

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 March 2012

**Public Authority:** Avon and Somerset Police Authority

**Address:** Valley Road  
Portishead  
Bristol  
Avon  
BS20 8JJ

#### Decision

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1. The complainant requested a copy of a company's (Southwest One) Board Minutes from April 2010 to the end of March 2011 held by the Avon and Somerset Police Authority ("Avon and Somerset"). The police authority though holding the minutes relied on section 41 not to communicate them to the complainant.
2. The Commissioner's decision is that Avon and Somerset correctly relied on section 41 not to communicate the withheld information to the complainant.

#### Background

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3. Southwest One (SW1) is a limited company established in 2007 from a joint venture. Its shareholders are Somerset County Council, Taunton Deane Borough Council, Avon and Somerset Police Authority and IBM to provide support services to the said public authorities. IBM holds a majority 75% share of the company.

#### Request and response

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4. On 19 May 2011 the complainant wrote to Avon and Somerset and requested information in the following terms:
  - Copies of the SW1 Board Minutes held by the Police Authority from the start of April 2010 to the end of March 2011.

5. Avon and Somerset provided its substantive response on 1 June 2011. It stated that the requested information was withheld under section 41 (information provided in confidence) of FOIA.
6. Following an internal review, Avon and Somerset wrote to the complainant on 3 October 2011. It stated that the review upheld the original decision.

### **Scope of the case**

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7. On or about 7 October 2011 the complainant contacted the Commissioner to complain about Avon and Somerset's handling of his request for information.
8. The Commissioner has considered all of the arguments made by the complainant and Avon and Somerset including those not specifically referenced within this decision notice.

### **Reasons for decision**

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9. Section 41 of FOIA states that information is exempt information if—
  - (a) it was obtained by the public authority from any other person (including another public authority), and
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
10. Section 2(3)(g) states this exemption is absolute. This means that if section 41 applies, a public authority does not have to apply a public interest test under the FOIA in order to withhold the information (as would be required in the case of a qualified exemption). A duty of confidence can arise explicitly or implicitly<sup>1</sup>. Avon and Somerset's position is that the duty of confidence arises here out of a written agreement between the parties and thus it is explicit.

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<sup>1</sup> Secretary of State for the Home Office v British Union for the Abolition of Vivisection & the ICO (para 28 [2008] EWHC 892 (QB))

11. The issues to be determined under subsection (1) of section 41 are:
  - Whether the information was obtained by the public authority from a third party; and
  - Whether the disclosure of that information would constitute an actionable breach of confidence.
12. Avon and Somerset has provided the Commissioner with a copy of the withheld information, relevant extracts from written agreements between it and SW1 and a letter dated 2 December 2011 that it had received from SW1.
13. Avon and Somerset state that SW1 Board Minutes are the private and confidential information of SW1, a limited company. Avon and Somerset explained that it only holds a copy of them as it provides a director to the Board of SW1. It further states that, by virtue of written agreements (in particular, clause 16 of the Joint Venture Agreement and clause 21 of the Service Delivery Contract) between it and SW1 the requested information is confidential. In addition, Avon and Somerset provided the Commissioner with a copy of a letter to it from SW1 dated 2 December 2011. In the letter, SW1 states that, if necessary, it would take appropriate legal action if confidential information it had provided to Avon and Somerset was divulged contrary to the agreement between the parties.
14. The Commissioner has viewed clause 16 of the Joint Venture Agreement and clause 21 of the Service Delivery Contract of the written agreements between Avon and Somerset and SW1. These provide that confidential information received by one party to the agreement from another shall remain confidential. Confidential information is defined in the agreement as, amongst other things, commercially sensitive information or information that if disclosed would/would be likely to prejudice the commercial interests of any person. The obligation of confidentiality therefore, as between Avon and Somerset and SW1, is one that is expressed explicitly by virtue of the agreement.
15. It is clear to the Commissioner that Avon and Somerset obtained the withheld information from a third party, SW1, a limited company. Avon and Somerset does hold a minority shareholding in SW1, however they are separate legal entities. Having viewed the withheld information the Commissioner's view is that its public dissemination would constitute a disclosure of commercially sensitive information or information that would or would be likely to prejudice the commercial interests of any person. The withheld minutes are concerned with the financial and operational state of the company. In this regard, if Avon and Somerset

were to disclose the requested information it would provide credible grounds for an action for breach of confidence.

16. However, in the Commissioner's view (based on case law<sup>2</sup>), disclosure will not constitute an actionable breach of confidence which can be maintained in legal proceedings if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential, i.e. that there is a public interest defence for a breach of confidence.
17. The complainant, in correspondence to the Commissioner, submitted arguments as to why the withheld information should be released in the public interest. He argued that the agreement between councils and SW1 is a controversial one. The complainant expressed the view that using a private limited company as a public service delivery vehicle appears to remove public transparency, governance and democratic accountability by avoiding disclosure through public committee and the FOIA. The Commissioner considers the question / principle of service delivery to be essentially a political one, and therefore outside his remit. However, he is of the view that if agreements were being used primarily to circumvent the purpose of FOIA (the promotion of access to public information) it would be in the public interest to override that circumvention. The Commissioner has not found evidence that this has occurred or is occurring here.
18. On viewing the requested information the Commissioner did not discern that its contents could provide any other grounds for a defence (to an action for breach of confidence) of "in the public interest" if the information was released contrary to the written agreement between the Avon and Somerset and SW1. Whilst there are other defences to an action for breach of confidence (such as that the information was publically known in any event) the Commissioner could not discern evidence that would support such defences.
19. The Commissioner, for the reasons laid out above, finds that Avon and Somerset correctly relied on section 41 to withhold the requested information from the complainant.

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<sup>2</sup> For example - Attorney General v Guardian Newspapers (No 2)[1990] 1 AC 109 at 282

## Right of appeal

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20. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

21. 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.
22. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**