**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2012/0077**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No:**
FS50419791

**Dated:** **22nd. March, 2012**

**Appellant:** **David Orr**

**First Respondent:** **The Information Commissioner**

**Second Respondent:** **Avon and Somerset Police Authority**

**Determined on the papers: 10th. September, 2012**

**Before**

**David Farrer Q.C.**

**Judge**

and

**Pieter de Waal and Henry Fitzhugh**

**Tribunal Members**

**Date of Decision: 26th. September, 2012**

**Representation:**

The Appellant acted in person:

For the First Respondent: Mark Thorogood

For the Second Respondent: Anya Proops

**Subject matter:**

Freedom of Information Act 2000 ss. 41(1) and 43(2)

**Cases:** *Coco v A.N.Clark (Engineers) Ltd. [1969 ] R.P.C.41*.

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22nd. March, 2012 and dismisses the appeal.

Dated this 26th. day of September, 2012

David Farrer Q.C.
Judge

## REASONS FOR DECISION

Introduction

1. South West One Limited ("SW1") is a company formed in 2007 as a joint venture by three West country public authorities and IBM to create for their own use and promote and sell to other authorities I.T. support systems of various kinds. The Second Respondent, ("ASPA") is one; the other two are Somerset County Council and Taunton Deane Borough Council.

2. IBM holds 75% of the shares and the remaining 25% is shared among the three public authorities. All the shareholders are represented on the board of directors, ASPA by the Chief Constable. Board minutes are therefore supplied to each of the three authorities but on terms that they are to be treated as confidential. Clause 16 of the 2007 Joint Venture agreement ("the JVA") under which SW1 was established provides that *"each of the parties . . . shall hold in confidence . . any financial or other information in respect of the company or the business . . . ."* Clause 21.1 and 21.3 of the Service Delivery Contract ("the SDC") between ASPA and SW1 require the parties to *"keep confidential . . all matters relating to this agreement . . ."* and *"all Confidential Information and Authority Data received by one Party from the other Party relating to this Agreement"* (use of capitals as in the original text).

3. The board of SW1 meets at least four times a year.

4. Though not directly relevant to our decision, we observe that SW1 is not itself a public authority within FOIA and cannot become one as a result of judicial development of the concept. That is because, first, it is not included in Schedule 1 to FOIA which, subject to s.6, contains the definitive list of authorities to which FOIA applies. If the Secretary of State wishes to extend that list, she can do so by order under s.4 amending Schedule 1 but it is a matter for her, not the Tribunal. Secondly, SW1 is not a publicly – owned company, as defined by s.6. As indicated in paragraph 2, public authorities included in Schedule 1 hold a minority of its shares.

5. The position is, of course, different as regards the reach of the Environmental Information Regulations, 2004 ("the EIR"), enacted in response to the European Directive which implemented the Aarhus Convention. Regulation 3(1) applies EIR

to "public authorities" as defined in reg. 2(2), which includes all the authorities to which FOIA applies but, additionally, so far as material, at 2(2)(c), *"any other body or other person that carries out functions of public administration"*

6. The Upper Tribunal and this Tribunal have indeed, as Mr. Orr points out, considered the interpretation of this term in several appeals, where the question arose, whether a body carried out such functions, hence whether the EIR applied to it – see e.g., *Port of London Authority v ICO and Hibbert [2007] UKIT ea/2006/0083; Network Rail v ICO [2007] UKIT EA/2006/0061;Bruton v ICO and Duchy of Cornwall EA/2010/0182; Smartsource v ICO and Others [2011] 1 Info L.R. 1498.* Such jurisprudence is, however, quite irrelevant to the definition of "public authority" for the purposes of FOIA.

7. We have engaged in this quite extensive diversion because the principal ground of this appeal was that the ICO and the Tribunal should regard SW1 as a "public authority" because of the public funds that it received. That argument is, with respect to Mr. Orr, wholly misconceived. Even if it had been a public authority (which it is not), it was not the recipient of his request for information. The Tribunal was invited to strike out this appeal for these reasons and would have done so, had not other, less prominently emphasised issues arisen for determination.

8. SW1, from its formation, has looked for commercial opportunities to sell its systems and expertise to other public authorities. As indicated above, it receives funds from its three partners. It publishes accounts, accessible to the public. So, of course, does ASPA , which has published reports of its own meetings, including those where SW1 affairs have been discussed, and two internal audit reports.

9. IBM, the private sector partner, may make profits or incur losses from the JVA. The three public sector bodies aim to make savings on existing operations and would share any income derived from sales to other authorities of bodies.

10. Joint ventures between the public and private sectors are often a focus for vigorous political debate and SW1 appears to be no exception. Issues have arisen as to the costs and performance of an SAP support system and a large shortfall in predicted savings to be produced by the formation of SW1. Questions of conflicts of interest involving the Chief Constable were raised inside and outside Parliament. It is not the Tribunal`s

function to form any view on these issues but their existence demonstrates, if it becomes relevant, that significant public interests are engaged.

The request for information

11. On 19th. May, 2011 Mr. Orr requested from ASPA;

*"Copies of the SW1 Board Minutes held by the Police Authority from the start of April 2010 to the end of March 2011."*

There were four sets of minutes relating to board meetings between those dates.

12. ASPA responded on 1st. June, 2011, refusing the request and citing as justification s.41 of FOIA – that the minutes had been received from SW1 in confidence.

13. It maintained that stance by letter of 3rd. October, 2011 following review and further invoked s.43(2), asserting that the information requested was commercially sensitive.

14. Mr. Orr complained to the Information Commissioner ("the ICO").

15. The ICO, by his Decision Notice, dated 22nd. March, 2012, upheld the refusal, ruling that the requirements of s.41 were satisfied. The minutes were, he judged, confidential in nature and content and were communicated in confidence, having regard to the agreements referred to in paragraph 2.

16. He concluded that there was no evidence that those agreements were being used to circumvent FOIA improperly so that there was no overriding public interest in disclosure.

The appeal to the Tribunal

17. Mr. Orr appealed. His ground of appeal was initially that the ICO should have found that SW1 was a public authority to which FOIA applied. That argument was doomed to fail for the two reasons already set out at paragraphs 4 – 7. The Tribunal declined to strike out his appeal, because it had not seen the information requested nor the evidence of Mark Simmonds of ASPA and could not therefore properly judge whether the information was confidential in nature or whether a powerful public interest might demand disclosure anyway (see paragraphs 21, 22 and 31 - 34 below).

18. By its Initial Directions, the Tribunal had invited Mr. Orr to indicate whether his sole ground of appeal was the FOIA status of SW1; if not, whether he disputed the ICO`s decision that ASPA was entitled to rely on s.41 and, if he did, on what grounds. In his Reply Mr. Orr continued to press the argument about SW1 but confirmed that he challenged the ruling as to s.41. He asserted that the JVA made no provision for the parties to respect the requirements of FOIA. That is, in fact, incorrect; Schedule 39 to the Agreement requires compliance by the parties with their FOIA obligations.

19. His final submission repeated, in large measure, his deep concern over the use of private sector companies for joint ventures and the resulting curbs on public access to information. He raised, by implication, the issue of the public interest in relation to the appointment of the Chief Constable to the board and the alleged conflicts of interest that resulted.

20. ASPA submitted that the minutes contained specifically confidential material as to sales initiatives and that disclosure would have been actionable at the instance of SW1, given the terms of the JVA and the SDC. It further argued that s.43(2) was engaged and that there was no significant public interest in disclosure of the minutes. It invited the tribunal to aggregate the public interests in maintaining the two exemptions, if necessary.

<u>The questions for the Tribunal</u>

21. FOIA s.41(1) provides that information is exempt 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.*

It is an absolute exemption, though the public interest may be engaged through the requirement that a breach would be actionable.

22. The familiar test for an actionable breach of confidence is set out in *Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41*. It requires that the information has the quality of confidentiality, that it was imparted in circumstances giving rise to a duty of confidence and that disclosure causes detriment to the party communicating it.

Subsequent authorities and ECHR Article 10 permit an exception where there is an overriding public interest in disclosure, for example where the confidential relationship would conceal wrongdoing affecting the public.

23. Section 43(2) provides –

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

This is a qualified exemption, which will be maintained only if the public interest in its maintenance outweighs the public interest in disclosure.

Evidence

24. The evidence in the case consisted of a statement from Mark Simmonds, Deputy CEO and Treasurer of ASPA, of which an unredacted version was in the closed bundle. The redactions identified particular sensitive passages and did not affect the thrust of his argument He dealt with the background to the formation of the joint venture in 2007, with the funding and the nature of IBM`s stake in it. He described the composition of the board and SW1`s commercial targets. He concluded with a perceptive expression of sympathy for Mr. Orr`s position, rightly observing that any loss of transparency or "democratic deficit" arising from the creation of SW1 was an inevitable consequence of joint ventures involving public and private sector entities working together through a limited company.

25. Whether such ventures are desirable in general or in particular circumstances is a political issue, which is not for decision by nor comment from the Tribunal.

Our Decision

The s.41 exemption

26. It is undeniable that ASPA received the requested information from a third party, namely SW1 and that it was imparted on expressly confidential terms, set out in the JVA and the SDC.

27. We have read all four sets of minutes within the scope of the Request. Each contains references to commercial initiatives and perceived opportunities, clearly confidential in nature, disclosure of which would have been detrimental to the commercial

interests of SW1 in May, 2011, the date relevant to our determination, whatever might be the position sixteen months later, when the matter came before us. Each also records discussions on a range of matters affecting the running of SW1.

28. Mr. Orr stated that he would have been prepared to accept the excision of sensitive names. However, we do not consider that that would defeat the right to invoke the s.41 exemption. The removal of the name of the targeted purchaser might not conceal its identity from well – informed readers. More fundamentally, board minutes are, by their nature, confidential information. They record disagreements and minority opinions. They should frankly describe the inner workings of the company, whenever significant issues are discussed. It is important in the shareholders` interests, that board minutes fully reflect what has been transacted.

29. For these reasons companies are not required to give and do not generally give the public access to such minutes.

30. We have no doubt that disclosure of these minutes at the material date would have been detrimental to the interests of SW1 for the reasons already discussed.

31. That leaves the question of the public interest.

32. We have regard, on the one hand, to what is already in the public domain and, on the other, to the undoubted importance of transparency in the operation of joint ventures, in so far as that is consistent with the proper commercial interests of the company thereby created, here SW1. If a joint venture company has been formed for the specific purpose of frustrating the duties of disclosure enacted in FOIA ; if public funds are being needlessly squandered in a badly – managed business ; if serious conflicts of interest are or may be distorting the company`s operations, then there may be a strong case for disclosing information which reveals such facts, on the ground that disclosure by the requested public authority (here ASPA ) would not be actionable.

33. That is not the case here. There is no improper attempt to hide information from a FOIA request. Whether or not the criticism of SW1`s performance is justified, whether or not improper conflicts of interest have been permitted, the minutes shed no light on such issues.

34. We see no legitimate public interest in their disclosure. We therefore uphold the ICO`s decision that ASPA was entitled to rely on s.41.

The s.43(2) exemption

35. The reasoning set out in the preceding paragraphs leads inevitably to the conclusions that SW1`s, hence probably ASPA`s, commercial interests would have been prejudiced by disclosure and that the public interest in protecting such interests clearly prevails over any interest served by disclosure.

36. It is perhaps worth observing that, whilst the use of a joint venture company may create a "democratic deficit" as regards the availability of the s.41 exemption, the position is less clear, as regards s.43(2).

37. If one or more public authorities decide to engage in a commercial venture, most probably but not inevitably, through a limited company of which it or they is/are shareholder(s), such a company is a public authority by virtue of s.6 of FOIA but, as such, entitled to invoke s.43(2) to protect its commercial interests in response to, for example, a request for disclosure of its minutes. A similar request to the public authority shareholder could likewise be met by reliance on s.43(2). So when commercial interests are at stake, the elector`s right to know may not be significantly greater where the venture company is owned solely by a public authority rather than by a combination of public authorities and private investors.

38. Given these conclusions, the question of aggregation of public interests does not arise.

Conclusion

39. For these reasons we uphold the Decision Notice and dismiss this appeal.

40. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

26th. September, 2012