



Veolia client update

Protecting commercially sensitive information in local authority contracts: a lifeline from the Court of Appeal

Introduction

A recent decision of the Court of Appeal has bolstered the privacy rights of private contractors engaged in the provision of services to local authorities. In *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and others* [2010] EWCA Civ 1214 the Court revisited the 2009 judgment of the Administrative Court¹ and held that documents relating to the company's financial model and profit margin could not be disclosed as they were protected as confidential information under the European Convention on Human Rights ("the ECHR").

The decision represents a real lifeline to all those involved in public sector contracting where commercially sensitive information is handed over whether during the tender phase or during the life of the contract.

Background

The case stemmed from a request from a local elector, Mr Downen, for access to copies of documents relating to a PFI contract between Veolia and the council for waste management services. See our briefing 'Confidentiality clauses in local authority contracts' (http://www.burges-salmon.com/Practices/commercial/Publications/Confidentiality_clauses_in_local_authority_contracts.pdf) on the decision at first instance. Mr Downen made a request under section 15(1) of the Audit Commission Act 1998 ("the 1998 Act") to inspect and take copies of various documents relating to the accounts to be audited and the court at first instance held that Mr Downen did have a right to inspect the contract, including the pricing mechanisms and key performance indicators and that only personal information was excluded from the remit of the 1998 Act. Veolia and the Council had decided that they could live with that decision but when Mr Downen made a further request for access to documents and asked for Veolia's financial model and profit margin they appealed. Veolia considered those

documents to be 'commercially sensitive' and did not want them to be available to its competitors. The information was needed by the Council in order to manage and price risks that might occur over the life of the PFI contract. Unsurprisingly, Veolia felt that harm from the disclosure of the information would be "very considerable indeed"².

Confidentiality

The Court of Appeal agreed with the judge at first instance that the types of documents which could be accessed under the 1998 Act were very wide. However, unlike the judge at first instance whose view, based on the exception in section 15(3), was that the only information which could not be inspected was personal information, the Court of Appeal held that Section 15(1) had to be read so as to preserve the confidentiality of confidential information. The Court of Appeal acknowledged that there is a public interest in transparency particularly in the use of public money but, on the other hand, "*there is a strong public interest in the maintenance of valuable commercial confidential information*". In reaching its decision that the documents were protected from disclosure to Mr Downen, the Court relied on the provisions of the ECHR.

What is protected under the European Convention on Human Rights?

The ECHR recognises that everyone (both individuals and companies) is entitled to peaceful enjoyment of their possessions (Article 1 of the first protocol). The Court of Appeal held that valuable commercial confidential information falls within the concept of "possessions". Therefore, the 1998 Act must be interpreted in light of the right to peaceful enjoyment with the Council having to perform a balancing exercise to justify maintaining confidentiality or disclosure of documents. The Court held that Veolia's financial model and profit margins were protected and also commented that the pricing mechanisms

¹ Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council [2009] EWHC 2382 (Admin).

² *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and others* [2010] EWCA civ 1214 at para 11.

and key performance indicators originally disclosed were also the type of confidential information protected under the ECHR and disclosure could not be justified.

As the financial model and profit margins did not have to be disclosed, the Court of Appeal did not decide whether or not there were any restrictions or limitations that could be placed on the use of information contained in any documents which are disclosed in the future. This may be considered in a future case but, for now, there remains uncertainty.

Conclusion

The effect of this case is that members of the public cannot access valuable commercial confidential information under the 1998 Act unless there is a public interest in granting access which outweighs the private interest in keeping it confidential. The Court admitted that this means there is not a “*bright-line test*”³ to help private contractors know in advance whether or not information in public service contracts might be disclosed. Instead, public authorities will have to weigh up the competing private and public interests in each and every case, as they do already in other areas where human rights considerations apply.

This brings the 1998 Act more in line with the FOIA and the EIR, under which genuinely confidential information does not have to be disclosed. Of course, labelling a document as ‘commercially

confidential’ will not guarantee that it is protected from disclosure if it is not genuinely confidential.

The advice to private contractors is to make it clear, within contracts and supporting documents, which information they consider to be commercially sensitive and to include confidentiality provisions to protect it.

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³ *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and others* [2010] EWCA civ 1214 at para 128.