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1 & 2 Raymond Buildings, Gray's Inn, London, WC1R 5NR

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Information rights: Commercial confidentiality and local government accountability in conflict?

Ligia Osepciu

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The High Court's recent decision in *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council* [2009] EWHC 2382 (Admin) has potentially far reaching implications for the protection of confidential information in commercially sensitive documents provided to a local authority by a successful tenderer for a public contract.

In this case the High Court held that a local authority was bound by section 15(1) of the Audit Commission Act 1998 ("the 1998 Act") to allow a local government elector to inspect certain portions of a public contract dealing with commercially sensitive pricing issues. The judgment is particularly notable as the Court held that that duty of a Council to provide documents for inspection under section 15(1) of the 1998 Act is not subject to any exception for commercial confidentiality and that there is no restriction on the purpose for which an elector can use information obtained by this method.

The request to inspect contractual documents

Mr. Downen, an elector of the Nottinghamshire County Council ("the Council"), sought, pursuant to section 15(1) of the 1998 Act, to inspect certain documents in the possession of the Council relating to a waste management contract ("the Contract") between the Council and Veolia ES Nottinghamshire Ltd ("Veolia"). Veolia had won the Contract through a public tender competition conducted under the Public Service Contracts Regulations 1993.

The Council considered that it was obliged to allow Mr. Downen to undertake the requested inspection, and informed Veolia to that effect. Veolia sought judicial review of the Council's decision to allow inspection.

In particular, Veolia objected to the disclosure of (1) four schedules to the Contract outlining the method for calculating the level of payments to be made by the Council under the Contract, (2) invoices issued by Veolia under the Contract and (3) schedules to those invoices showing how the invoice sums had been calculated (collectively "the disputed documents"). Veolia maintained that the information in these documents had been supplied confidentially to the Council and was valuable to Veolia's commercial competitors; it argued that disclosure of

the documents would impair Veolia's ability to compete on other bids for public contracts and to hold down its sub-contract prices on existing and future contracts.

The structure of the Audit Commission Act 1998

Section 2 of the 1998 Act requires an audit of local government accounts to be carried out yearly. Under section 5 of the 1998 Act, the duty of local government auditors is to ensure that the entity being audited has prepared accounts in accordance with all applicable legislation and codes of practice and "*has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources*".

Section 15(1) of the 1998 Act provides:

- (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.

Under regulation 13 of the Accounts and Audits Regulations 2003, a local government auditor must appoint a date for the exercise of the rights granted under section 15(1) of the 1998 Act. The accounts to be audited and related documents must be made available for public inspection for 20 working days after that date.

Section 15(3) of the 1998 Act lays down an exception to the section 15(1) right in circumstances where the documents sought to be inspected contain confidential *personal* information ("the personal confidentiality exception"). The 1998 Act contains no similar exception in respect of documents containing commercially confidential information, unlike the Freedom of Information Act and Environmental Information Regulations 2000 and the Environmental Information Regulations 2004.

The Judgment of Cranston J

The outcome of Veolia's application for judicial review unsurprisingly turned on the meaning of section 15(1) of the 1998 Act and, in particular, the correct interpretation of "*accounts to be audited*" ("the accounts") and "*[documents] relating to [the accounts]*", neither of which terms are defined in the 1998 Act.

Cranston J held that the accounts are "*the general ledger and any accounts feeding into it*", which "*show all the financial movements or items of account in the Council's funds*" (paragraphs 49 & 50). He noted that the year-end Statement of Account produced by a Council does not itself constitute the whole of the accounts for the purposes of the 1998 Act, but rather provides a summary of the accounts. In so holding, Cranston J rejected Veolia's proposed narrow construction, which would have restricted the meaning of "the accounts" to the lines of a Council's Income and Expenditure Account, excluding all notes thereto (paragraph 48).

Veolia also contended that a document only “relates to” the accounts if the link with an item of account is evident on the face of document itself or the face of the accounts themselves. Again, the judge rejected this narrow interpretation, holding that the words “*relating to*” in the 1998 Act only required that there be an “*enquiry as to the factual connection*” between the limited category of documents specified in section 15(1) on the one hand and the accounts to be audited on the other hand (paragraph 67).

Cranston J went on to hold that there was a factual connection between the disputed documents and the Council’s accounts, which was evidenced by the identification of the Contract in the explanatory forward and in Note 29 to the Council’s Statement of Account (paragraph 68). Therefore, the Council was required to allow Mr. Downen to inspect the disputed documents, and the application for judicial review failed.

The judge noted that this outcome accorded with the Parliamentary purpose of section 15(1) of the 1998 Act, which was to “*to enable those with a real and close interest in a council’s activity to scrutinise its accounts in the audit process*”, including considering questions of “*whether in incurring any liability for expenditure the body under audit has made proper arrangements for securing value for money*” (paragraph 72).

Cranston J also found that Parliament’s recent review and amendment of the personal confidentiality exception¹ suggested that it did not intend to include a commercial confidentiality exception to section 15(1) at this time – as Parliament could not have been unaware of potential commercial confidentiality issues at the time of the review, yet chose not amend section 15(3) in that regard (paragraph 80).

While the meaning of “*persons interested*” in section 15(1) was not in issue in this case, the judge observed that this was a group “*wider than local government electors and could include local businesses and community groups*” (paragraph 72).

Furthermore, and notwithstanding the stated purpose of section 15(1) of the 1998 Act, the judge noted that persons who inspected documents under that section could use the information obtained for any purpose (paragraph 42). This necessarily implies the possibility that such information may ultimately arrive in the hands of a contractor’s competitors or sub-contractors.

As Cranston J refused permission to appeal, Veolia is seeking permission to appeal from the Court of Appeal.

The views expressed are those of Ligia Osepiciu alone.

Ian Rogers appeared for Nottinghamshire County Council.

For more information on **Ian Rogers**, and **Ligia Osepiciu** please contact the Clerks on 020 7405 7211 or consult the ‘Find a Barrister’ section at www.monckton.com.

¹ By the Local Government and Public Involvement in Health Act 2007