's investigation has been whether or not the Home Office was correct in citing the exemptions at sections 41 and 43.

### Chronology

14. The Commissioner contacted the Home Office on 6 April 2009 asking it to provide further information about its decision to apply the exemptions cited and further arguments in relation to the public interest test.
15. The Home Office provided a substantive response on 7 May 2009. In its correspondence, the Home Office provided the Commissioner with a copy of the test report together with arguments in support of its use of the exemptions in sections 41(1) and 43(2).
16. The Commissioner wrote to the Home Office on 30 June 2009 asking for further clarification in support of its arguments.
17. The Home Office responded on 24 August 2009.

### Analysis

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#### Exemptions

18. In this case, the Home Office has argued that the whole of the test report is exempt by virtue of section 41(1) on the basis that disclosure would constitute an actionable breach of confidence. It has also withheld the entire document under section 43(2) on the basis of the commercial prejudice that would be likely to be caused to the manufacturer's interests.
19. The Commissioner has first considered whether or not the Home Office was correct to cite section 41(1).

## Section 41 - information provided in confidence

20. Section 41 provides that:

*'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.'*

21. For the purposes of section 41(1)(a), a 'person' may be an individual, a company, a local authority or any other legal entity.

### Was the information obtained from another person?

22. Under the provisions of section 41(1)(a) the exemption only applies to information which was obtained by the public authority from another person and does not apply to information created by the public authority itself.

23. In deciding whether information has been obtained *'from any other person'* the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded. He takes the view that there is no requirement for any physical passing of documents from one party to another to consider whether the information was obtained from a third party and therefore information which is transcribed or recorded by one party can fall under section 41(1)(a) of the Act if that record contains information disclosed to it, in whatever form, from a third party.

24. In this case, the Home Office has advised that:

*'the test report was supplied to the Home Office by Gatsometer BV Holland, as the manufacturer of the device, and their UK agent Serco, as part of their application for Type Approval'.*

25. Accordingly, the Commissioner accepts that the report was obtained by the Home Office from another person and therefore the requirement at section 41(1)(a) is satisfied.

### Would disclosure constitute an actionable breach of confidence?

26. Under section 41(1)(b), the exemption can only be engaged if disclosure of the information would give rise to an 'actionable breach of confidence', in other words, the provider or a third party could bring court proceedings against the public authority.

27. A duty of confidence arises when one person (the confidant) is provided with information by another (the confider) in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is

a breach of confidence, the confider or any other party affected may have the right to take action through the courts.

28. Whether or not a breach of confidence is actionable is itself dependent on a number of factors which were referred by Megarry J in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* and cited by the Information Tribunal in *Bluck v The Information Commissioner & Epsom St. Helier University NHS Trust (EA/2006/0090)*. According to Megarry J:

*'In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself [...] must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it...'*

29. The Commissioner is aware that this is not the only approach to the analysis of confidentiality. However, in this case, he considers it an appropriate test to use.
30. The Commissioner notes that a breach will no longer be actionable when there is a defence in the public interest. This means that, as submitted by the Commissioner in *S v the Information Commissioner and the General Register Office (EA2006/0030;9 May 2007)*:

*'Disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential'.*

### **Does the information have the necessary quality of confidence?**

31. Information which is protected from disclosure by an obligation of confidence must have the necessary 'quality of confidence'. In the Commissioner's view, this means that:

- a) the information need not be highly sensitive but it must not be trivial; and
- b) the information must not be readily available by other means.

32. In determining whether the withheld information had the necessary quality of confidence at the time the complainant made his request, the Commissioner has therefore considered whether or not the information is trivial in nature and to what extent it is already in the public domain.

#### *a) Is the information trivial in nature?*

33. The test report contains '*details of the device's technical features and performance*' in relation to the tests it is required to undergo as part of the type approval process.
34. The Home Office has described the information contained within the test report as being '*very technical in nature*'. It also acknowledges that '*the information in the report is, by its very nature, very detailed*'.

35. Having seen a copy of the test report, the Commissioner is satisfied that the information is not trivial in nature. However, he does not consider that this alone is sufficient to indicate that the requested information has the necessary quality of confidence. He has therefore gone on to consider the second element of the test in relation to the quality of confidence.

*b) Is the information in the public domain?*

36. In the Commissioner's view, information will not have the necessary quality of confidence if it is already in the public domain. This is in accordance with the view expressed in *Coco v Clark* by Megarry J, who stated that, *'However confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge'*.

37. The Home Office advised the Commissioner during the course of his investigation:

*'A good deal of information about the camera is already in the public domain, but not the information contained within this test report'*.

38. In this respect, the Commissioner notes that the Speedmeter Handbook, the manual for the camera in this case and another piece of information required for Type Approval, is in the public domain as a result of one of his previous decisions. Although ordering disclosure in that case, the Commissioner made it clear in the Decision Notice that in the event of a request being made for other information obtained during the type approval process, he would consider that material separately and may reach a different conclusion regarding disclosure.

39. According to the Home Office website, the Speedmeter Handbook contains:

*'a description of the technical requirements to be met for consideration of type approval of certain types of speedmeter which are prescribed devices for the purposes of the road traffic legislation. It is intended to be a reference for manufacturers wishing to develop or sell existing products to the Police Service in Great Britain. The handbook contains a list of technical requirements and guidance on methods of measurement, and the procedures to be followed in seeking type approval'*.

40. The complainant acknowledges that the type approval test procedures for this device *'are already known to all manufacturers of such devices since they have to comply with certain requirements before a device can be submitted for type approval testing'*.

41. In this case, the Home Office advised the complainant that *'the test report is supplied by the company as part of the technical documentation provided for the purpose of gaining Type Approval'*. The Commissioner accepts that the fact that devices of many types, including devices such as the speed camera in this case, undergo tests prior to receiving Type Approval is common knowledge.

42. However, the issue the Commissioner must consider is not whether it is generally known that devices such as the one in this case are tested, but whether or not the contents of the test report in this case are in the public domain. In this respect, and as evidenced by his request for information, the complainant states that *'only the actual test results are not within the public domain'*.
43. During the course of his investigation, the Commissioner has not become aware of any evidence that contradicts this statement.
44. He is therefore satisfied that, as the requested information is not trivial in nature and is not in the public domain, the requested information has the necessary quality of confidence.
45. The Commissioner has next gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.

### **The circumstances in which the information was provided**

46. Speed camera manufacturers are required to submit a variety of technical documents to the Home Office Scientific Development Branch (HOSDB) for the purpose of obtaining Home Office Type Approval. The test report is one of these documents.

47. The Home Office has argued that:

*'The information supplied by manufacturers as part of the type approval process was supplied with a clear and legitimate expectation that it would be held in confidence by the Home Office'*.

48. In support of this argument the Home Office has advised that, at the end of the type approval process, the company involved is required to sign an agreement with the Home Office before approval is granted. The following wording is included in this agreement:

*'The Secretary of State shall ensure that, so far as is practicable, the commercial confidentiality of the information supplied by the company (or its agents) about the device will be maintained'*.

49. Although not a determining factor as to whether or not something is confidential, the Commissioner notes that, in this case, there is nothing on the test report to indicate that the document is classified as being 'confidential'.

50. The Home Office has also advised the Commissioner that it wrote to the providers of its speedometer devices in January 2005 advising them about the Act and its implications. In this correspondence, it invited their comments regarding *'what types of material you would expect us to claim an exemption [for] should we receive an FOIA request'*.

51. The Home Office has confirmed that a number of responses were received, including from Serco the suppliers of the camera in this case. The Commissioner

has seen a copy of Serco's response which, having been received in 2005, was therefore in existence at the time of this request for information. He notes that, in relation to disclosure, it makes specific reference to the test results provided as part of the type approval process.

52. The Commissioner notes the following views expressed in some of the replies from other suppliers which the Home Office received:

*'We consider that ALL of the information submitted during the Type Approval process is commercially sensitive and crucially, that it was submitted on the understanding that it would remain confidential'.*

*'Any release of information demonstrating how we achieve Home Office Type Approval would be deeply injurious to our business and is strictly against the undertaking of confidentiality expressed by HOSDB at the time the information was supplied'.*

*'The information was provided against undertakings, and indeed signed agreements, of strict confidentiality'.*

*'All the information provided to you for the purpose of obtaining the approval of our ... speedmeter has been and is given in confidence and therefore should be treated as strictly secret and confidential information'.*

53. Having considered the context in which Type Approval information is provided to the Home Office, the Commissioner is satisfied that the requested information in this case was provided in circumstances that implied an obligation of confidence. As there is no evidence to suggest that the circumstances had changed by the time of the request, the Commissioner is also satisfied that these arguments were still valid at the time the complainant's request for information was received.

### **Unauthorised use of the information**

54. While the Commissioner acknowledges that responsibility for the decision whether or not to disclose under the Act ultimately lies with the authority which holds the requested information, in the circumstances the Commissioner is surprised to learn that the Home Office did not contact the company concerned to advise them of the complainant's request for information when it first received his request. He notes that it was only at the internal review stage of the decision-making process that the Home Office contacted the manufacturer of the camera with regard to the request for disclosure of the test report.
55. The Commissioner notes that the manufacturer, in its response, objected to disclosure and provided reasoned arguments in support of this stance. The Commissioner has given weight to these arguments as they were provided by the confider itself rather than being speculative reasons put forward by the Home Office on its behalf.

56. The Commissioner also notes that these arguments are in addition to the objection to disclosure provided in 2005 which he considers still to be relevant at the time of the request.
57. Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider for the exemption to be engaged.
58. In this case, the Home Office has argued that release of the requested information would be to the detriment of Gatsometer in that it '*would allow competitors to see the test results and improve their own devices which would prejudice this particular supplier's commercial interests*'.
59. Having viewed its submission, the Commissioner is satisfied that disclosure would be to the detriment of the company to whom the duty of confidence is owed.
60. As the Commissioner is satisfied that all three elements of the test of confidence have been met, he has next considered whether or not the Home Office could rely on a public interest defence in an action for breach of confidence in the event of disclosure.

**Would the public authority have a defence to a breach of confidence claim because the public interest in disclosure would outweigh the public interest in maintaining the exemption?**

61. Section 41 is an absolute exemption and therefore there is no public interest test to apply under the Act. However, under the common law of confidence there is a public interest defence to a claim of breach of confidence. The Information Tribunal described the effect of this in the case of *S v The Information Commissioner and the General Register Office*:

*'Disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.'*

62. The test to be applied in deciding if a duty of confidence can be overridden differs from the public interest test normally applied under the Act. The public interest test normally applied under the Act assumes that information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure. The test applied in respect of the duty of confidence assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
63. When considering whether an action for breach of confidence would fail because disclosure of the information would be protected by a public interest defence – in other words, no duty of confidence would arise because it would not be in the public interest to prevent disclosure – the Commissioner's view is that the Home Office would have to provide arguments that outweigh the public interest in maintaining the obligation of confidence in this case.

## Public interest arguments in favour of disclosing the requested information

64. The Home Office recognises that there is a public interest in disclosing the requested information:

*'The public interest could be served by the release of the type approval report as it would enable the public to see the standards these devices have to meet before they can be brought into use. It would also acknowledge the public's interest in transparency and increase public understanding of controversial policy areas such as speed cameras.'*

65. The complainant has argued that it is in the public interest *'to know that a device has been used in accordance with the Type Approval Schedule of Conditions, which states "For use in the Attended Actively Operated Mode as tested"'*.

66. The Home Office acknowledges the public interest in learning how the camera in question performed when tested. In favour of releasing the information, it advised the complainant that it took account of the fact that:

*'the public may well be interested in learning how the device you are interested in performed when tested'.*

## Public interest arguments in favour of withholding the requested information

67. In favour of withholding the information, the Home Office has argued that:

*'the information was provided to us in confidence and it is important that the HOSDB [Home Office Scientific Development Branch] maintains the trust of manufacturers. Nor would it be in the public interest for businesses not to be able to trust our commitment to abide by confidentiality agreements'.*

*'More generally, the industry's wariness of the consequences of sharing sensitive information has, in HOSDB's case, been tempered by HOSDB's proven integrity in handling such material which has enabled a level of trust to develop'.*

68. In the Commissioner's view, this is mitigated by the fact that commercial organisations contracting with public authorities must now be aware that a different confidentiality situation exists as a result of the Freedom of Information Act.

69. The Home Office has also argued that it is in the public interest that the maintenance of safety on the roads is carried out using the most effective equipment available and that this can be ascertained only through Type Approval.

*'If we were to release documents supplied to us in confidence for the type approval process we would lose the co-operation of the manufactures which would seriously undermine the process and have wide ranging safety implications'.*

*'The information supplied by manufacturers as part of the type approval process was supplied with a clear and legitimate expectation that it would be held in confidence by the Home Office. Disclosure of such confidential information would have a detrimental effect on the manufacturer'.*

### **Balance of the public interest arguments**

70. In the Commissioner's view, there is a public interest in maintaining trust and preserving the free flow of relevant information to public authorities to enable them to perform their functions. The duty of confidence protects the necessary relationship of trust between the confider and the confidant, thereby operating to serve the public interest. Disclosure of confidential information may undermine that relationship.
71. In this case, having considered the opposing public interest factors, the Commissioner is satisfied that the public interest in disclosure does not outweigh that in maintaining the duty of confidence. Accordingly, as the Commissioner is satisfied that the information was obtained from another person and that disclosure of the information would give rise to an 'actionable breach of confidence' he finds the exemption at section 41 engaged.
72. As the Commissioner is satisfied that the Home Office was correct in citing section 41 in relation to the whole of the test report, he has not gone on to consider the exemption at section 43.

### **The Decision**

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73. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

### **Steps Required**

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74. The Commissioner requires no steps to be taken.

## Right of Appeal

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75. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 10<sup>th</sup> day of November 2009**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### **S.41 Information provided in confidence**

**Section 41(1)** provides that –

*'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.'*

**Section 41(2)** provides that –

*'The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.'*

### **S.43 Commercial interests**

**Section 43(1)** provides that –

*'Information is exempt information if it constitutes a trade secret.'*

**Section 43(2)** provides that –

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

**Section 43(3)** provides that –

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).'*