



Article by Tim Farr

ACCESS TO INFORMATION:
“commercially sensitive” information can be released!

On October 1st the High Court gave judgment in a case relating to access to information which could set an important precedent. The point in issue was whether commercial information about Veolia’s £850 million PFI-funded contract with Nottinghamshire County Council should be made public under the Audit Commission Act 1998 even though there were exemptions under the Freedom of Information Act 2000 (FOI) and the Environmental Information Regulations 2004 (EIR).

The background was that a local elector and anti-incineration campaigner responded to a notice that Nottinghamshire County Council placed in the local press giving electors the opportunity to inspect the audited accounts. He requested that in accordance with section 15(1) of the Audit Commission Act 1998 (“the 1998 Act”) he would like to be able to see a full as opposed to redacted version of the Council’s PFI contract with Veolia. The 1998 Act governs the annual audit of local authority accounts by District Audit which takes place within 3 months of the end of the financial year. Section 15(1) of the 1998 states:

- “15(1) At each audit under this Act, other than an audit of accounts of a health service body, any persons interested may –
- (a) inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them, and
 - (b) make copies of all or any part of the accounts and those other documents.”

The 1998 Act contains exceptions to this right in relation to personal information but not in relation to commercially sensitive matters.

Nottinghamshire County Council put Veolia on notice that they were going to release the information to the local elector. This prompted Veolia to seek an injunction whilst the matter was litigated. The local elector was joined by the Audit Commission and Friends of the Earth as interested parties.

The case was heard in August and the judgment was reserved. It was handed down on 1st October 2009 with Veolia being unsuccessful in their challenge to keep confidential the information they had identified as commercially sensitive.

The judge, Mr Justice Cranston, noted that from its inception an important feature of the district audit system was the existence of public rights of inspection of, and objection to, the accounts. He traced this back to the Poor Law Act 1844. He said that he could understand the concern about commercial confidentiality. Not only may Veolia suffer from its breach, but the Council could as well, through the demands of sub-contractors once they learn the basis of Veolia’s models. But he said that the plain fact was that there was no duty to keep commercial confidentiality in section 15 and that confidentiality was no bar to disclosure. If the section applies to a contract, the Council must disclose it.

The judge said that section 15 of the 1998 Act trumps the confidentiality obligations that were set out in the contract. He conceded that there was a striking contrast with the wider confidentiality provisions in FOI and EIR. He thought that this might be because the 1998 Act only applies to the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them. As such the category of information available under section 15 is much narrower than under FOI or EIR and Parliament therefore determined that exceptions or qualifications should not be necessary to restrict disclosure. As the category of information which may be obtained under the 2000 Act is broader, more constraints are required.

Veolia has said that it accepts the judgement and will not appeal.

It therefore would seem that as soon as payments under a contract feature in the audited accounts of a local authority, a local elector can rely on this case to support a claim to have sight of the entire contract excluding personal information.

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**This note is intended to provide a brief overview of the legal principles under discussion.
It is not intended to be a comprehensive guide or to constitute legal advice.**

