

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2023

Public Authority: Somerset West and Taunton Council
Address: Deane House, Belvedere Road, Taunton
TA1 1HE
(enquiries@somersetwestandtaunton.gov.u

Decision (including any steps ordered)

1. The complainant requested information about the terms of letting a café owned by Somerset West and Taunton Council.
2. The Commissioner decided that some commercially confidential information had been correctly withheld by Somerset West and Taunton Council relying on the section 43(2) (Commercial interests) FOIA exemption.
3. The Commissioner did not require SWTC to take any steps.

Request and response

4. On 13 September 2022, the complainant wrote to Somerset West and Taunton Council (SWTC) and requested information in the following terms:

“Café at [location redacted]

The proposed lease of the [location redacted] café was signed off by Cllr [name redacted] by way of the record of decision dated 3/11/21.

I would like to see the documentation leading up to this decision which should include but not be limited to the how the café was marketed, details of the bids received and how they were assessed and how this led to a final decision.

I would like to see a copy of the final agreement by the council with the proposed tenant which I believe was circa November 21 [2021].

[SWTC] say other options were considered and dismissed, please include evidence.

The record of decision states that councillor [name redacted] was consulted, please include full details: who consulted him, what information was he given and what was his response. Please include details of phone calls and meetings if available.

Details of any surveys/ valuations and advice re suitability of the design of the café and whether the proposed rent was a commercial rent together with any comparables. Details of any consultations/ recommendations/ advice received including with the public regarding this being a suitable way forward for this cafe.

If I have failed to request a vital piece of information please ensure it is included."

5. SWTC responded and provided some information within the scope of the request but refused to provide the remainder citing the section 43(2) (Commercial interests) FOIA exemption as its basis for doing so. Following an internal review on 8 December 2022, SWTC disclosed further information but continued to withhold details of the applications and bids as well as of the contract between SWTC and the successful bidder.

Scope of the case

6. The complainant contacted the Commissioner on 27 November 2022 to complain about the way his request for information had been handled.

7. The Commissioner investigated whether or not SWTC had been correct to rely on the section 43(2) FOIA exemption for the undisclosed information.

Reasons for decision

8. Section 43(2) FOIA provides that information is exempt if its disclosure would, or would be likely to, 'prejudice' (harm) the commercial interests of any person, including the public authority itself. The Commissioner has set out detailed guidance on section 43 on his website.¹
9. At internal review, SWTC focused on the commercial interests of the applicants. The Commissioner is satisfied that the prejudice envisaged by SWTC relates to the commercial interests of the applicants who submitted bids to lease the cafe. His guidance explains that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity – in this instance, the commercial premises rental market.
10. The complainant told the Commissioner that there were just two matters of which he was aware that SWTC had withheld but he did not know what else was held and could be disclosed as he did not have access to the SWTC files. He added that even if the applications were confidential, they could be redacted as necessary to ensure confidentiality.
11. SWTC told the Commissioner that it had sent the complainant as much information as it could without disclosing commercially confidential information. The information disclosed included the advertisement for the café leasing process, the assessment criteria SWTC used to decide which of the applicants was successful, and the site survey which included photos.
12. SWTC said it did not share the commercially sensitive information relating to the details of each of the bids, relying on the section 43(2) FOIA exemption. There was also an expectation from the bidders that the information they had provided would be kept out of the public domain. The interested parties had submitted Expressions of Interest (EOI) forms which included confidential and commercial information and which some bidders had proactively asked SWTC to keep confidential.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

13. SWTC said that the letting decision was a delegated decision made by the relevant SWTC Portfolio Holder and was made publicly available on its website. The decision was subject to call-in from its Scrutiny Committee as required by the Scrutiny Procedure Rules, the Constitution of which was also publicly available on the SWTC website.
14. SWTC added that it had searched for information regarding any consultation with the Ward Councillors but none was held.
15. SWTC said it had only withheld commercially sensitive information relating to the final agreement/ lease with the tenant relying on section 43(2) FOIA. It had sent everything except the commercially sensitive information relating to the details of the individual bids and the final agreement/ lease with the tenant. Disclosure would prejudice the interests of those who submitted bids to run the café.
16. During his investigation, the Commissioner reviewed the information being withheld by SWTC and also that which it had disclosed; he considered the scope for SWTC to make further disclosures. He accepted that a causal link exists between the disclosure of the withheld information about applications to lease the café and the business interests of the applicants who were operating in a competitive market.
17. The Commissioner considered the SWTC position that the envisaged prejudice 'would' occur from disclosure in the light of the evidence before him and was satisfied that the higher threshold is met. Therefore he decided that SWTC was entitled to rely on the section 43(2) FOIA exemption and considered the associated public interest test.

Public interest test

18. The Commissioner noted that SWTC has already disclosed most of the information it holds and has emphasised that it has provided as much information as it could. Having reviewed the information held, he is satisfied that SWTC were open and transparent. If however SWTC were now to disclose the withheld information, that would add to the information available to the public and make clearer why the contract was awarded to the successful bidder.
19. The Commissioner has seen SWTC's evidence that disclosing the withheld information 'would' cause significant prejudice to the bidders who are operating in a competitive market. There were five bids and some of the bidders were explicit in asking SWTC to keep confidential the information they had provided. He was satisfied that, if SWTC were to disclose the information provided to it in confidence by the bidders against their wishes, that would damage them. Disclosure would also cause serious harm to SWTC's own reputation as a trustworthy business

partner and make it harder for SWTC to achieve best value for the public purse in future competitions. This would be against the public interest.

20. The Commissioner therefore decided that the balance of the public interest favoured maintaining the section 43(2) FOIA exemption to withhold the undisclosed information and that SWTC had complied with the legislation.

Right of appeal

21. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

22. 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.
23. 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

Dr R Wernham
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF