

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 August 2012

Public Authority: Somerset County Council
Address: County Hall
Taunton
Somerset
TA1 4DY

Decision (including any steps ordered)

1. Southwest One is a joint venture between the Somerset County Council, Avon and Somerset Police Authority, Taunton Deane Borough Council and IBM in order to manage support services for the three public authorities. The complainant submitted a request to Somerset County Council (the Council) for a copy of the MoU signed by the three public bodies which dealt with a number of issues regarding their engagement with Southwest One. The Council disclosed a copy of this contract but redacted certain parts of it on the basis of section 43 of FOIA, the commercial prejudice exemption.
2. The Commissioner's decision is that some of the redactions – the 'Deferred Payment Redactions' - are not exempt from disclosure on the basis of section 43(2); further redactions – the 'Apportionment Redactions' - are exempt from disclosure on the basis of section 43(2) but the public interest favours disclosure of these redactions; and a final set of redactions – the 'Percentage Increases in Services Redactions' - are exempt from disclosure on the basis of section 43(2) and for this information the public interest favours maintaining the exemption.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with unredacted copies of the parts of the MoU to which the 'Deferred Payment Redactions' and the 'Apportionment Redactions' have been applied. That is to say unredacted versions of:
 - Clause 5.1(b) and Schedule 6;

- Clause 5.1(a);
 - Clause 5.1(d)(ii);
 - Clause 8.1(a)(i)(A) and (C);
 - Clause 14.2; and
 - Schedule 5.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 29 November 2011 the complainant wrote to Somerset County Council (the Council) and requested information in the following terms:

'A recent Account Objection about "alleged unequal allocation" of SAP costs between the Avon & Somerset Police Authority (ASPA) and Somerset County Council (SCC), was ruled not to require a public interest report, by the District Auditor for SCC Mr Brian Bethell (who subsequently retired on 31st October 2011).

In part of his ruling Mr Bethell stated that:

"The terms of the deferred payment arrangements were negotiated on the basis of information available at the time. These are clearly set out in a legal agreement".

I am requesting a copy of the legal agreement Mr Bethell refers to above (as £2.17m of SCC borrowing for ASPA has been written off wholly at Somerset taxpayers expense).'

6. The Council provided him with a response to his request on 17 February 2012. With this response the Council provided the complainant with a redacted version of the 'legal agreement' he had requested (referred to from here on as the Memorandum of Understanding (MoU)). The redactions had been made to a variety of numerical figures on the basis of the exemption contained at section 43(2) of FOIA.

7. The complainant contacted the Council on 20 February 2012 and asked it to conduct an internal review into the decision to withhold certain sections of the MoU on the basis of section 43(2).
8. The Council informed him of the outcome of the review on 27 February 2012; the reviewed upheld the application of section 43(2) as a basis to withhold the redacted various figures.

Background

9. Southwest One is a joint venture between the Council, Taunton Deane Borough Council and Avon and Somerset Police Authority together referred to as 'the Partners') and IBM in order to manage support services across the Partners.
10. The MoU which is the focus of this case was entered into in March 2008 and sets out the internal arrangements between the Partners. The MoU deals with a variety of matters from 'partnering principles', how the Partners should interact and communicate, the objectives of the project and the procedures in the event of a Partner withdrawing from Southwest One.
11. The complainant submitted the same request which is the focus of this case to Avon and Somerset Police Authority (the 'Police Authority'). The Police Authority's handling of that request is also the subject of a complaint to the Commissioner and the decision notice in that case, reference number FS50440278, is being issued alongside this notice. The Police Authority redacted exactly the same information from the MoU as the Council, again relying on section 43(2) of FOIA to do so.

Scope of the case

12. The complainant asked the Commissioner to consider the Council's reliance on section 43(2) to withhold the various redacted sections of the MoU. The complainant's arguments focused primarily on why he believed that disclosure of the withheld information was in the public interest. However, he suggested that disclosure of the withheld information would not result in commercial prejudice to any party and thus in fact exemption was not engaged. The complainant provided the Commissioner with detailed submissions to support his position. The Commissioner has not set out these submissions here but has referred to them, where appropriate, in his analysis of section 43(2) below.

Reasons for decision

13. Section 43(2) states 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).'

14. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

15. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

16. The Commissioner wishes to emphasise the fact that a public authority must consider the application of any exemptions at the date of the

request or at least within the statutory time for compliance with a request i.e. within 20 working days of receiving the request. This in line with the position adopted by the Information Tribunal.¹

17. Therefore, the Commissioner has to decide whether section 43(2) was applicable at the time of the request in November 2011. The Commissioner is aware from media reports of number of developments in respect of Southwest One which occurred after this date, including a decision in March 2012 by the Council to bring back-in house a range of services provided by Southwest One.² However, such events cannot be taken into account by the Commissioner.

The Council's position

18. In its submissions to the Commissioner the Council explained that it believed that there were seven distinct redactions made to the MoU which could be classified into three separate types of information:

The 'Apportionment Redactions' which are the redactions made to:

- Clause 5.1(a);
- Clause 5.1(d)(ii);
- Clause 8.1(a)(i)(A) and (C);
- Clause 14.2; and
- Schedule 5.

19. The 'Deferred Payment Redactions' which are the redactions made to:

- Clause 5.1(b) and Schedule 6.

20. And, 'Percentage Increase in Services Redaction' which was made to:

- Clause 5.2.

21. The Council provided the Commissioner with separate arguments in relation to why disclosure of the three different types of redactions

¹ [*Department for Business, Enterprise and Regulatory Reform and the Friends of the Earth v The Information Commissioner*](#) (EA/2007/0072), paragraph 110.

² <http://www.guardian.co.uk/government-computing-network/2012/mar/05/somerset-southwest-one-service-transfer>
<http://www.guardian.co.uk/government-computing-network/2012/feb/16/southwest-one-ibm-loan-council>

would be likely to result in commercial prejudice. The Commissioner has summarised these arguments below. For all of these arguments the Council explained that its position was that the exemption was engaged on the lower threshold of likelihood, i.e. that prejudice 'would be likely' to occur rather than 'would' occur if the various redacted information was disclosed.

22. Furthermore, the Council explained that throughout its handling of this request it had been in regular contact with Taunton Deane Borough Council and the Police Authority and therefore its submissions to the Commissioner as to why section 43(2) was engaged were directly informed by the concerns of these third parties.

The Apportionment Redactions

23. The Council explained that these redactions relate to the unequal apportionment of expenses and revenues between the Partners. Release of the figures that identify these unequal apportionments would be likely to prejudice the interests of the Partners in a number of ways:
24. Firstly, the Council explained that Southwest One had been structured in anticipation of future joiners investing and becoming partners in it. The apportionment information includes the details of the commercial arrangements that each Partner has negotiated in respect of Southwest One, in particular the financial contributions that each partner has negotiated. Disclosure of this information would enable a potential partner to gain a commercial advantage in any negotiation for entry to Southwest One as it identifies the level of financial contribution that each of the partners pay for participation in Southwest One. Disclosure of this information could give a potential partner an unfair insight into the negotiating position of the existing Partners.
25. Secondly, the Council explained that any new partners would be subject to a joiner's fee. Disclosure of the apportionment information would allow a comparison between the joiner's fees and apportionment figures for each of the Partners which could enable a joining partner to bid less than they might otherwise bid or negotiate a lower level of joiner's fee. This would prejudice both the Council itself and its Partners.
26. Thirdly, if an incoming supplier were to be engaged by the Council, or the Partners, it could take unfair advantage of the apportionment information as it provides an insight into the relative financial investments and commitments that the various Partners have made in the services provided by Southwest One. This information could be used by a future bidder to negotiate a more commercially advantageous pricing structure.

27. Fourthly, disclosure of the information would be likely to prejudice the Partner's ability to attract such potential new suppliers in a procurement process. This is because knowledge of the internal apportionment information may discourage potential bidders due to the unequal financial commitments of the Partners. This is because the financial commitment of the Partners reflects the apportionment of risk adopted by the Partners. Disclosure of the redactions could therefore be seen as exposing one or more of the Partners to be of secondary or less value to a potential bidder and as a Partner who might be perceived as a weakness in the partnership thus making it unattractive. With regard to why a smaller proportion of potential bidders would be prejudicial to the Partnership's commercial interests, the Council explained that in order to attract the greatest number of bidders and thus the widest range of options to achieve value for money, the Partnership needed to be perceived as a low risk organisation of equal partners.
28. The Council explained that the first two arguments were relevant in the scenario where the Partners were seeking additional partners, which as the Council emphasised was a key strategy of the Partners. With regard to the likelihood of the first two arguments occurring, the Council identified a number of procurement processes for shared services launched by other public authorities that Southwest One had bid for in the past and other tenders that it was intending to tender for in the future. The latter two arguments would be of relevance if Southwest One failed and the Council, and its Partners, then had to arrange for a replacement service provider.

Deferred Payment Redactions

29. Release of this redaction would be likely to prejudice just the commercial interests of the Police Authority (as opposed to the commercial interests of all Partners). This is because it reveals the exact amount and financial arrangement in favour of the Police Authority in respect of the joining fee. This information could be used by a future supplier or future joining partner to gain commercial advantage in any negotiations, or by IBM in order to affect or manipulate its bargaining position in relation to the Police Authority using its knowledge of this payment structure.

Percentage Increase in Services

30. The Council argued that the disclosure of this redaction could be used by IBM to affect or manipulate its bargaining position in any negotiations where the Unitary Charge may be affected by the outcome of the discussions. This is because IBM could use the figure to extrapolate the potential risk or financial exposure of Partners. This would be likely to

prejudice the commercial interests of the Partners and compromise their position in any such discussions.

31. For all of these redactions, the Council emphasised that the timing of the request increased the likelihood of prejudice occurring. This was because the on going negotiation with IBM further compounded the commercial sensitivity of redacted information.

Obligation of confidentiality in MoU

32. In addition to identifying specific arguments in relation to the various redactions, the Council explained that the MoU also contained a legal obligation on the Partners not to disclose the terms of the MoU. The Council explained that it applied in particular to confidential information which was defined in the MoU as 'information which if disclosed would prejudice the commercial interests of any person'. The Council argued that if it disclosed the redacted information it would be likely to prejudice its relations with the Partners.

The complainant's position

33. With regard to the engagement of the exemption, the complainant suggested that as no private company – neither IBM nor Southwest One – were party to the MoU it was difficult to see how it could be argued that the information would prejudice a party's commercial interests.

The Commissioner's position

34. With regard to the three limb test for engaging a prejudice based exemption set out at paragraph 14, the Commissioner is satisfied that in relation to all of the arguments identified by the Council the first limb is met. That is to say the nature of the harm envisaged, namely prejudice to the commercial interests of various Partners, clearly relates to the interests which section 43(2) is designed to protect.
35. With regard to the complainant's suggestion that no private company was party to the MoU, the Commissioner's position is that the exemption contained at section 43(2) can be used to protect the commercial interests of 'any party', be that a private company or public authority. Furthermore, if a commercial interest is taken to be a party's ability to successfully participate in commercial activity, i.e. the buying and selling of goods and services, it is clear that a public authority can be said to have commercial interests.
36. With regard to the second limb of the test, the Commissioner is satisfied that for all of the reasons identified by the Council there is some causal link between disclosure of the redacted information and the particular prejudice identified. Furthermore, the Commissioner is satisfied that the

nature of the prejudicial effects is one that can correctly be described as being real, actual or of substance.

37. The only exception to this finding is in respect of the Council's argument concerning the obligation of confidentiality contained in the contract. Whilst the Commissioner accepts that disclosing the redacted information may constitute a breach of this clause he is not clear how any negative impact on the Council's relations with its Partners which may flow from this breach would actually manifest itself in commercial prejudice to the Council's own commercial interests.

The Apportionment Redactions

38. With regard to the third limb of the test, and the first two arguments identified by the Council in respect of the 'Apportionment Redactions' the Commissioner is satisfied that the likelihood of this harm occurring is one that goes beyond being simply a hypothetical risk. The Commissioner has reached this conclusion primarily because he considers the rationale underpinning these arguments to be logical and sound. That is to say it is broadly accepted that a situation of information asymmetry - where one party to a commercial transaction has more (or better) information than the other - is highly likely to distort the competitive buying process to the extent that the party in a position of having less (or worse) information is commercially disadvantaged. Furthermore, the Commissioner believes that the fact that Southwest One is actively prospecting for new partners means that the likelihood of prejudice occurring in these ways is one that is simply more than a hypothetical possibility. (The Council has provided the Commissioner with details of specific tender opportunities which Southwest One is pursuing).
39. Turning to the latter two arguments identified by the Council in respect of the 'Apportionment Redactions' the Commissioner notes that the likelihood of such prejudice occurring is dependent on Southwest One failing. In light of some of the initial concerns identified by the Council's own review of its contract with Southwest One completed in June 2010, and the fact that as result of this review the Council renegotiated with Southwest One a realignment of the contract, the Commissioner is prepared to accept that the risk of the company 'failing' is one that is more than hypothetical and thus there is a real likelihood of the Partners needing to look for new suppliers.
40. The Commissioner accepts that given that such arguments envisage the opposite scenario to those envisaged under the first two arguments – i.e. the failure of the company rather than its ability to attract new partners – it could be argued that it would be contradictory for him to accept both situations were real and significant possibilities. However,

engaging a prejudice based exemption on the basis that harm 'would be likely' to occur does not mean that the likelihood of prejudice occurring has to be at a level that means that it is more probable than not (i.e. the chances of it occurring are above 50%). Therefore the Commissioner accepts that, depending upon the circumstances of the particular scenario, it is possible to engage an exemption on the basis of two different, and apparently contradictory, scenarios occurring. Furthermore in the circumstances of this case it could be the case that Southwest One successfully attracts new partners and then subsequently fails.

41. Having accepted the Council's premise that Southwest One could fail, the Commissioner has then considered whether, in such a scenario, there is a real likelihood of prejudice occurring in the two specific ways described by the Council. With regard to the third argument the Commissioner believes that this is very similar to the first two arguments, i.e. disclosure of the information would place the Partners at a disadvantage in a commercial negotiation as it would provide a third party with information which would place them at an advantage. Again, given the sound logical reasoning of this argument the Commissioner is prepared to accept that the likelihood of prejudice occurring in this way represents a significant risk and one that is more than hypothetical.
42. However the Commissioner is less persuaded by the Council's fourth argument and does not accept that the likelihood of this happening is anything more than remote. The fact there is an unequal split of financial commitments between the Partners is already a matter of fact following disclosure of the redacted version of the MoU. Therefore any potential supplier will have already been able to make the assessment that the financial commitments – and thus the risks adopted by the various partners - is different. Furthermore, the Commissioner finds it difficult to accept that any organisation that was seriously considering tendering for the services currently provided by Southwest One would not be able to make its own, presumably reasonably accurate assessment, of the commitments and financial strengths of the various Partners. Moreover, the Commissioner is not convinced that simply because one Partner may represent a greater risk means that third parties would be completely put off bidding to supply its services given that any contract would presumably be of significant value.

Deferred Payment Redactions

43. The Commissioner has considered the arguments put forward by the Council in respect of these redactions. He notes that the redacted information relates specifically to the 'SAP³ Transformation Projects Costs' (This is clear from the redacted version of the MoU which has been disclosed by the Council.) Furthermore the Commissioner understands that some information relating to the Police Authority's arrangements concerning these payments is already in the public domain. In light of this the Commissioner is not convinced that the likelihood of prejudice occurring to the Police Authority's commercial interests if this information was disclosed is one that can be correctly described as anything more than hypothetical. Therefore the Commissioner has concluded that section 43(2) is not engaged in respect of the deferred payment redactions.

Percentage Increase in Services Redactions

44. The Commissioner is satisfied that the Council has identified a clear way in which IBM could use this redacted figure to its commercial advantage during negotiations with the Partners. Furthermore given that at the time of the request the Council was in the process of renegotiating its contract with IBM then the likelihood of prejudice occurring if this information was disclosed is clearly one that is more than hypothetical; rather it presents a real risk. The Commissioner therefore accepts that section 43(2) is engaged in respect of this particular redaction.
45. In summary then, the Commissioner has concluded that 'Apportionment Redactions' and 'Percentage Increase in Services Redactions' are exempt from disclosure on the basis of section 43(2) of FOIA but the 'Deferred Payment Redactions' are not.

Public interest test

46. Section 43(2) is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the public interest arguments are equally weighted, the information must be disclosed; in that sense the legislation effectively contains an assumption in favour of disclosure. .

³ <http://www.sap.com/uk/about-sap/index.epx>

Public interest arguments in disclosing the redacted information

47. The complainant argued that there was a clear public interest in the disclosure of an unredacted copy of the MoU given the failure of Southwest One to make significant and assured savings. The complainant suggested that to date the joint venture had cost around £60m and by September 2011 had saved £8m which was well short of the 'assured savings' target of £139m for March 2012. The complainant emphasised that this was against a backdrop of significant cuts in the Council's budget. Moreover, the complainant argued that given that Southwest One was delivering public services and was funded to a significant extent by the three public authorities it should remain accountable to local taxpayers. In particular, the complainant argued that without disclosure of parts of the MoU which outlined the cost sharing agreements it was not possible to establish whether the MoU remained fit for purpose in light of the significant cuts across all three public authorities.
48. More specifically, the complainant explained that he was concerned about a cost sharing agreement that he had identified during an accounts inspection of the Police Authority in June 2011. The complainant explained that the Council had loaned the Police Authority £5m for the cost of a SAP IT system but then had written off £2.17m within the same year, 2008/09, solely at the expense of Council taxpayers if Southwest One gained no new business. The complainant explained that there had been no risk transfer of the £2.17m to Southwest One as they were responsible for the gaining of new business and no risk sharing with the Police. The complainant argued that this was bad practice and compounded by the fact that Somerset, by geography and population, was only a third of the Avon and Somerset Police precept tax base and thus Council taxpayers were cross subsidising Avon Police precept taxpayers.
49. In light of his concerns the complainant submitted a formal accounts objection to the regulator – the District Auditor from the Audit Commission – requesting a public interest report. The District Auditor refused the complainant's request. The District Auditor's letter to the complainant referred to the legal agreement under which the cost sharing between the Partners was established, i.e. the MoU which is the focus of this complaint, and noted that the MoU was informed by 'external and independent professional advice'. In response to a FOI request made to the Avon and Somerset Police Authority the complainant was provided with a redacted copy of this advice which took the form of a presentation made by KPMG. The complainant suggested that this advice also reflected concerns regarding proposed cost sharing in relation to SAP. However, the complainant argued that without disclosure of an unredacted copy of the MoU he, and other interested

members of the public, were unable to establish whether the MoU actually reflected the KPMG advice. Furthermore, the complainant explained that without access to an unredacted copy of the MoU he was unable to properly understand the District Auditor's refusal of his accounts objection and whether to take any further action in relation to this decision.

Public interest arguments in favour of maintaining the exemption

50. The Council argued the public interest was best served by ensuring that public authorities are able to get value for money when commissioning services and entering into commercial arrangements with third parties. More specifically, disclosure of the redacted MoU would compromise its ability, and that of its Partners, to obtain value for money for services. It would also damage the Council's potential recovery of revenue through future investment in Southwest One by new partners, something which was strongly against the public interest.

Balance of the public interest arguments

51. In the Commissioner's opinion the public interest arguments in respect of the redactions made to the apportionment redactions are finely balanced: In relation to the Council's position the Commissioner agrees that it is clearly in the public interest that both it and its Partners are able to secure the best value for money. Furthermore, the fact that prejudice could occur in a number of different ways and in different scenarios, e.g. because Southwest One fails or conversely if Southwest One secures new partners, adds weight to the public interest in maintaining the exemption.
52. However, the Commissioner believes that there is also a strong public interest in disclosure of the apportionment redactions in order to allow the public, and in particular taxpayers of the three public authorities, to more fully understand the costs of the Southwest One project incurred by each of the respective bodies and the extent to which each body would benefit should Southwest One attract new partners. The Commissioner believes that such greater accountability is important given the initial problems in the operation of Southwest One as identified in the Council's review of the contract in June 2010, the sums of money involved and the broader public debate surrounding the decision by the Council to contract out these services set against the backdrop of wider cuts which all public authorities are having to make in this age of austerity.
53. With regard to the complainant's specific argument around the apportionment of the SAP costs, the Commissioner recognises that the complainant obviously has clear and genuine concerns around this

particular aspect of the cost sharing agreement. However as this represents simply one aspect of the MoU, and moreover this issue has been considered by the District Auditor, the Commissioner is not persuaded that there is significant public interest in disclosure of the MoU in order to address this particular concern alone. Rather in the Commissioner's view of more relevance is the broader public interest in disclosure of the apportionment redactions to improve the accountability of the Council's entire engagement with Southwest One in respect of all costs and potential benefits, rather than simply because of one particular aspect of it.

54. The Commissioner is therefore of the opinion that the public interest arguments on both sides are equally weighted in respect of the apportionment redactions. Given that FOIA includes an assumption in favour of disclosure the Commissioner has ultimately concluded that the public interest favours disclosing the 'Apportionment Redactions'.
55. In contrast the Commissioner believes that disclosure of the 'Percentage Increase in Services Redaction' would not serve the public interest in disclosure anywhere near as clearly as the apportionment redactions. Given the Commissioner's findings in relation to the likely prejudice flowing from disclosure he is therefore satisfied that the balance of the public interest favours withholding this this particular information.

Right of appeal

56. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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