

PUBLIC & ADMINISTRATIVE LAW

VEOLIA ES NOTTINGHAMSHIRE LTD v NOTTINGHAMSHIRE COUNTY COUNCIL [2010] EWCA CIV 1214

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The Court of Appeal's recent decision in Veolia clarifies the extent to which a local authority may withhold commercially sensitive information in its possession from those seeking to exercise a right to inspect the authority's accounts and related documents under section 15 of the Audit Commission Act 1998. Rix LJ (with whom Etherton and Jackson LJ agreed on this point) indicated that the seemingly unfettered right to access accounts and certain categories of related documents of a local authority that is available to "persons interested" under section 15 must be "read down" - in accordance with Article 1, Protocol 1 of the ECHR (protection of peaceful enjoyment of possessions) - so as to protect the commercial confidentiality of those documents or parts of those documents, unless disclosure is objectively justified. This judgment, no doubt, comes as a relief to local authority contractors who must have been concerned, following the Administrative Court's decision in this case, that commercially sensitive information could be readily obtained under section 15 and thereafter be passed onto competitors or enter the public domain.

FACTUAL BACKGROUND AND THE HIGH COURT DECISION [2009] EWHC 2382 (ADMIN)

The Audit Commission Act 1998 provides for a yearly audit of local authorities and sets out the manner in which the audit is to be conducted. Section 15(1) of the Act was the provision of interest in this case and states:

“At each audit under this Act...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 proceedings had their origins in the request of a local elector¹ of Nottinghamshire County Council (“the Council”) to inspect copies of a waste management PFI contract between the Council and Veolia and the invoices raised under that contract during the relevant audit year. It appears that the elector’s purpose for requesting the documents was to assist in the campaign of local resident’s group, “People Against Incineration” and, so, was not obviously related to the audit. The elector had previously requested the same information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000, pursuant to which requests the Council had disclosed substantial parts of the PFI contract, but had withheld the invoices raised under the contract and certain Schedules to the contract setting out Veolia’s charging methodologies on the grounds on commercial sensitivity. Veolia did not object to the Council’s disclosure under section 15 of the Act of the information already disclosed under the freedom of information legislation. The Council, having been asked for disclosure pursuant to section 15 of the Act, proposed to disclose certain previously undisclosed materials – including certain pricing-related schedules to the contract and the invoices raised under the contract. Veolia objected to the disclosure of this commercially confidential information and so sought judicial review of the Council’s decision to disclose.

In the High Court, Veolia’s grounds of review were limited to arguments on the proper construction of section 15 of the Act. Veolia submitted that “accounts” in the context of section 15 meant the high level summarized statements of account produced by the Council at the end of each year and not the Council’s general books of accounts, which kept a running record of its financial activity throughout the year. Veolia also submitted that documents “relating to” the accounts should be construed as documents expressly mentioned in the accounts. On that basis, Veolia’s argued that the invoices and the schedules

¹. A local elector qualifies as a “person interested” under section 15, although the range of “persons interested” goes beyond local electors.

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of the PFI contract that the Council proposed to disclose were not properly disclosable under section 15, because they were not expressly mentioned in the Council's high level statement of accounts, although the Council's expenditure under the PFI contract was incorporated into those high level statements of account. Cranston J rejected Veolia's proposed narrow construction of section 15 and held (1) that the "accounts" referred to in section 15 were the general books of accounts, and (2) "relating to" was much broader than "expressly mentioned in"; he went on to hold that invoices and the schedules to the PFI contract "related to" the Council's accounts, however "accounts" was defined, and were disclosable under section 15. Cranston J also indicated (obiter) that documents disclosed under section 15 could be used for any lawful purpose; their use was not restricted to participation in the audit.

Following the High Court decision, local authority contractors were concerned that, without protection for commercially sensitive information specifically enshrined in section 15 or restrictions on use of information disclosed under section 15, commercially sensitive material obtained under section 15 may ultimately end up in the hands of competitors. Procurement specialists and disappointed tenderers saw in the High Court decision an alternative means – other than disclosure and freedom of information rules – of obtaining information about the winning bid in a tender for a public contract; in fact, potentially, a means of getting fuller information than would be available on disclosure or FOI.

It should be noted, however; that Veolia did not, before the High Court, advance any arguments for "reading down" the language of section 15 on human rights or European law grounds so as to protect commercial sensitive information. Indeed, the Council specifically drew the Court's and Veolia's attention to the potential relevance of the Human Rights Act 1998 to the decision, but Veolia expressly disavowed any reliance on human rights arguments. Similarly, the possible relevance of EU procurement law was drawn to the Court's and Veolia's attention, but again was expressly disavowed by Veolia.

THE COURT OF APPEAL DECISION

In the Court of Appeal, Veolia renewed its technical arguments on the proper construction of the language of section 15 of the Audit Commission Act 1998, but added two further grounds of appeal. The first new ground raised on appeal was that section 15 should be "read down" so as to preserve commercial confidentiality by reason of either common law, Article 8 or Article 1, Protocol 1 of the European Convention on Human Rights ("ECHR")

or Article 3 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (which deals with confidentiality of information submitted to a public authority in the course of tender for a public contract). Veolia also argued that use of information obtained under section 15 be limited to the relevant audit.

As regards Veolia's "technical arguments", the Court of Appeal upheld the High Court's findings on the proper construction of section 15 of Audit Commission Act 1998, and that the invoices and schedules sought by the elector did "relate to" the accounts within the meaning of section 15.

The Court of Appeal, however, with a measure of agreement from all parties, accepted that section 15 ought to be "read down" to exclude confidential information protected by the ECHR: see paragraphs 121 and 122. In particular, the Court of Appeal found that commercially sensitive information fell within the concept of "possessions" in Article 1, Protocol 1 ECHR and, as such, was protected from interference by the state, subject to objective justification for such interference (see paragraph 121). Accordingly, in deciding whether to accept a request under section 15 for inspection of commercially sensitive information, it is now incumbent upon a local authority to balance the Article 1, Protocol 1 ECHR rights – and possibly those rights under Article 8 ECHR also - in the information against the public interest in disclosure (see paragraph 128). The court did not consider Article 3 of Directive 2004/18/EC at length, and did not decide the issue of its possible relevance (see paragraph 141 and 142). Applying the balancing test to the documents in dispute, the Council was found not to have acted unlawfully. Guidance was given in relation to further documents on which no decision had been made.

The Court of Appeal was divided on the issue of the proper use of information obtained under section 15. Rix LJ considered that it was appropriate and desirable to make a finding on this issue and stated that "whatever may be the position more generally, access to confidential information should be at the very least restricted to use only for the purposes of an audit" (paragraph 155). Etherton and Jackson LJ, however, declined to follow Rix LJ on this point. Etherton LJ (with whom Jackson J agreed on this point) noted that, as these were not proceedings by Veolia to enjoin the elector from putting the commercially confidential information to a particular use, consideration of the issue of proper use of information provided under section 15 was not necessary to dispose of the matter before the court

(paragraph 163). His Lordship considered the issue to be a “difficult and important one” (paragraph 164) and, as such, preferred not to opine on the issue unnecessarily. Veolia was ordered to pay three sets of costs, including the Council’s at first instance and 75% of the Audit Commission’s costs on appeal.

COMMENT

As stated above, the Court of Appeal’s judgment provides significant comfort for local authority contractors or those bidding for a local authority contract that any commercially sensitive information included in tender documents and incorporated into the contract with the local authority will only be disclosed under section 15 of the Audit Commission Act 1998 following a balancing of the contractor’s interest in the maintenance of confidentiality and the public interest in disclosure. This balancing is likely to be very similar to the balancing approach that takes place under freedom of information legislation. Thus, going forward, it appears that disappointed tenderers will derive little, if any, advantage in seeking information on the winning bid and the resulting contract under the Audit Commission Act 1998, rather than under freedom of information rules.

For local authorities, the judgment provides valuable guidance in undertaking the often difficult task of deciding what information to make available for inspection during the annual inspection window under the Audit Commission Act 1998. The judgment suggests that the balancing approach will have much in common with the familiar approach under the freedom of information legislation.

Ian Rogers appeared for Nottinghamshire County Council.