



Public's right to know upheld; Audit of local authority accounts and information relating to contracts with private sector providers

This is a briefing paper on the public's 'right to know' established in a groundbreaking case of Nottinghamshire County Council and Veolia ES Nottinghamshire Ltd with the Audit Commission as an interested party. The case has far reaching implications for local authorities and contractors who enter into contracts, such as PFI arrangements, with the public sector. This briefing is issued for English local authority contacts and to Wales, Scotland and Northern Ireland for information.

Key issues

This briefing explains the findings in the recent High Court case involving Veolia ES Nottinghamshire Ltd and Nottinghamshire County Council and First interested party Shlomo Downen and second interested party the Audit Commission for Local Authorities and the National Health Service in England.

The case explores what documents are subject to public inspection during an audit inspection and centres on S.15 of the Audit Act 1998 though the origins of the right to know stem from much earlier legislation including the Poor Law Act 1844.

1. Introduction

The High Court has decided in favour of public disclosure in a ground-breaking court case which has considered the level of detail to be disclosed in council deals with contractors.

The contractor (Veolia ES Nottinghamshire Ltd) part of a French-owned environmental concern, had sought an injunction to stop the council (Nottinghamshire County Council) making details of the private finance initiative (PFI) arrangements public. A local elector, Shlomo Downen, backed by Friends of the Earth, had asked to see documents. The company argued that a more liberal definition of what should be disclosed compromised its commercial position.

The Audit Commission - an 'interested party' in litigation between Nottinghamshire County Council and Veolia ES Nottinghamshire Ltd. - argued the company had misrepresented the rights of residents to view accounts. In his judgment delivered on Thursday 1 October Mr. Justice Cranston agreed, backing the Commission's definition of what documents are subject to public inspection during an audit.

2. Background

Mr Downen, the First Interested Party, has applied to inspect and make copies of certain documents which related to a waste management contract between the claimant, Veolia

ES Nottinghamshire Ltd ("Veolia"), and Nottinghamshire County Council ("the Council"). The Council having taken legal advice considered that it must allow him access to the documents. Veolia instituted proceedings to compel the Council to keep the documents confidential. The issue that was considered by Mr. Justice Cranston was whether the documents requested, in their entirety, fall within the statutory right of inspection and copying under section 15(1) of the Audit Commission Act 1998 ("the 1998 Act"). In particular he considered whether they fall within the category of "books, deeds, contracts, bills, vouchers and receipts" "relating to" "the accounts to be audited" of the Council for the purposes of that section. The issues which arose in this case had not been the subject of previous case-law.

3. Details of the case

Veolia is a waste management company and holds a contract with Nottinghamshire County Council for waste management ("the Contract"). The Contract was made on 26 June 2006. Veolia submits monthly invoices to the Council for work done under the Contract.

The Council prepared a statement of accounts for the year ended 31 March 2009. By notice in various local newspapers, the Council notified the public that the accounts "together with all books, deeds, contracts, bills, vouchers and receipts relating to them" were to be open for public inspection at the County Hall from 29 June to 24 July 2009. The notification also advised that from 27 July 2009, until the auditor completed auditing the accounts, a local elector could ask the auditor questions about the accounts and could make objections to anything about which the auditor could take action or make a report under the relevant legislation. On 29 June 2009 Mr. Downen applied to the Council to inspect and take copies of documents open to inspection, including all books, deeds, contracts, bills, vouchers and receipts relating to waste management in the area of the Council.

On 2 July 2009 Veolia wrote to the Council, asking the Council to take detailed legal advice and to liaise closely with it before disclosing any documents relating to the Contract, other than documents already disclosed with Veolia's consent in response to freedom of information requests. On 3 July 2009 the Council wrote to Veolia informing it that it proposed to make the disputed documents available for inspection. It is the decision in the 3 July 2009 letter which Veolia challenged by way of the proceedings; seeking to prevent the Council from disclosing the disputed documents, save in heavily redacted form.

The disputed documents comprised schedules 6A, 6B, 6C and 7 to the Contract; monthly invoices submitted by the claimant to the Council in respect of work carried out under the Contract; and schedules to the invoices which particularise the sums payable. Schedule 6A sets out the various formulae, some with many variables, according to which payments under the Contract are made. Schedule 6B provides for deductions in amounts payable in the event of default by Veolia. Schedule 6C is, in effect, a performance scorecard. Schedule 7, was considered integral to the calculation of those deductions in setting out the key performance indicators by reference to which some deductions are made. The invoices include schedules which set out the individual items under the

Contract for which payment is to be made, the rate for each such item, the quantity of that item claimed for that month and the resultant total for that item.

Veolia contends that these documents constitute valuable information which it supplied to the Council on a confidential basis. It did not want information disclosed to Mr. Downen or otherwise to enter the public domain. Veolia argued that the information is valuable to commercial competitors and to its sub-contractors under the Contract. Were any of that information to enter the public domain it would damage its ability to compete on bids with other local authorities and would impair its ability to hold down sub-contract prices on the Contract.

The Contract between Veolia and the Council is entitled "Waste Management PFI. Project Agreement. Contract A". Part of it has been disclosed on the Council's website as a result of freedom of information requests. The decision to publish was taken by the public interest panel of the Council, following input from Veolia.

The recitals to the Contract record that local authorities have targets for recycling and landfill obligations; that the Council wishes to procure the services of a private sector contractor to provide waste management functions to enable it to meet its targets and fulfil its obligations; that the Council tendered the contract in accordance with the Public Services Contracts Regulations 1993 and selected Veolia "as the most economically advantageous tenderer to provide the services"; and that the parties consent to the contract being certified under the Local Government (Contracts) Act 1997.

The Public Services Contracts Regulations 1993, SI 1993 No 3228, to which the recitals refer, implement Council Directive 92/50/EEC (OJ NO L209, 24.7.92, p.1) relating to the coordination of procedures for the award of public services contracts. In essence, for what are called Part A services contracts, the regulations require that the process be open and the intention to seek offers be published in the Official Journal of the European Union. Part A services contracts must be awarded on the basis either of the offer which delivers the lowest price or the one which is the most economically advantageous. Among the purposes of the Local Government (Contracts) Act 1997 is to enable councils to certify long-term service contracts, giving a safe harbour from legal challenge except by judicial review or audit review.

The Council's statement of accounts for 2008/09 was approved by the full Council in the ordinary way on 25 June 2009. The Council's statement of accounts is made available on the Council's website. The statement of accounts includes what is described as the Council's accounts and certain Pension Fund Accounts. In the Council's statement of accounts there is an Explanatory Foreword, an overview of the year, including a reference under Capital Expenditure and Financing to "waste recycling and energy recovery facilities". Further details of all PFI contracts, are set out in a note to the accounts. There are also references made in the accounts to financing the unitary charge (in respect of the PFI scheme) and landfill trading allowances amongst other detailed items.

4. The legal framework

Mr. Justice Cranston considered central to the resolution of this case is section 15(1) of the Audit Commission Act 1998 ("the 1998 Act").

"15(1) At each audit under this Act, other than an audit of accounts of a health service body, 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."

Therefore the issue to be addressed was whether the disputed documents – Schedules 6A, 6B, 6C and 7 to the Contract, the invoices and the schedules to contract could be said to be related to the accounts so they are open to inspection and copying by Mr Downen. In handing down the judgment Mr. Justice Cranston explored the legislative history to S.15 (1) and its contemporary statutory context.

Briefly this included the right conferred by section 15(1) of the Audit Commission Act 1998 originated in the Poor Law Act 1844 (7 to 8 Vic. c.101), which dealt with the financial accountability of parishes. These rights reflected the "19th century concept that an audit was a public proceeding which any local government elector could attend": [Lloyd v McMahan [1987] 1 AC 625, 641C, per Lawton LJ]. Subsequent legislation introduced the concept of 'persons interested' and extended ratepayers 'right of access' beyond the accounts themselves. It is from these historical legislative developments from which s.15(1) of the 1998 Act is derived it states:

"A copy of the accounts duly made up and balanced, together with all rate books account books deeds contracts accounts vouchers and receipts mentioned or referred to in such accounts, shall be deposited in the office of such authority, and be open, during office hours thereat, to the inspection of all persons interested for seven clear days before the audit, and all such persons shall be at liberty to take copies of or extracts from the same, without fee or reward."

6. Specifics relating to the Audit Commission Act 1998

The Audit Commission Act 1998 ("the 1998 Act") is a consolidation Act, consolidating principally the provisions of Part III of the Local Government Finance Act 1982, as well as various other enactments relating to the Audit Commission. Part II of the 1998 Act is concerned with the accounts and audit of public bodies, including local authorities. The accounts to which it applies are listed in Schedule 2 of the 1998 Act. The 1998 Act provides for the auditor to audit the accounts, to be satisfied that they have been prepared in accordance with the Accounts and Audit Regulations 2003, that they comply with all other statutory provisions applicable to the accounts, that proper practices have been observed in their compilation and that the body whose accounts are being audited has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources. This last requirement, in section 5(1)(e) of the 1998 Act, that the auditor satisfy himself that the authority "has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources", is the statutory basis for what is often called the value for money aspect of the audit. Auditors are required to carry out their functions under the 1998 Act in accordance with a code of audit practice prepared by the Audit Commission under the "Value for money" aspect of the code. Conferred on the auditor is a right of access to every document relating to a body subject to audit which

appears to him necessary for the purposes of his functions under the 1998 Act. Section 6 also confers on the auditor a power to interrogate individuals for that same purpose:

Sections 14-17 address public inspection of certain documents and action by the auditor. There are two discrete rights of access to information. The first is conferred by section 14, which confers a right on every local government elector for the area subject to audit to inspect and to make copies of any statement of accounts prepared under the Accounts and Audit Regulations 2003 and of any auditor's report, other than an immediate report. Unlike the right in section 15, the section 14 access right is not time-limited. However, it is confined in two respects: it is given only to local government electors for the area of a body subject to audit, and it is only attaches to the statement of accounts and to reports, other than an immediate report made to the body by an auditor. Section 14 does not carry a right to inspect documents relating to the statement of accounts.

Section 16 deals with a local authority elector's right to make objection in relation to the accounts:

"(1) At each audit of accounts under this Act, other than an audit of accounts of a health service body, a local government elector for an area to which the accounts relate may make objections to the auditor—

(a) as to any matter in respect of which the auditor could take action under section 17; or

(b) as to any other matter in respect of which the auditor could make a report under section 8.

However safeguards are in place on accounts or other documents that contain personal information and in particular in summary if it identifies a particular individual or enables a particular individual to be identified; and if the auditor considers that it should not be inspected or disclosed and the information is personal information if it is information about a member of the staff of the body whose accounts are being audited which relates specifically to a particular individual and is available to the body for reasons connected with the fact and that that individual holds or has held an office or employment under that body; or that payments or other benefits in respect of an office or employment under any other person are or have been made or provided to that individual by that body.

The Code of Audit Practice 2008, prepared pursuant to the 1998 Act, has been laid before Parliament. Under "General Principles" the code notes that, because of the special accountabilities attached to public money and the conduct of public business, the scope of external audit in local government covers not only the audit of the financial statements but also the audited body's arrangements for securing economy, efficiency and effectiveness in its use of resources. The auditor's objectives are to review and report on the audited body's financial statements and its statement on internal control, and whether the audited body has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources. Auditors do not act as a substitute for an audited body's own responsibilities. They are not expected to review or perform detailed tests of all the financial and other systems and processes or of all the accounting procedures and transactions.

The Code recognises that local government in the modern age enters into arrangements with the private sector. With that in mind, the code explains that auditors should consider

whether they need to follow public money into and across such arrangements. Auditors are expected to discuss with the audited body the need for timely and effective production of working papers and other information required for audit so that the process can be carried out as efficiently and effectively as possible. As to confidentiality, the Code provides that auditors should take all reasonable steps to ensure that they and their staff comply with relevant statutory and other requirements relating to the holding and disclosure of information received or obtained during the audit.

Part 2 of the code sets out how auditors fulfil their statutory functions under the 1998 Act in auditing the financial statements. Section 5 refers to the specific powers, such as where there are representations or information relevant to the audit. Auditors must apply a balanced and proportionate approach.

7. Information rights and other related legislation

The Freedom of Information Act 2000, confers a right of access to recorded information held by public authorities. A number of conditions must be fulfilled before a public authority is obliged to comply with a request. Section 42 protects legal professional privilege and section 43, commercial interests. In particular section 43(2) means that information is exempt if it would "prejudice the commercial interests of any person ...". The exemptions in sections 42 and 43(2) are subject to a public interest test so that, even if it falls within the scope of the exemption, the information must be disclosed, unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Environmental Information Regulations 2004, 2004 SI No 3391 (the "Environmental Information Regulations") were made pursuant to the EU Directive on Public Access to Environmental Information 2003/4/EC. In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the Regulations. Broadly stated regulation 12(5)(d)(e) allows a public authority to refuse to disclose information to the extent that disclosure would adversely affect confidential and commercial information. The exemption in regulation 12(5)(d)(e) is subject to a public interest test.

Finally there is the Data Protection Act 1998. In brief the Act requires anyone who handles personal information to comply with a number of important principles. It also gives individuals rights over their personal information, including access, and to prevent processing.

8. Outcome of the case

In arriving at a decision Lord Justice Cranston considered the terms of section 15 of the 1998 Act and considered that the media to which the access right attaches are "books, deeds, contracts, bills, vouchers and receipts," as well as the accounts themselves. It was not contested that what he referred to as 'the disputed documents' are recorded on one or other of these media. Schedules 6A, 6B and 7 are part of a "contract" and the invoices and supporting materials are "bills" or "vouchers". The right is conferred on "persons interested." Again it is not in dispute that this covers a local government elector for an area to which the accounts relate, of which Mr Downen is one. The information must not be personal information within the meaning of sections 15(3A) or 15 (4) however none of the information in dispute was personal information as defined in these sub-sections.

The judgement also considered the position of there being no definition of "accounts to be audited" ("accounts") as used in section 15 of the 1998 Act. Two meanings of the phrase emerged during the course of the hearing. The first was the narrow definition contended for Veolia and the second meaning of accounts, as advanced by the Audit Commission. Accounts under this approach are the general ledger and any account feeding into it. Thus the accounts show all the financial movements or items of account in the Council's funds. The Council and Mr Downen agree with this approach. In Mr Justice Cranston's view the approach of the Audit Commission to the meaning of accounts is more in accord with the 1998 Act and 2003 Regulations and was preferred.

Mr Justice Cranston also considered the phrase of "relating to" [the accounts] which is flexible in its meaning. The contractor argued that the link between the item and the accounts must be apparent from the item, from the accounts that are to be audited, or from both. Where a contract is not specifically identified in a line of those accounts, section 15(1) does not give that person a right to inspect that contract. Mr Justice Cranston reasons for rejecting the contractors arguments were that Parliament's intention in using the words "relating to" in section 15(1) was simply that there should be an enquiry as to the factual connection between the limited category of documents mentioned on the one hand and the accounts to be audited on the other. Once the term accounts is interpreted to mean what it was held to mean [supporting the Audit Commissions definition], a factual connection between the disputed documents and the Council's accounts was obvious. The Contract related to the accounts and each payment made by the Council to Veolia during any financial year constitutes an item within the Council's accounts for that year. Thus if a contract or bill relates to an item or note anywhere in the statement of accounts, it therefore relates to the accounts to be audited. The explanatory foreword and Note 29 of the statement of accounts ("waste recycling") identified the Contract through the date on which it was signed, the amount charged to the Council and the contracting party, Veolia. Thus the Contract itself, and any invoice paid under it, relates to the accounts.

In interpreting S.15 the purpose of section 15(1) cannot be confined to assisting local government electors in questioning the auditor and making objections to the accounts. That is because the right to inspect and copy under section 15(1) is conferred on persons interested, which is a wider group than local government electors and could include local businesses and community groups. In examining Parliamentary purpose Mr Justice Cranston concluded that it is to enable those with a real and close interest in a council's activity to scrutinise its accounts in the audit process. Local government electors and other interested persons may wish to consider questions such as whether sums purportedly paid under a contract are properly due under that contract; whether payments made by the body under audit are lawful; and whether in incurring any liability for expenditure the body under audit has made proper arrangements for securing value for money.

A local government elector may ask the auditor a question about a matter in the accounts not specifically considered in the audit. It may very well be that a local government elector raises a point which the auditor has not considered.

APSE comment and conclusions

Section 15(1) of the 1998 Act enables an interested party to inspect and copy certain documents related to the accounts of the Council. It does not create the type of general free-standing right of access to information as conferred by modern information rights legislation. Its history lies in democratic accountability, rather than the policy of transparency and openness behind the modern legislation. In the judgment of Mr Justice Cranston, as a matter of legal analysis, section 15(1) applies in this case, notwithstanding Veolia's contention that this will lead to a breach of commercial confidentiality. Accounts are not defined but the 1998 Act indicates that they are the record of the Council's financial activity over a period and of the financial position at a particular time. The statement of accounts is a summary of the accounts. In Mr. Justice Cranston's view it is plain that each of the disputed documents relate to the Council's accounts as that phrase is to be construed in its statutory context. In the result Mr. Downen was entitled to inspect and copy these documents.

This is an important judgment for councils, contractors and interested parties including local electors, community and interest groups, and trade unions. Whilst the historical position on an elector's right to know is clear from the judgment the modern interpretation of this in a world whereby informed electors and others will demand more and more information with increasingly specific details of accounts and payments opens up a very interesting debate. On the one hand the right to know should enhance democratic accountability and follow the public pound into contract arrangements in a transparent and open way. On the other hand contractors may be fearful that the level of detail published or requested under audit arrangements will provide too much openness to the point where they are unable to avoid knowledge transfer on the likely contract costs to competitors – in other words could this level of information be used to mischievously undermine competitive processes designed to ensure value for money? This is particularly timely in the light of the recent fines handed out to some contractors found to be colluding on public sector contract pricing. In light of this judgment it could be difficult to prove in future if such contractors had deliberately colluded or if in fact pricing was merely intelligent pricing in light of public disclosure issues.

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