

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 August 2012

Public Authority: Avon and Somerset Police Authority

Address: Valley Road
Portishead
Bristol
BS20 8JJ

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 Avon and Somerset Police Authority (the Police Authority) 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 Police Authority 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 Police Authority 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 submitted the following request to the Police Authority:

'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 Police Authority responded on 21 December 2011 and explained that it was withholding the Memorandum of Understanding (MoU) in its entirety on the basis of the exemptions contained at sections 41 and 43(2) of FOIA.

7. The complainant contacted the Police Authority on 19 January 2012 and asked it to conduct an internal review of this decision.
8. The Police Authority informed the complainant of the outcome of the internal review on 21 February 2012. The Police Authority provided him with a redacted version of the MoU with the numerical data redacted on the basis of section 43(2) of FOIA.

Background

9. Southwest One is a joint venture between the Police Authority, Somerset County Council and Taunton Deane Borough Council (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 Somerset County Council ('the Council'). The Council's handling of that request is also the subject of a complaint to the Commissioner and the decision notice in that case, reference number FS50438297, is being issued alongside this notice. The Council redacted exactly the same information from the MoU as the Police Authority, again relying on section 43(2) of FOIA to do so.

Scope of the case

12. The complainant asked the Commissioner to consider the Police Authority'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 also suggested that disclosure of the withheld information would not result in commercial prejudice to any party and thus in fact the 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 is 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 a 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 Police Authority's position

18. As explained in the linked decision notice which deals with the Council's handling of the same request, the Council identified 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.

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>

21. The Commissioner is satisfied that it is logical to divide the redactions into these categories. Therefore, although the Police Authority has not categorised the redactions into these headings, the Commissioner has nevertheless considered its submissions with regard to section 43(2) in this context.
22. Although not explicitly stated, the Commissioner understands that the Police Authority's position is that it is relying on the lower threshold of likelihood, i.e. that prejudice 'would be likely' to occur rather than 'would' occur if the redacted information was disclosed.
23. Furthermore, the Police Authority explained that in handling this request it had been in contact with Taunton Deane Borough Council and Somerset County Council 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

24. The Police Authority 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:
25. Firstly, the Police Authority 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 had negotiated in respect of Southwest One, including how both the costs and benefits of participation had been split. 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.
26. Secondly, the Police Authority 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 be likely to prejudice both commercial interests of the Partners.
27. Thirdly, the Police Authority argued that disclosure of these redactions could prejudice the bargaining ability of the individual Partners to negotiate and to carry out procurement in the future, either as individual

organisations or as a partnership because this information could provide potential suppliers with 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.

Deferred Payment Redactions

28. The Commissioner understands that the Police Authority's view is that disclosure of this redaction would simply harm its interests rather than the interest of all three Partners. Although the Council's submissions to the Commissioner actually provided greater detail on this point, the Commissioner understands that the Police Authority's view is that disclosure of this information would be prejudicial to its commercial interests because it reveals the exact amount and financial arrangement in its favour 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

29. The Police Authority, in contrast to the Council, did not make any specific submissions as to why it believed that disclosure of these particular redactions would be prejudicial.

Obligation of confidentiality in MoU

30. The Police Authority also highlighted the fact that the MoU contained a legal obligation on the Partners not to disclose the terms of the MoU, in particular any confidential information which was defined in the MoU as 'information which if disclosed would prejudice the commercial interests of any person'.

The complainant's position

31. 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

32. 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 Police Authority 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.

33. 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.
34. With regard to the second limb of the test, the Commissioner is satisfied that for all of the reasons identified by the Police Authority 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.
35. The only exception to this finding is in respect of the Police Authority's reference to 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 Police Authority's relations with its Partners which may flow from this breach would actually manifest itself in commercial prejudice to its own commercial interests.

The Apportionment Redactions

36. With regard to the third limb of the test, and the first two arguments identified by the Police Authority 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 Police Authority has provided the Commissioner with details of specific tender opportunities which Southwest One is pursuing).

37. With regard to the third argument identified by the Police Authority in respect of the 'Apportionment Redactions' the Commissioner notes that the likelihood of such prejudice occurring is dependent on Southwest One failing, i.e. it is only if the venture fails that the Partners will need to look for a new service supplier. 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.
38. 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.
39. Having accepted the Police Authority'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 manner described by the Police Authority. The Commissioner believes that this line of argument i.e. disclosure of the information would place the Partners at a disadvantage in a commercial negotiation with a potential supplier, is very similar to the first two arguments in relation to the commercial advantage that would be provided to a potential new partner. Therefore on the basis of 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 is more than hypothetical.

Deferred Payment Redactions

40. The Commissioner has considered the arguments put forward 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

41. As noted above, the Police Authority did not make any specific submissions in respect of this redaction. However, as explained in the linked decision notice the Council argued that 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. 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.
42. As also explained in the linked notice, 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.
43. The Commissioner wishes to emphasise that it is only because of the particular circumstances of these two cases that has led him to conclude

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

that the 'Percentage Increase in Services Redaction' is exempt from disclosure not on the basis of submissions provided by the public authority upon which this notice is served, but on the basis of submissions provided by a third party, i.e. the Council.

44. 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

45. 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.

Public interest arguments in disclosing the redacted information

46. 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.
47. 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 gaining 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.

48. 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

49. The Police Authority 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 Police Authority'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

50. 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 Police Authority'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.

51. 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 Police Authority and Partners 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.
52. 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 public authorities' entire engagement with Southwest One in respect of all costs and potential benefits, rather than simply because of one particular aspect of it.
53. 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'.
54. 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 particular information.

Right of appeal

55. 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

56. 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.
57. 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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