

## Court Ruling on Disclosure Of Commercially Sensitive Information

Parties who enter into contracts with public bodies are often concerned that information relating to the contract will be subject to an information request. The public body may be under an obligation (whether under the Freedom of Information Act 2002, the Environmental Information Regulations 2004 or another information-release regime) to disclose information relating to the contract. The danger is they may - in complying with this obligation - disclose commercially sensitive information.

As well as being of concern to the parties, this could also detrimentally affect the bargaining position of public bodies in entering into contracts if, for example, information relating to pricing and costing is disclosed.

The decision of the High Court in *R (Veolia Nottinghamshire Ltd) v Nottinghamshire County Council and Schlomo Downen and the Audit Commission* in 2009 came as a blow to parties (and public bodies) looking to protect commercially sensitive information from disclosure. In this case, a member of the public made a request under the Audit Commission Act 1998 (which allows requests for information to be made about local authorities' financial activities). The request related to a waste PFI contract entered into between the Council and Veolia. Veolia argued that certain pieces of information, in particular relating to their financial model and profit margins, were commercially sensitive and so exempt from disclosure. The High Court, however, held that this information should be disclosed.

The good news is that this decision was overturned on appeal. The Court of Appeal held that, although persons with sufficient interest could request disclosure of some information, this right did not extend to commercially sensitive information. The information relating to Veolia's profit margins and financial model was commercially sensitive and – importantly – it was not considered to be in the public interest for this to be disclosed.

Interestingly, the Court of Appeal further held that some commercially sensitive information (such as financial models and profit margins) can be protected as “possession” under Protocol 1, Article 1 of the European Convention on Human Rights.

### *What this means:*

- Although this decision relates to the Audit Commission Act 1998, it is likely that the same approach would be applied to requests under the Freedom of Information Act 2002 and the Environmental Information Regulations 2004. This means that commercially sensitive information is only likely to be disclosed where the public interest in disclosing the information is greater than the private, commercial interests of the parties to the contract.
- The application of the decision will depend on the individual facts and circumstances of each case. However, the appeal decision does provide a good basis for parties to argue that information in relation to accounts, in particular profit margins and financial models, should be considered commercially sensitive.

- When parties are entering into a contract with a public body (whether through a Joint Venture or for the provision of services) they could try to include a provision in the tender documents and in the contract setting out what information is to be considered commercially sensitive, if the body will allow this. There should also, if possible, be a requirement that, if the public body is subject to any information request, it should consult before disclosing any information. This would be in line with codes of practice in terms of which authorities are encouraged to, and do, consult. Such provision would allow representations to be made as to whether commercially sensitive information is to be disclosed.

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