

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 February 2011

Public Authority: Home Office
Address: Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested a report relating to trials carried out by IBM on the effectiveness of biometric recognition technology. The public authority refused the request and cited the exemptions provided by the following sections of the Act: 31(1)(a) (prejudice to the prevention or detection of crime), 31(1)(e) (prejudice to the immigration controls), 41(1) (information provided in confidence) and 43(2) (prejudice to commercial interests). The Commissioner finds that the exemption provided by section 41(1) was applied correctly and so the public authority is not required to disclose the information. As the finding on section 41(1) relates to the entirety of the information in question, it was not necessary to also consider the other exemptions cited by the public authority. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 17(1)(c) and 17(3)(b) in its handling of the request.

The Commissioner's Role

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.

The Request

2. The complainant made the following information request on 6 January 2010:

"Please provide a copy of the detailed report of the competitive trials developed and run by IBM [that tested the speed, accuracy and cost of multibiometric facial and fingerprint recognition technology developed by Sagem Sécurité] so that the public can assess for themselves the reliability of the technology."

3. A delay followed during which holding responses were issued stating that the exemptions provided by sections 31(1)(e) (prejudice to the immigration controls), 41(1) (information provided in confidence) and 43(2) (prejudice to commercial interests) of the Act were being considered. These responses did not confirm that these exemptions were engaged, or give any reasoning as to why. Section 41(1) was incorrectly referred to in these responses as being a qualified exemption.
4. The public authority responded substantively by letter dated 17 March 2010, outside 20 working days from receipt of the request. The request was refused, with the public authority citing the exemptions provided by the following sections of the Act: 31(1)(a) (prejudice to the prevention or detection of crime), 31(1)(e), 41(1) and 43(2). Little reasoning was given as to why these exemptions were believed to be engaged and the public interest was addressed jointly, rather than separately for each of the qualified exemptions cited. Section 41(1) was addressed under the public interest test heading, despite being an absolute exemption.
5. The complainant responded to this by letter dated 3 April 2010 and requested an internal review. The public authority later stated that it did not receive this letter until 20 April 2010.
6. The public authority responded with the outcome of the internal review on 17 June 2010. This response recognised that a breach of the Act had occurred through the failure to respond to the request within 20 working days of receipt and that section 41(1) is an absolute exemption. Some explanation for the citing of this exemption was given. The conclusion of the internal review was that the exemptions cited previously were upheld.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 1 July 2010. The complainant indicated at this stage that he did not agree with the exemptions cited by the public authority and that he believed that the public interest favoured disclosure of the information requested. The complainant also referred to contracts relating to the National Identity

Register remaining in place, despite the process of creating legislation to cancel the identity cards scheme being, at that stage, in train.

Chronology

8. The Commissioner contacted the public authority in connection with this case on 15 October 2010. The public authority was asked to respond with further explanation for the exemptions cited and with a copy of the withheld information.
9. After a delay, the public authority responded substantively on 15 December 2010. Further explanation for the exemptions cited was given and a copy of the withheld information was supplied. The public authority also at this stage provided papers setting out the background to the request.

Background

10. The wording of the request refers to technology developed by Sagem Sécurité. The public authority has identified as the information that falls within the scope of this request a document titled 'The National Identity Scheme, Biometric Performance Demonstration'.

Analysis

Exemptions

Section 41

11. The public authority has cited the exemption provided by section 41(1). This provides that confidential information provided to the public authority by any other person is exempt. Consideration of this exemption is a two-stage process; first, the information in question must have been provided to the public authority by a third party, referred to here as an A to B transfer. Secondly, the disclosure of this information must constitute an actionable breach of confidence. As a breach of confidence would no longer be actionable if there is a defence that this breach was in the public interest, the Commissioner will also consider whether there would be any such public interest defence in this case.
12. Covering first whether this information was supplied to the public authority in an A to B transfer, the stance of the public authority is that the information was provided to it by IBM. The wording of the introduction contained within the withheld information is addressed by

IBM to the public authority. This content of the information therefore supports the stance of the public authority and so the Commissioner accepts that this information was supplied to the public authority by a third party.

13. Turning to whether disclosure of this information would constitute an actionable breach of confidence, the Commissioner has considered three points in reaching a conclusion on this issue:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure of this information would result in detriment to the confider.
14. The approach of the Commissioner is that information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. On the issue of whether this information is otherwise accessible, the Commissioner is aware of no evidence that this is the case and the stance of both the public authority and IBM suggests that it is not. On this basis, the Commissioner accepts that this information is not otherwise accessible.
15. As to whether this information is more than trivial, the Commissioner has on this point taken into account the content of the information and the attitude of IBM towards the possibility of disclosure. The content of this information shows this to be a substantial report that was the culmination of a significant program of work, which supports the argument that this information is more than trivial.
16. When approached on the issue of the complainant's information request, IBM objected to disclosure. In the case *S v the Information Commissioner and the General Register Office* (EA/2006/0030) the Information Tribunal stated that:

"Information cannot be said to be trivial if it is of importance to the person whose privacy has been infringed" (paragraph 36).
17. The attitude of IBM towards the disclosure of this information demonstrates that the preservation of the confidentiality of the information in question is of importance to it. For these reasons, the conclusion of the Commissioner on this point is that this information is more than trivial.
18. Turning to whether the information was imparted in circumstances importing an obligation of confidence, the clearest means to show that this was the case would be if there had been an explicit agreement

between confider and recipient that this information would be kept confidential. Alternatively, an implied obligation of confidence may be said to exist if, for example, the content of the information suggests that the confider would have expected it to remain confidential.

19. In this case, the public authority has not provided evidence of an explicit agreement between it and IBM that this information would remain confidential, but has stated that IBM considers this information to have been provided in confidence. The public authority has also stated that IBM believes that information that was provided to IBM by other organisations was subject to an explicit obligation of confidence and that IBM could be subject to action for breaching this confidence if this information was to be disclosed.
20. In evidence for the confidentiality agreements between IBM and other organisations is correspondence from IBM to the Home Office in which IBM refer to these agreements and to the possibility of being subject to action for breaching these agreements. As mentioned above, IBM has also made clear that it would expect the Home Office to maintain the confidentiality of this information. Also of note is that the report in question is marked "Restricted".
21. The conclusion of the Commissioner is that this information was imparted in circumstances importing an obligation of confidence. Whilst the public authority has not provided evidence of an explicit agreement of confidentiality between it and IBM, the combination of the guarantees of confidentiality that IBM gave to its suppliers, the representations from IBM to the public authority that it would not wish this information to be disclosed, and the marking of this information as "Restricted", lead to the conclusion that IBM would have held a legitimate expectation that the Home Office would maintain the confidentiality of this information.
22. Although it is not always the case that there must be an element of detriment to the confider for a breach of confidence to be actionable, representations concerning detriment have been made in this case and so are considered in this Notice. As covered previously, IBM gave undertakings of confidentiality to other organisations concerning content within the information withheld. The public authority states that a breach of these agreements could expose IBM to unlimited liability. As also covered previously, evidence of these confidentiality agreements has been provided by the public authority and, therefore, the Commissioner accepts the possibility of detriment to the confider in this case.
23. As referred to above at paragraph 11, the final step when considering if this exemption is engaged is to consider whether there would be a public interest defence to the breach of confidence that would result

through the disclosure of the information in question. Such a defence would mean that this breach of confidence would no longer be actionable and so the exemption provided by section 41(1) would not be engaged.

24. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test in relation to qualified exemptions. That test is whether the public interest in maintenance of the exemption outweighs the public interest in disclosure. The test here is whether the public interest in disclosure of the information exceeds the public interest in the maintenance of confidence.
25. The view of the Commissioner is that an obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. There must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence.
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.
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 request still in train, has been the 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.
28. The Commissioner agrees with the complainant that there is a substantial public interest in favour of the disclosure of the information in question here due to the content of this information. However, he also believes that there is an equally weighty public interest in ensuring that the Government is able to carry out technology procurement exercises appropriately and this, combined with the possible detriment to the confider, means that the Commissioner does not believe that the public interest in maintaining the confidence is outweighed.

29. The Commissioner concludes that a valid defence could not be made in this case that the breach of confidence was in the public interest. The breach of confidence would, therefore, be actionable.
30. The Commissioner concludes that the exemption provided by section 41(1) is engaged in relation to the information in question. This conclusion is based on his findings that the information was provided to the public authority from a third party; the information is subject to the quality and obligation of confidence, and any breach of this confidence would result in detriment to the confider. This means that disclosure of this information would constitute an actionable breach of confidence. The Commissioner has also found that a breach of this confidence would not cease to be actionable due to a defence that the breach would be in the public interest.

Section 31(1)(a), 31(1)(e) and 43(2)

31. As the conclusion recorded above regarding section 41(1) relates to the entirety of the information falling within the scope of the complainant's request, it has not been necessary to go on to consider the other exemptions cited by the public authority.

Procedural Requirements

Section 17

32. In failing to adequately explain why the exemptions provided by sections 31(1)(a), 31(1)(e) and 43(2) were believed to be engaged, or for why the balance of the public interest was believed to favour the maintenance of these exemptions, the public authority did not comply with the requirements of sections 17(1)(c) or 17(3)(b).

The Decision

33. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 41(1) correctly. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 17(1)(c) and 17(3)(b) in its handling of the request.

Other matters

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The

Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 28th day of February 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,

- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls”

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 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).”