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Access all areas: how safe is your commercially sensitive
environmental information?

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Access all areas: how safe is your commercially sensitive environmental information?



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ACCESS TO ENVIRONMENTAL INFORMATION often creates conflict between the rights of citizens to understand the environment in which they live and the legitimate confidential interests of businesses that provide services to public bodies. The Environmental Information Regulations (EIR) 2004 came into force over five years ago, but there are still frequent skirmishes in the courts over the scope of access to commercially sensitive documents, and the public (and non-governmental organisations in particular) are becoming increasingly creative in their efforts to obtain this information. Two recent examples are *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & ors* [2009] and *Office of Communications (Ofcom) v The Information Commissioner* [2010], both of which have reshaped the contours of this area of law. Uncertainty exists in both the operation of the individual legislative routes to accessing information and in the interaction between them, which is of concern to the large number of commercial enterprises that do business with the public sector.

In this article, we look at the law on the access to environmental information and the implications of the recent judicial decisions, and we examine the risks and opportunities that this creates for businesses.

ORIGIN OF THE LAW

The two primary routes for accessing environmental information in the UK are the Freedom of Information Act (FoIA) 2000 and EIR 2004. The mere fact that there are two potential routes for the disclosure of environmental information, rather than just one route as for most other forms of information, is of significance and demonstrates the perceived importance of public access to environmental information.

FoIA 2000 has its origins in Westminster, whereas the principles of EIR 2004 arise from international and European law. Before the introduction of FoIA 2000, public authorities were required to ensure that their processes complied with the non-statutory Code of Practice on Access to Government Information, which gave individual authorities considerable discretion in the exercise of their functions. Viewed as unsatisfactory, calls for reform were widespread and greater political transparency was one of the cornerstones of New Labour's 1997 manifesto.

In parallel to the domestic agenda, the parties to the United Nations Economic Commission for Europe signed the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) on 25 June 1998 in Aarhus, Denmark. As is clear from the title, one of the central pillars of the Aarhus Convention was the access to environmental information by the public. The Aarhus Convention gave rise to EU Directive 2003/4/EC on public access to environmental information and EIR 2004 is the product of the UK's implementation of the Directive.

FoIA 2000 and EIR 2004

Under EIR 2004 'environmental information' has a wide definition, and may include tenders, contracts and pricing information for environmental services. For such information, both FoIA 2000 and EIR 2004 could be utilised. FoIA 2000 and EIR 2004 are drafted in a similar fashion. The starting point is a presumption in favour of the disclosure of information to the public but with a list of possible exemptions. There are differences between FoIA 2000 and EIR 2004 (for example, EIR 2004 applies to a wider range of public authorities than FoIA 2000 and the exemptions under EIR 2004 are arguably harder to satisfy), but both pieces of legislation have a broad scope of application and in practice a member of the public will request environmental information under both FoIA 2000 and EIR 2004 at the time when the request is made. In the event that either one of the routes favours disclosure, then disclosure must be made.

Under FoIA 2000 there are both qualified and absolute exemptions whereas under EIR 2004 there are only qualified exemptions. If an absolute exemption applies (such as where disclosure would give rise to an actionable breach of confidence) then disclosure cannot be permitted. For qualified exemptions, the public body must carry out a balancing exercise between the public interest in disclosing the information and the public benefit in maintaining the public and private interests protected by the exemptions (the public interest test). For example, if disclosing the information would inhibit the commercial activities of the public body, to the detriment of the taxpayer, then this needs to be weighed against the public benefit in disclosing the information.

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In practice, this balancing act is a difficult one, and is often the source of challenge and appeal to the Commissioner. If parties are dissatisfied with the decision of the Commissioner, then an appeal can be made to the First-tier Tribunal (Information Rights). Further challenges on points of law can be made to the High Court.

COMMERCIAL INTERESTS EXEMPTION

One of the exemptions of most interest to businesses is the exemption contained in s43 of FoIA 2000 and regulation 12(5)(e) of EIR 2004, which is the commercial interests exemption. This is a qualified exemption and therefore subject to the public interest test.

The exemption is broadly similar for both FoIA 2000 and EIR 2004, although the wording is subtly different which may give rise to future arguments over its scope. The exemption under FoIA 2000 applies to commercially prejudicial information whereas EIR 2004 exemption applies to environmental information that would compromise:

'... the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.'

Despite these differences in language, they have been generally accepted by practitioners and commentators as parallel exemptions, which means that issues raised by one of the exemptions have been generally held to be applicable to the other.

Recent decisions by the Information Commissioner, the First-tier Tribunal and the courts suggest that the scales used for the balancing act have been tipped in favour of disclosure over commercial confidentiality. The 2008 decision of the Deputy Information Commissioner involving East Riding of Yorkshire Council is a good example. The complainant requested a copy of a 25-year-term waste management contract between the Council and a waste management contractor. The Council disclosed some sections of the contract but withheld the commercially sensitive sections, relying on the commercial interests exemption. However, the Deputy Information Commissioner declared that disclosure should prevail, emphasising the fact that waste management activities were a core function of local authorities

with the potential to affect the entire community. The Council were ordered to disclose all information relating to pricing contained in the contract, with the exception of information highlighting the specific costs or profits of the contractor.

The current trend is clear. The simple fact that information is commercially sensitive will not protect that information from disclosure. In every case there will be a balancing act between the public interest in protecting commercial information and the public interests in disclosure, and significant weight is being given to the rights of the public to access environmental information.

VEOLIA

Veolia entered into a waste management contract with Nottinghamshire County Council and the contract included commercially sensitive schedules setting out the pricing mechanisms. The Council disclosed sections of the contract but omitted the commercially sensitive schedules. A local resident (advised by Friends of the Earth: Rights and Justice Centre) sought to access these commercially sensitive schedules but, instead of utilising FoIA 2000 or EIR 2004, they utilised s15(1) of the Audit Commission Act (ACA) 1998, which provides:

'15(1) 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.'

ACA 1998 contains an exemption for personal information to ensure compatibility with the Data Protection Act 1998 but no others and the Council considered that it had no discretion to withhold the information on the grounds of commercial confidentiality. In the subsequent judicial review, the High Court agreed with the Council. There was considerable argument over the scope of 'the accounts to be audited' and the documents 'relating to them', but the Court held that the scope was wide enough to include the pricing schedules to the contract.

Veolia then argued that the Court should interpret ACA 1998 to incorporate the principles of the protection of commercially sensitive information that are contained in EIR 2004 and FoIA 2000. The Court rejected this submission. The Court was sympathetic to Veolia's concerns that the information was valuable to Veolia's competitors, and would affect their ability to compete for other local authority contracts and to hold down their sub-contract prices on existing and future contracts. However, the Court looked at the origins of ACA 1998 in the Poor Law Amendment Act 1844 and noted that, unlike FoIA 2000 and EIR 2004, the roots of ACA 1998 lie 'in democratic accountability, rather than the policy of transparency and openness behind the modern legislation', and that the purpose of s15(1) was to 'enable those with a real and close interest in a council's activity to scrutinise its accounts in the audit process'. One of the key features of such accountability was to consider:

'Whether in incurring any liability for expenditure the body under audit has made proper arrangements for securing value for money.'

As such, the Court agreed that the confidential schedules should be disclosed.

The impact of *Veolia* on future requests for environmental information may be significant. The lack of a commercial interests exemption in ACA 1998 may allow access to commercially sensitive documents that would not be available under FoIA 2000 or EIR 2004. There is also concern that there is no restriction within ACA 1998 over the purpose for which the disclosed information can be used. The time limits for inspection are strict (a request can only be made during the 20-working-days period appointed by the local government auditor as part of the annual audit process) and the request must come from 'persons interested' (a group wider than merely local electors, and potentially including local businesses and community groups). Subject to these hurdles, however, the precedent has been set for an increased number of applications for commercially sensitive environmental information under ACA 1998.

OFCOM

On 27 January 2010 the Supreme Court handed down its preliminary judgment

on the long-running *Ofcom* case. The dispute concerned access to the precise location of mobile telephone base stations in the UK, which had been requested for epidemiological purposes under EIR 2004. It is worth noting how wide the definition of 'environmental information' is under EIR 2004. Even grid references for mobile telephone base stations held by Ofcom are included. Ofcom refused disclosure, relying on the unrelated exemptions for public safety and the protection of intellectual property rights that were provided by regulations 12(5)(a) and (c) of EIR 2004 respectively.

The matter was the subject of numerous appeals. Disclosure was ordered by the Information Commissioner, the First-tier Tribunal and the Administrative Court, all of whom considered that, on balance, neither of the exemptions outweighed the requirement for disclosure. The legal issue on appeal to the Court of Appeal was on the operation of the public interest test, and whether the interests served by different exemptions could be combined and then weighed as a whole against the public interest in disclosure. Put simply, where multiple exemptions apply, should each exemption be addressed separately, or should they be combined together before being weighed against the public interest in the hypothetical scales? The Court of Appeal considered that the exemptions should be combined.

The subsequent appeal divided the Supreme Court (with three Justices of the Supreme Court agreeing with the Court of Appeal and two disagreeing). The Supreme Court did not provide a definitive answer, however, because they considered that the question required an interpretation of EU Directive 2003/4/EC (on which the EIR is based) and therefore the Justices referred the matter to the European Court of Justice (ECJ) for a ruling on the interpretation of the directive.

The clarification from the ECJ is awaited with interest because it may have a significant impact on the operation of EIR 2004. If the exemptions can be combined, then the private interests in preserving confidential commercially sensitive information may be combined with the public and private interests in other exemptions to tip the scales in favour of non-disclosure in cases when disclosure would otherwise have been required.

The case clearly demonstrates the point that, more than five years after its implementation, the operation of EIR 2004 is still far from certain, and a fundamental issue on the interpretation of the public interest test has perplexed the highest court in the land and is now with the ECJ. In light of this uncertainty, further skirmishes are expected over the scope and operation of EIR 2004 in the future.

Another unresolved question is the effect of the ruling of the ECJ on the interpretation of the exemptions contained in FoIA 2000. Despite its similarities to EIR 2004, the genesis of FoIA 2000 is not European but domestic. The immediate extrapolation of the ECJ's ruling to FoIA 2000 would be arguably unconstitutional. However, a difference in interpretation between EIR 2004 and FoIA 2000 would create additional complexity, which itself is undesirable.

SPECIFIC ENVIRONMENTAL INFORMATION

The environmental permitting regime and the planning regime both require the disclosure of environmental information to public bodies to enable the public body to determine the application. On many occasions, that information will include commercially sensitive information, such as details of the process that will be installed should the application be successful. The two regimes treat this confidential information in different ways and it is important for businesses to understand the differences in these regimes so that informed decisions can be made about the extent of the information disclosed in the application.

The environmental permitting regime is contained in the Environmental Permitting (England and Wales) Regulations (EPR) 2007. Under EPR 2007 the Environment Agency is required to maintain a register of information including the permits issued, the applications for the permit, and enforcement and notices issued during the lifetime of the permit. Members of the public are allowed to inspect the register.

However, regulation 48 of EPR 2007 provides an exception to this rule on the grounds of commercial or industrial confidentiality. The Agency is required to exclude from the register anything that it considers to be confidential. Further, if a business believes that any information contained within a permit application

ought to be restricted, it may apply to the Agency to exclude that information from the register. The Agency is then required to determine whether that information is confidential. In making the determination, the Agency must apply a presumption in favour of disclosure, but it is under a duty to consider any reasons against disclosure given by the applicant. For information to be excluded from the register, the Agency must be satisfied that information is confidential, that its confidentiality protects a legitimate economic interest and that the public interest in maintaining confidentiality outweighs the public interest in disclosure.

Under the Town and Country Planning Act 1990, information submitted as part of a planning application must be put on a public register and that register must be open to the public for inspection. However, unlike EPR 2007, the planning regime does not provide public authorities with an automatic right to withhold information from the register on the basis of commercial confidentiality. Therefore, the starting point is that commercially sensitive information submitted as part of a planning application will be placed onto the public register.

In practice it is sometimes possible to make informal arrangements with the public authorities to submit commercially confidential information separate from the main application and to withhold this from the register. However, this is not without some risk, because if there is a sustained challenge by an interested party then it is likely that the information would be disclosed as there is no statutory basis for withholding it.

PRACTICAL STEPS TO PROTECT ENVIRONMENTAL INFORMATION

- Confidentiality agreements (such as a confidentiality clause in a contract between the business and the public authority) are private arrangements and therefore are not conclusive when it comes to applying the public interest test. Guidance issued by the Information Commissioner warns public bodies against wide definitions of 'confidential information' in agreements because the authority:

'May unwittingly place itself in a future dilemma when faced with a request for information covered

by such a clause: to breach its statutory obligation or to ignore a contractual clause.'

However, such agreements are still very valuable because they highlight to the public body that the information is considered by the disclosing business

the appropriate contact information. For those businesses contracting with public bodies, the contractual provisions should require consultation in the event of an information request.

- Businesses should avoid physically handing over commercially sensitive

necessary to prevent disclosure until the issues have been resolved.

RISK OR OPPORTUNITY?

It is common for businesses to consider the law on access to information in purely negative terms, and in most cases rightly so, as information requests may pose a genuine threat to commercial activities. However, the law on access to information can also provide an opportunity for companies to obtain valuable information about their competitors, customers, suppliers and wider interest groups, and regular requests are made on behalf of companies to obtain information for commercial purposes. Although a detailed analysis is beyond the scope of this article, forward-thinking businesses are realising the potential of this area of law and are making the most of the opportunities that the law provides.

CONCLUSIONS

Individuals, non-governmental organisations and some companies are alive to the opportunities that the law provides to access environmental information, and the attempts to access that information are becoming more innovative and creative. The boundaries of the law are still unclear, and, more than five years after its implementation, the mechanism of the public interest test within EIR 2004 is still uncertain. Businesses need to be aware of the significant limitations in the 'commercial interests' exemption in FoIA 2000 and EIR 2004, and understand that there is no protection for commercially sensitive information in ACA 1998. Some steps can be made to protect commercially sensitive environmental information provided to public authorities, but risks remain and in-house lawyers must be wary. This is an area of law that in-house lawyers in the environmental sector, and indeed other sectors, will need to watch closely in the future.

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to be confidential. There is a risk in drafting the confidentiality provisions too wide and businesses should enter into confidentiality agreements in accordance with the guidance published in the Code of Practice issued by the Department for Constitutional Affairs. For example, paragraph 34 of the FoIA 2000 Code of Practice suggests that where there is good reason to include non-disclosure provisions in a contract, public authorities:

'Should consider the desirability where possible of making express provision in the contract, identifying the information which should not be disclosed and the reasons for confidentiality.'

This could be done, for example, by identifying the confidential information in a schedule of the contract. Such an approach will be viewed more favourably than contracts with confidentiality obligations that are drafted unreasonably wide. Businesses may wish to seek specialist advice on the terms of their agreements to ensure that the protection is as comprehensive as possible.

- Businesses should ensure that public authorities holding commercially sensitive information have the contact details of the person who should be contacted within the organisation should a request be made for disclosure. Public authorities are encouraged to consult with third parties whose interests are likely to be affected by a request for information, but this will only be possible if they have been given

information unless it is necessary, and controls over number of copies made and the location of retained documents can be incorporated into confidentiality agreements or commercial contracts. If information must be provided to public authorities, then send only what is required and do so on the last permissible date.

- Contractual provisions can also require the return of documents that the public authority no longer needs.
- Separate confidential and non-confidential information within the same document by using schedules, clear confidentiality labels and/or different paper. This will help reduce the likelihood of mistakes by the public authority and will allow confidential information to be redacted quickly and accurately.
- If feasible, businesses should consider submitting two versions of confidential documents: one version that can be disclosed (with the commercially confidential information redacted or omitted) and another that is to be kept confidential.
- Businesses should check and, where appropriate, challenge the statutory basis on which the public authority plans to release the information. External legal advice may assist both in deciding whether to challenge and in making the challenge. If the information is particularly sensitive, consider whether injunctive proceedings are

Office of Communications (Ofcom) v The Information Commissioner [2010] UKSC 3

Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & ors [2009] EWHC 2382 (Admin)