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WHY PFI CONTRACTORS SHOULD BE GRATEFUL FOR HUMAN RIGHTS LAW

By Wisam Sirhan and Richard Craven

Commercial confidentiality is rather important. So important that the freedom of information legislation provides confidentiality with exemptions but, for PFI contracts, it looked for a while as if Mr Justice Cranston had unearthed a way round that protection. Until, that is, the Court of Appeal intervened, with the help of EU human rights law.

When a Nottinghamshire elector opposing a proposed incinerator failed, under the freedom of information legislation, to obtain key financial documents relating to a PFI waste management contract awarded by Nottinghamshire County Council to Veolia, he turned to the courts. Mr Justice Cranston decided that the documents had to be disclosed to “any persons interested”, because s15(1) of the Audit Commission Act 1998 gave them rights to inspect documents “relating to” the Council’s “accounts to be audited” and the documents in question were information “relating to” the accounts. Ominously for PFI contractors, the judge also decided that commercial confidentiality was no bar to disclosure.

The Court of Appeal agreed that the documents were information “relating to” the accounts but, on appeal, Veolia had added two new arguments. It said that the s15(1) right of inspection did not extend to confidential information and that the use to which information provided might be put should be limited.

The Court agreed with Veolia that section 15(1) should be read down so as to exclude confidential information. Case law of the European Court of Justice and the European Court of Human Rights supported the proposition that the use of confidential information in professional or commercial activities of even legal persons could be protected as an element of their “private life”, under Article 8 of the European Convention on Human Rights, subject to disclosure justified in the public interest.

Article 1 of the Convention’s first protocol also says that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one is to be deprived of them except in the public interest and subject to the law’s conditions. In the absence of direct legal authority, Lord Justice Rix could see no reason why valuable commercial confidential information, such as the information in question in the case, could not be “possessions”. At least Article 1 (and perhaps also Article 8) provided sufficient reason in the case to interpret S15(1) so as to make an exception for confidential information, subject to justified disclosure. Not to protect this information would, in fact, be potentially anti-competitive.

But should the use of disclosed information be limited? Lord Justice Rix was happy to decide the point but the other Lord Justices were not. On the basis of the confidentiality



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decision, however, it was suggested the point was unlikely to arise in the future.

PFI contractors may now breathe easier about the confidential information in their tender bids, but public authorities face the potentially tricky challenge, when necessary, of balancing confidentiality against the public interest, for which the Court could not offer any clear-cut test.

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