

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date:** 11 October 2007

**Public Authority:** Home Office  
**Address:** 50 Queen Anne's Gate  
London  
SW1H 9AT

### Summary

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The complainant requested a copy of an official speedometer handbook and also a copy of the associated approved setup manual. The Home Office (the "public authority") informed the complainant that he had already been supplied with the former document but refused the latter document claiming that the information was exempt from disclosure under sections 41 and 43 of the Freedom of Information Act 2000 ("the Act"). After conducting an internal review, the public authority later varied this to section 43 only.

In further correspondence with the Commissioner the public authority sought to re-introduce section 41 and also section 31(1)(a) and (b).

After considering the submissions of both parties the Commissioner concluded that none of the exemptions cited had been appropriately applied and that therefore the public authority was in breach of section 1(1) of the Act. Consequently, the complaint is upheld and the Commissioner has ordered the public authority to disclose the requested information to the complainant.

### 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 Act. This Notice sets out his decision.

### Background Information

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2. The public authority has a test process called the 'Type Approval' procedure which any speedometer equipment must be subjected to prior to receiving accreditation. The purpose of this procedure is to ensure devices are accurate, reliable and robust and provide accurate evidence leading to safe convictions. Type Approval is granted for

enforcement devices in line with strict criteria laid down in handbooks produced by the Home Office Police Scientific Development Branch (PSDB). Without this approval the equipment will not be considered as 'authorised' for use.

3. The public authority has produced a Speedmeter Handbook which is sub-titled "A Guide to Type-Approval Procedures for Speedmeters Used for Road Traffic Law Enforcement in Great Britain". It is produced as a guide to the requirements of the Type Approval process and is readily available (the latest version is available via its publication scheme). The Commissioner has used the 'third edition' of the Handbook which is the same version which the public authority supplied to the complainant.
4. This Handbook provides the parameters of the tests which are undertaken in respect of the type-approval process. It also specifies that:

*"The supplier shall provide free of charge a written technical description of the speedmeter, its operation and intended use, and full circuit diagrams to PSDB when the device is accepted for the practical assessment"*.

*"A handbook or a set of written instructions for the use of the operator shall be provided with the instrument when it is accepted ..."*.

5. The device in question, the mobile/portable Gatso BV Type 24 AUS, is authorised for supply in the UK via Serco Ltd (the "supplier"). The manufacturer is Gatsometer BV.
6. This particular speedmeter device gained Type Approval in July 1992.
7. Although it was not the case at the time of the original request, and it has therefore not been considered in this Notice, the Commissioner is aware that other public authorities have since released various Instruction Manuals as a result of requests under the Act. These include the following Gatsometers, which were released in June 2006:
  - *Gatso Red Light camera types 36mSG-MC (in mph) Instruction Manual Gatso IM-E9914*
  - *Gatso FIP installation with radar 24 and traffic camera type AUS-S (mph version) and digital switch timer Instruction Manual IM-E9906\**

(\*This Instruction Manual is substantially the same as the one requested but has an additional switch timer.)

## The Request

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8. On 13 May 2005 the complainant requested the following from the public authority in accordance with section 1 of the Act:

*"I would be obliged if you would supply me a copy of the official Type Approval Handbook with respect to the mobile / portable Gatsometer BV Type 24 AUS, also a copy of the approved set up manual which the police are obliged to comply with."*
9. In a letter dated 19 May 2005 the public authority wrote to the complainant and stated the following:

*"The document to which you refer – Type Approval Handbook – is The Speedometer Handbook (Third Edition). You will already have received a copy of this document from us in response to your letter of 21 February."*
10. It further advised that there was no approved set up manual issued by the public authority but suggested that the complainant may be referring to the manufacturer's Instruction Manual which the public authority received as part of the required technical documentation.
11. The public authority went on to advise that this particular document was exempt, citing sections 41 and 43 of the Act. It did not include a public interest test in its response.
12. The complainant was unhappy with this response and wrote back on 23 May 2005 seeking a review of the decision. He qualified this by stating that:

*"...by refusing to disclose the said public information any Defendant wishing to challenge the admissibility of photographic evidence taken by unqualified police officers would pursuant to Article 6 of the Human Rights Act 1998 and Human Rights Convention be prejudice to the point where they would not receive a fair trial."*
13. The public authority acknowledged this request on 03 June 2005 and said that it aimed to send a substantive response within 30 working days.
14. On 06 July 2005 the public authority again wrote to the complainant to extend the deadline to the 16 August 2005. It apologised for the delay.
15. On 12 July 2005 the complainant wrote to the ICO to complain about his lack of response. The Commissioner acknowledged this on 18 July 2005 and also forwarded the complainant some information regarding the handling of complaints.

16. In a letter dated 19 September 2005 the public authority informed the complainant that it had conducted an internal review and that the decision to withhold the information in question had been varied. It stated that it had found that it could not apply the exemption under section 41 as it was "*found not to be compatible with the information being requested*". However, it upheld the use of the exemption under section 43(2) and included a public interest test. The public authority advised the complainant of his right to complain to the Information Commissioner.
17. The complainant contacted the Commissioner again on 20 September 2005. He asked the Commissioner to consider whether the refusal to disclose the information in question was appropriate.

## The Investigation

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18. Having ascertained that the complainant only required a copy of the Instruction Manual, the Commissioner wrote to the public authority on 28 February 2007 and asked for a copy of the withheld information.
19. Having had no response from the public authority, the Commissioner requested the information during a telephone call on 29 March 2007. This was followed up with an email on the same day.
20. The public authority replied to the Commissioner on 05 April 2007 and included a copy of the Instruction Manual and further detail to support its use of the section 43(2) exemption.
21. In this letter the public authority also advised the Commissioner that it had decided that it now sought to rely on section 41 again as well as section 43(2) as it believed that disclosure of the Instruction Manual would represent an actionable breach of confidence.
22. On 27 April 2007 the public authority also introduced section 31(1)(a) and (b) as it believed disclosure of the Instruction Manual could facilitate attacks on the equipment which would impact on road safety and also increase repair costs.
23. The Commissioner also ascertained that the public authority had written to all speedmeter providers in January 2005, advising them about the Act and its implications. It invited their comments regarding "*... what types of material you would expect us to claim an exemption [for] should we receive an FOIA request*".
24. On 04 May 2007 the public authority provided the Commissioner with copies of letters it had received in response to this letter from two speedmeter suppliers. Both included details of their concerns in respect of the possible disclosure of their information under the Act.

Neither was from the supplier relevant to this case, which did not furnish the public authority with its representations until after receipt of this request.

25. The supplier responded to this letter on 16 May 2005, which is later than the complainant's request for the Instruction Manual. In its reply to the public authority, the supplier said the following:

*"We are grateful for your enquiry and the opportunity to clarify and clearly state which elements of our proposals / bids / tenders and responses would be considered as exempt from disclosure under the terms of the Act."*

The Commissioner notes that this response refers only to 'proposals, bids and tenders' and there is no reference to the Instruction Manual.

26. Additionally, the supplier went on to identify thirteen areas of Type Approval information where it believed that disclosure should be exempt as it would result in either an actionable breach of confidence or a breach of commercial interests. The list provided is very general and included headings such as security aspects (physical, hardware, software), technical documentation, copyright, technical specifications, algorithms and information in confidence. The Instruction Manual is not listed, although it may be considered to fall under any of the examples given.
27. Other speedmeter providers gave different responses to the letter; some of their comments are cited by the public authority as part of its exemption arguments later in this Notice.

## Findings of Fact

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28. The Commissioner has also ascertained the following supplementary information:
- The speedmeters can only be purchased through a UK agent who can only supply them to enforcement authorities.
  - It is not possible to purchase a copy of the Instruction Manual. This is supplied to the public authority as part of the Type Approval process and would also be supplied to enforcement authorities when purchasing the equipment.
  - Although the Instruction Manual that the Commissioner has been given refers to a FIP Gatsometer, i.e. Fixed Installation Post, this is the same manual that is supplied for the mobile/portable Gatsometer.

29. The Commissioner has viewed the Instruction Manual, as provided by the public authority, and compared it to the Speedmeter Handbook which is already publicly available. The Handbook provides guidance for the Type Approval procedures that must be met by any speedmeter requiring approval, including technical requirements. The Commissioner has noted that any speedmeter must meet the criteria and that some of the technical limitations are therefore already in the public domain.

## Analysis

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### Procedural matters

30. The Commissioner considered whether the public authority breached section 17 when issuing the initial refusal notice on 30 November 2006 by not providing a public interest test. The full text of section 17 can be found in the Legal Annex at the end of this Notice.
31. Under section 17(3) where the public authority finds that it is to any extent relying on a claim that subsection 1(b) or 2(b) of section 2 applies it must, within a reasonable time, communicate to the applicant its reasons for claiming that, in all the circumstances of the case, the public interest favours maintaining the exclusion from either the duty to confirm or deny holding the requested information or from disclosing it. Section 43(2) is a qualified exemption and therefore the public authority was required to carry out a public interest test and communicate the outcome to the complainant. The refusal notice issued by the public authority on 19 May 2005 did not include this information and therefore it breached section 17(3).
32. The Commissioner notes that in its internal review letter of the 19 September 2005 there was an explanation of the public interest arguments.
33. As the section 31 exemption was only introduced during the Commissioner's investigation and was not cited in the original refusal notice, the public authority failed to comply with section 17(1) in this regard.
34. The Commissioner also notes that the public authority has changed the exemptions cited on several occasions, reintroducing one after having removed it on review, without the knowledge of the complainant.

## Exemptions

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### Exemption – Section 31(1) (a) and (b) (Law enforcement)

35. Section 31 (1) (a) and (b) provides that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice –
- (a) the prevention or detection of crime
  - (b) the apprehension or prosecution of offenders
36. Section 31 is a qualified exemption and therefore, if the Commissioner finds that the exemption is engaged, he must consider the public interest test as detailed at section 2(2)(b).
37. The Commissioner's guidance on the test of prejudice (Freedom of Information Act Awareness Guidance No 20) advises that although prejudice need not be substantial, he expects that it be more than trivial. The phrase, 'likely to prejudice' has been considered by the courts in the case of R (on the application of Alan Lord) v. the Secretary of State for the Home Office. Although this case concerns the Data Protection Act, the Commissioner regards this interpretation as persuasive. The judgment reads:
- 'Likely connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.'*
38. In other words, the probability of prejudice occurring need not be more likely than not but there should certainly be substantially more than a remote possibility.
39. The public authority sought to rely upon section 31 of the Act to withhold the requested information (this exemption was never relayed to the complainant as it was introduced at a much later stage to their argument for withholding the information).
40. In this case, the public authority cited that the exemption applied because the information was held in order to enable the following:
- (a) the prevention or detection of crime
  - (b) the apprehension or prosecution of offenders
41. In seeking to explain why sections 31(1)(a) and (b) applied the public authority put forward the following points in relation to the specific prejudice that it considered would, or would be likely, to arise if the information were released.

- *“... disclosure to people other than enforcement authorities would leave the camera equipment extremely vulnerable to informed tampering by vandals...”*
  - *“There are well documented instances of devices such as this having been attacked in the past ... and the disclosure of any information which could facilitate the effectiveness of such attacks is clearly not in the public interest, most importantly in terms of the prejudicial impact that this would have on road safety, but also because of the increased costs incurred in repairing cameras that would result.”*
  - *“... law enforcement would be damaged if people knew how to disable these devices.”*
42. In addition to this, in a letter to the public authority dated 24 April 2007, the supplier made the following representation:
- “... we believe the information contained in the Gatsometer Instruction Manual IM-E9906 [this is almost identical to the one requested] details far more than the routine set-up aspects of the AUS/Type 24 Radar. Serco Ltd / Gatsometer BV believe the release of this manual, and especially the images depicting the placement of key camera components within the cabinet, would subject our business to an unprecedented amount of targeted vandalism damaging operational effectiveness.”*
43. There are many cited cases of vandalism to speed camera equipment reported on the internet and in the press - as cited by the public authority in their defence above - which demonstrates that these acts are already being undertaken. The public positioning of these cameras makes them readily apparent to potential attackers. Their attacks are generally swift and destructive, the majority of these being caused by the following: setting fire to, blowing up, re-positioning, sawing-off the camera housing, driving into the stand or painting over the lens. This shows that the attacks are opportunistic as opposed to planned. The public authority has not presented any evidence to suggest that any different tactic would be undertaken if the Instruction Manual were to be released.
44. Websites contain further technical data, photographs and descriptions of individual speedmeters. One such example is the Sussex Safety Camera Partnership site which provides a detailed description and photographs of the Gatso camera type AUS at <http://www.sussexsafetycameras.gov.uk/facts.htm>
45. The Commissioner notes that it is clear where the camera is housed from looking at the equipment and it would be readily apparent as to what constituted a film cassette if the housing were forced open. He does not therefore agree that disclosure of the Instruction Manual



would reveal the placement of key camera components. It is already obvious either from information already in the public domain or would become readily apparent by simply opening the device.

46. The Commissioner has also considered the recent Information Tribunal decision in relation to case EA/2006/0060 & 0066. In its decision the Tribunal found that there should be evidence of a causal relationship between the information being disclosed and any associated crime. The Commissioner does not believe that the public authority has presented any evidence as to how disclosure of this specific piece of information would be likely to lead to the types of crime described.
47. Information is only exempt under section 31 if its disclosure would, or would be likely to, *prejudice* situations such as those cited above or cause *harm* to law enforcement. In this instance, the Commissioner does not accept that disclosure would, or would be likely, to prejudice the prevention or detection of crime and the apprehension or prosecution of offenders by making it easier to vandalise speeding equipment.
48. In view of the above the Commissioner has concluded that the public authority inappropriately cited section 31 when refusing to provide the requested information.

#### **Exemption – Section 41 – Information provided in confidence**

49. The public authority originally cited section 41 in its refusal notice then removed it when it undertook its review. In its review of 19 September 2005 it stated:

*“At the end of the process a formal agreement is drawn up between the manufacturer and the Home Office and included in the agreement is a section about commercial confidentiality – ‘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.’*

*“My review of the papers found that the HOSDB [Home Office Scientific Development Branch] should not have applied the exemption contained within section 41 (Information Provided in Confidence) of the FOIA as this exemption was found not to be compatible with the information being requested.”*

50. However, the public authority re-introduced Section 41 on 5 April 2007 when it was cited in a letter to the Commissioner.
51. In its response to the public authority's letter of January 2005, referred to in paragraph 23 above, the supplier cited several areas where it would consider the items as being actionable breaches of confidentiality were the information to be disclosed. The Commissioner

notes that this response was dated 16 May 2005 and was therefore received after the original request and possibly not received until after the public authority's initial refusal dated 19 May 2005.

52. The response specified that it was in respect of "*proposals / bids / tenders*" and also that "*we would appreciate the opportunity to comment upon any request that you may receive if it might involve the disclosure of what would normally be commercially sensitive data*". The Instruction Manual was not referred to either in the letter or the annex. The supplier only asked to be consulted regarding items that were "commercially sensitive".
53. To support its position that the section 41 exemption applies to the Instruction Manual, the public authority provided the Commissioner with copies of emails and letters in respect of speedometers provided by both this supplier and others, as cited in paragraph 27 above.
54. Section 41 is an absolute exemption which does not require consideration of the public interest test. Section 41(1) provides –  
  
"Information is exempt information if –  
  
(a) it was obtained by the public authority from any other person (including another public authority), and  
  
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."
55. Information is exempt by virtue of section 41 if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under this Act) by the authority holding it would constitute a breach of confidence '*actionable*' by that or any other person. This particular decision calls for detailed analysis of the wording of section 41 and the common law relating to breach of confidence as it applies to the requested information.
56. In relation to the application of the section 41 exemption, the Commissioner must first consider whether or not the requested information was in fact obtained from another person in order to satisfy the requirements of section 41(1)(a). The Commissioner notes that the Instruction Manual is necessarily submitted to the public authority as part of the Type Approval process. It is therefore clear that the Instruction Manual was obtained by the public authority from a third party (the supplier) and therefore this requirement is satisfied.
57. Having established that the requested information was in fact obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the Act), would

constitute a breach of confidence 'actionable' by that or any other person.

### **An 'actionable' claim for breach of confidence**

58. The requirements for a claim for breach of confidence are set out in the case of *Coco v Clark [1969] RPC 41*. According to the decision in this case a claim for breach of confidence can be established where:

*"... three elements are normally required if ... 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..."*

59. All three elements must be present for a claim to be made out. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the Act requires a further consideration in any case, namely, whether or not there would be a defence to such a claim.

### **The necessary 'quality of confidence'**

- **Is the information trivial in nature?**
- **Is the information in the public domain?**

60. The Instruction Manual gives details regarding the functionality, specification and operation of the Gatso speedmeter. It also provides diagrams and photographs. The Commissioner is satisfied that this information is not trivial in nature, however he does not consider that this alone is sufficient to indicate that the material has the necessary quality of confidence. Therefore he has also considered whether the information is in the public domain in order to determine whether, in his view, the information satisfies this aspect of the test.
61. The Commissioner notes that the Instruction Manual contains information about the hardware elements of the device. However, whilst there are images of some of these physical components, and it is shown how to assemble the equipment, many similar images are already published on the internet.
62. The Commissioner also notes that there is a considerable amount of information about the technical specification of equipment available via public websites about road traffic enforcement. The Speedmeter Handbook, referred to in paragraph 3 above, which is provided to the manufacturer / supplier by the public authority, also stipulates the technical requirements that must be met for the equipment to achieve 'approved' status. Further, some websites also include images of the interior of the equipment similar to the contents of the Instruction Manual (for example the website referred to paragraph 44).

63. The Commissioner has also considered the way that the information is handled by the manufacturers, the public authority and enforcement authorities. Specifically he has taken into account the degree to which access to the Instruction Manual is restricted.
64. The Instruction Manual is distributed to purchasers of the equipment. It is used as an 'instruction manual' which means its contents are therefore widely available to relevant users within the traffic enforcement arena.
65. Back in September 2001 the Association of Chief Police Officers (ACPO) carried out a survey which showed that there were 656 Gatso speedmeters in use at that time. There are currently approximately 800 live devices. Each Gatsometer, as supplied from the factory, comes with an Instruction Manual.
66. Instruction Manuals are also used in training. This training may be done by either the manufacturer or internally by a police force's own trainers. If done by the manufacturer then Instruction Manuals are given to officers. It is not known whether Instruction Manuals are distributed locally by trainers within police forces, however, this seems likely given that in order to operate the equipment correctly it would be necessary to have an indication of its features as denoted in the Instruction Manual.
67. During training given by the manufacturer, students' attention is drawn to the nature of information within the Instruction Manual but this is primarily focussed upon copyright issues.
68. It would therefore appear that there are a large number of the Instruction Manuals in circulation in order to provide enforcement authorities with the necessary information to use the equipment.
69. The Commissioner has considered all of the factors mentioned above. The question as to whether information is confidential for the purposes of an action for breach of confidence is a question of degree. Although the manual has wide distribution and information about the technical specification is in the public domain he has concluded that in this case he is satisfied that the Instruction Manual is not widely accessible to a degree that would indicate the information is public knowledge.
70. The Commissioner has therefore concluded that the information has the necessary 'quality of confidence'. However, the findings above have also been considered when assessing detriment later in the decision.

## Obligation of Confidence

71. The Commissioner does not accept the public authority's argument that, because the information provided by the supplier related to 'commercially confidential' issues, it was by its nature confidential. Whilst such information could be subject to a duty of confidence, it is necessary to give specific consideration to the information that has been requested in each case. Therefore the Commissioner has looked carefully at this particular document before deciding whether the information had the necessary obligation of confidence. (The Commissioner is aware that many of the 'commercially confidential' issues are pertinent to the exemption at section 43, commercial interests, and these will be considered later in this notice).
72. Though not a determining factor as to whether something is confidential or not, the Commissioner also notes that the Instruction Manual has no marking on it to infer it is 'confidential' or 'commercially sensitive'. The only caveat on the document relates to a copyright clause.
73. In a letter to the public authority dated 16 May 2005, of the thirteen areas where it believed an exemption would apply, the supplier identified ten types of Type Approval information where it believed that disclosure would result in an actionable breach of confidence. These areas are very general, there is no specific mention of the Instruction Manual, and, as noted in paragraph 25, the letter of 16 May 2005 only referred to 'proposals, bids and tenders'. Nevertheless the Commissioner has identified the following areas which could possibly be said to encompass the Instruction Manual:
- Security aspects (physical, hardware, software)
  - Copyright
  - Technical documentation
  - Technical specifications
74. Copyright has not been pursued as an issue by the public authority, however, the Commissioner believes it is pertinent to mention it as it has been cited by the supplier and the Instruction Manual does carry a copyright marking.
75. The Ministry of Justice has provided guidance on copyright which can be accessed via the following link:-  
<http://www.foi.gov.uk/guidance/proguide/chap08.htm>

*This guidance states: "Public authorities complying with their statutory duty under sections 1 and 11 of the Freedom of Information Act to release information to an applicant are not breaching the Copyright, Designs and Patents Act 1988. The FOIA specifically authorises release of the information to an applicant, even if it is in such a form as would otherwise breach the copyright interests of a third party."*

*“However, the Copyright Designs and Patents Act 1988 will continue to protect the rights of the copyright holder once the information is received by the applicant.”*

This demonstrates that the public authority was correct in not pursuing any copyright issues.

76. The Speedmeter Handbook cites that:

*“The supplier shall provide free of charge a written technical description of the speedmeter, its operation and intended use, and full circuit diagrams to PSDB when the device is accepted for the practical assessment described... They shall also provide free of charge a copy of this information together with a speedmeter of the type intended for sale to the testing laboratory carrying out the type-approval before the laboratory commences its testing.”*

*“A handbook or a set of written instructions for the use of the operator shall be provided with the instrument when it is accepted for the practical assessment described ... A copy will be provided to the PSDB. The instructions shall be dated and any subsequent changes sent to all users, including the Home Office.”*

77. There is no reference to any duty of confidence in respect of items supplied. However, the public authority and the supplier / manufacturer entered into a formal agreement at the end of the Type Approval process in respect of commercial confidentiality. This agreement states:

*“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.”*

78. The Commissioner's view is that whilst this extract of evidence states the general position that arrangements between the public authority and the supplier/manufacturer are considered to be 'commercially confidential' it does not specifically refer to either the contents of the Instruction Manual or a possible breach of confidence. The Commissioner has also taken into account the letter of 16 May 2005 which, as noted, did not explicitly refer to the manual. The letter was also dated after the request was made. He does not therefore agree that there is an obligation of confidence in respect of this particular document.

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

79. In order for a breach of confidence to be actionable the person imparting the information must have a reasonable belief that its release would be damaging to the interest of the confider, for example by

giving competitors an advantage. In reaching a view about whether releasing the requested information in this case would have a detrimental effect the Commissioner has considered the value of the information to the supplier and the likely harm that it may incur if the material were released, along with any possible harm to the public authority.

80. When considering the possible harm the Commissioner has taken into account the recent Information Tribunal (IT) case EA/2006/0090 in respect of *Bluck v the Information Commissioner*. This decision includes some context as to when detriment can be considered to apply. In paragraph 8 the IT cites the following reasoning taken from the judgment of *Attorney General v Guardian Newspapers [1990] 1AC109*, where Lord Goff set out the following broad principle:

*"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."*

Lord Goff went on to agree with Megarry J. in *Coco v Clark [1969] RPC 41* that it was appropriate *"to keep open the question whether a detriment to the plaintiff is an essential ingredient of an action for breach of confidence"*.

81. This particular IT decision relates to a case involving the potential invasion of 'personal privacy' where the detriment is in relation to doctor / patient confidentiality and human rights considerations. It demonstrates that detriment need not be monetary but can also involve less tangible elements.
82. In this particular case the context is 'commercial confidentiality' rather than 'personal privacy' and the Commissioner considers it appropriate that detriment must be established for the breach to be actionable.
83. The suppliers have provided the following comments regarding information supplied to the public authority for the purposes of the Type Approval process:

*"All documentation supplied to the Safety Camera Partnerships or the Police Authority is done so under strict confidentiality and in line with our Type Approval agreement with the Home Office. We would like to bring to your attention that if any information is released without our consent Serco / Gatsometer BV would deem this a breach of our agreement and will take the necessary legal advice."*

*"To re-endorse our comments, we feel the information contained in the Gatsometer instruction manual IM-E9906 details far more than the routine set-up aspects of the AUS/Type 24 Radar. Serco Ltd /*

*Gatsometer BV believe the release of this manual, and especially the images depicting the placement of key camera components within the cabinet, would subject our business to an unprecedented amount of targeted vandalism damaging operational effectiveness. Furthermore, certain descriptions would reveal design structures and interfaces placing our business at considerable commercial disadvantage.”*

84. The comments regarding targeted vandalism are addressed in paragraphs 35 – 48 above concerning section 31.
85. The Commissioner considers that some of the above arguments relate to prejudice to law enforcement or to the ability of the public authority to obtain sensitive information rather than the likely prejudice to commercial interests of the suppliers. Nevertheless, he recognises the relevance of the argument that information about the design of the equipment within the Instruction Manual may allow competitors to construct rival equipment without the same degree of investment, thus prejudicing the supplier's commercial interests.
86. The Commissioner has considered the comment that releasing the information would be detrimental by placing the supplier at a considerable commercial disadvantage. He notes that the supplier has not indicated which specific elements of the Instruction Manual may cause detriment by revealing design structures nor has it explained how the information would assist its competitors.
87. The Commissioner has also taken into account the amount of information about the equipment generally in the public domain via websites and the handbook referred to paragraph 3. He considers that the disclosure of the information would not be to the detriment of the confider given the amount of general information already in the public domain of a similar nature.
88. In reaching a view about the supplier's comments, the Commissioner notes the age of the equipment that the Instruction Manual in question relates to - the equipment gained type approval in 1992. He also recognises the competitive international market that the suppliers operate in. In such a market, products are constantly under review and new equipment is being developed in order to retain competitiveness and to incorporate technological advances. In the Commissioner's view, competitors within the market are unlikely to gain an advantage from the information within the requested Instruction Manual as current / future products are likely to be substantially more advanced. The Commissioner does not therefore agree that the disclosure of the Instruction Manual is likely to cause any detriment.
89. The wide distribution of the manuals across the police sector and the large numbers in circulation has also been taken into account. The Commissioner notes the point made in paragraph 67 above that use of the manuals in training focuses on the copyright status of the



information rather than its confidentiality. The emphasis placed on the value of the information is not on the basis of its confidential status.

90. The public authority has also indicated that, in light of the value that the suppliers place on the information within the Instruction Manual, the release of this information would be detrimental to the trust that has built up between them and the public authority. This in turn is likely to reduce the willingness of manufacturers to provide information required for the Type Approval process. The Commissioner notes that the public authority is the only organisation permitted to approve traffic enforcement equipment in the UK. Traffic enforcement authorities may only purchase approved equipment. In order to secure lucrative orders for that equipment, suppliers must provide sufficient evidence to enable the public authority to approve the equipment. He is not persuaded that suppliers will no longer attempt to secure business if the information specific to this case, i.e. an Instruction Manual, were to be released, particularly as he is not satisfied that the information is commercially sensitive.
91. The Commissioner has considered all of the factors mentioned above and has concluded that in this case he is not satisfied that the disclosure of the information within the Instruction Manual would cause any detriment or give rise to an 'actionable breach of confidence'. In view of this, he has not gone on to consider the public interest defence aspect of the test relevant to the section 41 exemption.
92. However, the Commissioner believes it is important to reiterate the point that each case must be considered separately and, therefore, in the event that a request were made for a manual which related to newer equipment, or for Speed Meters currently under consideration in the Type Approval Process, he may reach a different conclusion in respect of that material. Similarly, any other information requested which was supplied to the public authority as part of the Type Approval process would also require separate consideration. In the event that a request were made for other information obtained during the Type Approval process the Commissioner would have to consider that material separately and may reach a different conclusion.

### **Exemption – Section 43(2) – Commercial Interests**

93. Section 43 (2) provides that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). Section 43(2) is a qualified exemption and therefore, if the Commissioner finds that the exemption is engaged, he must consider the public interest test as detailed at section 2(2)(b). He must then decide whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

94. In this case there is clearly a degree of overlap between the exemptions in section 41 and 43. This is because the public authority has, in part, argued that the information possesses the necessary 'quality of confidence' because of the commercial disadvantage the supplier would suffer if the material were released.
95. In this case, the public authority maintained that the release of any information it holds as a result of the Type Approval process is likely to prejudice the suppliers' commercial interests.
96. The public authority provided that disclosure of the information requested would result in the potential withdrawal from the Type Approval market of some of the manufacturers because of the damage that would be caused to their commercial interests. It stated:
- *"The industry is naturally wary of the consequences of sharing information (even with the Home Office as part of the Type Approval process) as commercial advantage, achieved at great expense, could be compromised. However, through the proven integrity of HOSDB, a level of trust has been built up and the process therefore works."*
  - *"It is in the public interest that the maintenance of safety on the roads is carried out using the most effective equipment available. This can be ascertained only through the Type Approval process. Some manufacturers have already indicated in writing that they will withdraw from the policing market if the Type Approval process is seen to be undermined. If HOSDB were to have to release documents supplied to them in confidence for the Type Approval process they would lose the co-operation of the manufacturers which would seriously undermine the process and have wide ranging safety implications. It quite obviously would not be in the public interest to release information that could undermine trust and the conduct of business between the Home Office and their suppliers of road traffic enforcement equipment and such equipment plays a vital part in maintaining good order on roads."*
97. As stated in paragraph 85 above, the Commissioner considers that some of the arguments above relate to prejudice to law enforcement or to the ability of the public authority to obtain sensitive information rather than the likely prejudice to commercial interests of the suppliers. Nevertheless, he does recognise the argument that information about the design of the equipment within the Instruction Manual may allow competitors to construct rival equipment without the same degree of investment, thus prejudicing the supplier's commercial interests.
98. However, the Commissioner is not satisfied that the information within the Instruction Manual would, in this case, be likely to prejudice the commercial interests of the supplier as outlined above. His reasons for

reaching this conclusion are the same as those in paragraphs 85 to 90 above in relation to section 41.

99. In addition, the fact that information may be someone's intellectual property does not of itself preclude its legitimate availability to others. Just as library books may be protected by copyright, their public availability is not restricted because of that status. Whilst it is acknowledged that there may be circumstances when some individuals might attempt to infringe intellectual property rights, this is a separate matter which is protected under other legislation. The Commissioner is of the view that the manufacturer, during the fifteen years since its Approval, will have already taken appropriate steps to protect its commercial interests in respect of Patent Rights and Intellectual Property Rights both nationally and internationally – as stated in one manufacturer's comments above *"Much of this is subject to patents and commercial confidentiality"*. In addition, the Commissioner is mindful of the level of information within the Instruction Manual which relates to the "operational set-up and calibration". Having reviewed the material he is not persuaded that it is sufficiently technical to inform the development of rival products. The age of the equipment depicted in the Instruction Manual is also recognised in reaching this view.
100. As users of the speedmeter equipment and Instruction Manual, the Association of Chief Police Officers (ACPO) was consulted. ACPO Road Safety Support made the following comments in respect of the potential release of this (and another) manual:
- *"I do accept that neither of the manuals contains sufficient information for a competitor to build a device of a similar type, in much the same way as I would be unable to build a dvd recorder from the handbook I got with the machine."*
101. The Commissioner notes that these comments are from a different source and demonstrate a difference of opinion to that of this public authority. However, as actual users of the equipment the Commissioner values their opinion.
102. In contrast to other companies, the Commissioner understands that Gatsometer B.V. does not sell copies of the Instruction Manual for a fee; neither has he received any submissions that it intends to do so. Therefore he does not consider that there would be any loss in revenue from the sale of the Instruction Manual were the material publicly available and therefore no prejudice to the supplier's commercial interest would arise in that regard.
103. Having examined all the arguments the Commissioner considers that the public authority has not demonstrated that disclosure would or would be likely to prejudice the commercial interests of the supplier. He is not persuaded that the information is sufficiently detailed to inform the development of rival devices and even if he accepted that it was,

he does not think that there is a real and significant likelihood of this occurring given the age of the equipment. Therefore the exemption at section 43 is not engaged and he is not required to explore the public interest arguments applicable to this exemption.

## The Decision

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104. The Commissioner's decision is that the public authority has not dealt with the request for information in accordance with the Act in that:
105. The public authority inappropriately withheld the requested information under sections 31(1)(a)(b), 41 and 43(2). Therefore it failed to comply with section 1(1)(b) of the Act.
106. The public authority also failed to satisfy the requirements of section 17(1) and section 17(3), in that it issued an inadequate refusal notice.

## Steps Required

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107. The Commissioner requires the public authority to release the Instruction Manual to the complainant within 35 calendar days of the date of this notice.

## Other matters

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108. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
109. The supplier made these additional comments to the ACPO Roads Policing Enforcement Technology Committee Secretary on 02 May 2007:
  - *"All documentation supplied to the Safety Camera Partnerships or the Police Authority is done so under strict confidentiality and in line with our Type Approval agreement with the Home Office. We would like to bring to your attention that if any information is released without our consent Serco / Gatsometer BV would deem this a breach of our agreement and will take the necessary legal advice."*
  - *"... certain descriptions would reveal design structures and interfaces placing our business at considerable commercial disadvantage."*
110. The Commissioner notes that these comments are not directed at the public authority in this case and that they are general comments about

all documentation and not specifically the Instruction Manual in question. However, he feels it is important to note that, prior to this comment to the ACPO Roads Policing Enforcement Technology Committee Secretary, the supplier / manufacturer were already aware that an Instruction Manual which is substantially the same to the one requested had already been released by another public authority in June 2006. Despite saying that they would take the “necessary legal advice” no action has been taken in relation to this release which was over a year ago. If a further request was received by the public authority in respect of this information it would be necessary for it to take into account the fact that a virtually identical Instruction Manual has now been placed in the public domain.

111. There is no statutory requirement for the time within which an internal review should be completed; however, the expectation is that such reviews will be carried out within a ‘reasonable’ timescale. In this case the Public authority agreed to complete such a review on 03 June 2005 but did not in fact do so until 19 September 2005. This delay is clearly unacceptably long and merits the Commissioner’s criticism. The Public authority is invited to consider the Commissioner’s recently published Good Practice Guidance no. 5 on this topic, which is accessible on his website, and now recommends that all reviews are completed within 20 working days (or, exceptionally, within a maximum of 40 working days).
112. The public authority took over a month to respond to a letter that the Commissioner sent them on 28 February 2007. The response was written on 05 April 2007, shortly after the Commissioner chased a response by telephone. This falls outside of the agreement that the Commissioner has with the Public authority so also merits his criticism.

### **Failure to comply**

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113. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the FOI Act and may be dealt with as a contempt of court.

## Right of Appeal

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114. 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)

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 11<sup>th</sup> day of October 2007**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### Section 17 – Refusal of request

- (1) 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.
  
- (2) Where –
  - (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
    - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
  
- (3) 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.

- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where:
  - (a) the public authority is relying on a claim that section 14 applies,
  - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
  - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under subsection (1), (3) or (5) must-
  - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by section 50.

### **Section 31 – Law enforcement**

- (1) 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,
  - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
  - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
  - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
  - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection



(2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) 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 any of the matters mentioned in subsection (1).

### **Section 41 – Information provided in confidence**

(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.

(2) 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.