Case No: CO/4553/98

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Royal Courts of Justice

Strand, London. WC2A 2LL

Date: 29.07.97

Before:

THE HON MR JUSTICE SULLIVAN

THE QUEEN

-v-

The Secretary of State for the Environment,

Transport & The Regions and Midland

Expressway Limited

Ex Parte

Alliance Against the Birmingham Northern

Relief Road and Others

Mr John Howell QC and Miss Nathalie Lieven for the Applicants.

Mr Philip Sales for the First Respondent.

Mr Nigel Pleming QC and Mr Sean Wilken for the Second Respondent.

Judgement

The proposed Birmingham Northern Relief Road (BNRR) is a new 44 km. motorway around the North and East of the West Midlands conurbation. If constructed it will provide an alternative route to the heavily congested section of the M6 between junctions 4 and 11.

It is proposed to be designed, built financed and operated by Midland Expressway Ltd., the Second Respondents, pursuant to a concession agreement (the Agreement) with the Secretary of State for the Environment Transport & the Regions (the Secretary of State), the first Respondent, which was made on 28th February 1992 under Section 1 of The New Roads and Street Works Act 1991. (The 1991 Act). MEL as the concessionaire would recover its costs by charging tolls to users of the BNRR in accordance with a Toll Order made under Section 6 of the 1991 Act.

The proposal to construct the BNRR proved to be very controversial and the opposing arguments were heard at a lengthy public enquiry which sat for over 200 days between 21st June 1994 and 4th October 1995. The Inspector reported on the 27th February 1997, recommending that the necessary orders be made. In his decision letter dated the 23rd July 1997 the Secretary of State stated that he proposed to make the relevant orders. In due course the orders were made. They have been challenged by the applicants in the present proceedings, by a notice of motion dated the 26th March 1998.

The First Applicant as its name implies, was formed from some 20 groups, including Parish Councils and Residents Associations, who are opposed to the BNRR. The remaining applicants live between 300 m - 11/2 k.m. from the route of the proposed motorway, and occupy various positions within organisations which oppose its construction.

The draft order for the BNRR has been published by a Conservative Secretary of State. On 28th July 1997, the Deputy Prime Minister wrote to a local Member of Parliament, Mr O'Brian, who had objected to the BNRR, to inform him that after an accelerated review the new government had decided to give the go ahead to the BNRR. By way of explanation he said:

> *The proposal for the BNRR scheme was unique, in that it was to produce this country's first privately financed toll motorway. It opens up opportunities for more integrated road-rail freight routes and links, particularly in relation to the Hams Hall development. We have taken our decision against the background of a binding concession agreement entered into by the previous administration. If we had breached the terms of the agreement, it would have been open to the concessionaire to seek compensation, the scale of which might have been substantial. The impact of the new road was considered in depth at the public inquiry and the Inspector recommended that it should go ahead. The impact will be mitigated by measures such as noise barriers, creation of new habitats and extensive tree and shrub planting. In some cases we have decided in the light of the Inspector's recommendations, to enhance the proposed noise mitigation measures.*

Sub-section 1(1)(4) and (5) of the 1991 Act provides as follows:

> *(1) In this part a "concession agreement" means an agreement entered into by a highway authority under which a person (the "concessionaire"), in return for undertaking such obligations as may be specified in the agreement with respect to design, construction, maintenance, operation or improvement of a special road, is appointed to enjoy the right (conferred or to be conferred by a toll order under this Part) to charge tolls in respect of the use of the road.*

> 1*(4) A concession agreement relating to the design and construction of a special road shall provide that if the special Road scheme authorising the provision of the road is not made or confirmed, or if the highway authority decide not to proceed with the proposed road. the authority shall pay to the concessionaire such compensation in respect of costs incurred by him as may be determined in accordance with the agreement*
>
> *1(5) A concession agreement relating to the design and construction of a special road shall provide that if the concessionaire fails to complete the road in accordance with the agreement, he shall, without prejudice to any other liability pay to the highway authority such compensation as may be determined in accordance with the agreement in respect of costs incurred by them.*

The Alliance was concerned that in taking his decision the Secretary of State may have been influenced by the prospect of having to pay compensation to MEL under the terms of the Agreement if he had decided not to proceed with the BNRR.

It is clear that there was some discussion of the Agreement at the public inquiry. A Mr Ross had asked for full details of the Agreement and been refused. The Inspector stated in paragraph 10.4.1.8 of his conclusions that:

> *In this connection, I would observe that the terms of the concession agreement between the Government and MEL have not been fully revealed, either to me or the public, on the grounds of commercial confidentiality. Insofar as these may have a bearing on the acceptability of the project as a whole, I consider this to be unsatisfactory, since it is unlikely to have inspired confidence in all those who attended the inquiries that all relevant factors were properly revealed and discussed. In my view, by analogy with the case of Public Interest Immunity Certificates, an Inspector should be permitted to read all apparently, or allegedly, relevant documents for which commercial confidentiality is claimed and to question the continued withholding of any parts which it appears to him or her should be made public in order to permit the inquiry to fulfil its task. A commercial organisation undertaking a semi-public project should, in my view, be willing to accept this, and to arrange its business accordingly. I therefore recommend. that consideration should be given to amending Departmental practices in relation to the claiming of commercial confidentiality, accordingly.*

That recommendation was noted in paragraph 14 (k) of the decision letter, and in paragraph 65 the Secretary of State responded to the Inspector's recommendation as follows:

> *65. The Secretary of State notes the Inspector's comments about commercial confidentiality recorded-at paragraph 14(k)above. The Department's normal practice in claiming commercial confidentiality is governed by the Code of practice on Access to Government Information and the guidance on the interpretation of that Code. Broadly, the presumption underlying the Code is that information relating to a contract will be released unless revealing that information would damage the commercial interests of Government or breach a contractor's commercial confidence and damage their competitive position. However, the Code does not override statutory or other restrictions on the release of information. The BNRR Concession Agreement was drawn up within the statutory framework prescribed by Part l of the 1991 Act. When Parliament passed this Act there was debate about the confidentiality of concession agreements. It was accepted that concession agreements would be commercially confidential documents and the agreement relating to the BNRR so provides. But the Act provided for the publication of a concession statement describing the terms of a concession agreement. Such a statement in respect of the BNRR concession agreement was published with the schemes and orders.*

During the debate on the 1991 Act ministers had explained why it was not thought sensible to publish concession agreements which might be very lengthy, and which might contain confidential information. In the House of Lords, Lord Brabazon of Tara said:

> *As I said during committee stage, concession agreements will be contracts and will contain information which is commercially confidential I accept that the amendment requires only certain information about the agreement to be made public. However, I wonder what could be achieved by publication of those details. Compensation to concessionaire or the highway authority is a matter for agreement between those two parties. Both can be expected to ensure that they are properly protected because it will be in each one's interest to do so, particularly as we now have provision in the Bill for the concession agreement to allow for compensation of either party. Highway authorities will no more neglect their duties as highway authorities on signing a concession agreement as regards design, construction, maintenance or monitoring of the facility than if they were paying contractors to undertake the work in the conventional way. I have never heard it argued that details of contracts made by highway authorities should be published and commented on by the public. I therefore see no reason for requiring that of concession agreements.*

In the House of Commons, Mr Freeman said:

> *We have to strike a balance between producing 300 pages of technical detail, which might put off an ordinary member of the public, and communicating information in a way that can sensibly be reproduced*

in the newspapers, understood by councillors, resident's associations, road users groups and legitimate lobby groups such as ramblers and cyclists. All those people will then understand the proposals. Such a concession statement would be most helpful at a public inquiry.

"Schedule 2 to the 1991 Act prescribes the procedure for making toll orders, which is similar to that for the making of other orders, such as compulsory purchase orders, save that paragraph 1(3) provides:

1(3) Where the special road to which the toll order relates is to be subject to a concession, the Secretary of State or the local highway authority shall make available for inspection with the copy of the draft order or of the order, as the case may be, a statement containing such information as may be prescribed with respect to the concessionaire and the concession agreement.

By regulation 3 of the Concession Statement (Prescribed Information) Regulations 1993, made under paragraph 1(3) a concession statement shall contain inter alia:

(e) A brief description of any highway functions specified in the concession agreement which the concessionaire is or is to be authorised to exercise pursuant to section 2 (1) of the Act;

(f) A summary of any obligations undertaken by the concessionaire in the concession agreement-

(i) to take steps to minimise or avoid any adverse environmental effects arising out of the construction, existence or use of the concession road, and

(ii) with regard to the provision of service areas by him or pursuant to an agreement with him.

The concession statement for the BNRR contained the prescribed information. Having identified MEL as the concessionaire and dealt with the ownership of its share capital it stated that the length of the concession period was 53 years and that provisions for early termination of the concession were contained in the agreement. It referred to traffic management, and said this:

(e) Highway Functions exercisable by the Concessionaire

The concessionaire is responsible for the BNRR in its construction, its signing, its day to day operation and in ensuring that it is maintained (in a safe and serviceable way). This includes the provision of

communications, video monitoring and such works as are entrusted by the Secretary of State. These responsibilities are to be carried out in compliance with the law. any Department standards, and agreement procedures.

(f)(i) Mitigation of Adverse Environmental Effects by the Concessionaire

The concessionaire is required to draft an Environmental Statement on behalf of the Secretary of State in accordance with European Directive 85/337/EEC. This is published concurrently with the draft Orders under the Highways Act 1980 and this Statement. The concessionaire will be required to provide, and where appropriate maintain to a satisfactory standard throughout the concession period, works to mitigate any adverse effects on the environment as a result of the construction or use of the Concession Road.

On the 21st August 1997 the Applicants' solicitors wrote to Mrs Dixon of the Department of the Environment, Transport and the Regions. She is head of the Department's Tolling and Private Finance Divisions, and the Department's representative under the Agreement. The letter was as follows:

We are writing as a matter of urgency to request a copy of the Concession Agreement entered into between the Secretary of State for Transport and Midland Expressway Limited in 1992. This request is made under the Environmental Information Regulations 1992 (No. 3240) adopted pursuant to Council Directive 90/313/EEC on the Freedom of Access to Information on the Environment (OJ No L158, 23.6.90, P56).

Under the regulations you are under an obligation to provide the information requested as soon as possible. Since the document sought is easily available, we assume you will have no difficulties in providing it within 14 days. We would of course be pleased to meet your reasonable costs of supplying the documents.

The most relevant recitals to Council Directive 90/313/EEC (the, Directive) which I have numbered for ease of reference are as follows:

8 Whereas access to information on the environment held by public authorities will improve environmental protection;

9 Whereas the disparities between the law in force in the Member States concerning access to information on the environment held by public authorities can create inequality within the Community as regards access to information and or as regards conditions of competition;

10 Whereas it is necessary to guarantee to any natural or legal person throughout the Community free access to available information on the environment in written, visual, aural or data-base form held by public authorities, concerning the state of the environment, activities or measures adversely affecting, or likely to affect the environment, and those designed to protect it;

11 Whereas, in certain specific and clearly defined cases, it may be justified to refuse a request for information relating to the environment,

12 Whereas a refusal by a public authority to forward the information requested must be justified,

13 Whereas it must be possible for the applicant to appeal against the public authority's decision.

The relevant Articles are as follows:

Article 1

The object of this directive is to ensure freedom of access to, and dissemination of information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available.

Article 2

For the purposes of this directive:

information relating to the environment shall mean any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.

Article 3

1 Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest. Member States shall define the practical arrangements under which such information is effectively made available.

2 Member States may provide for a request for such information to be refused where it affects:

commercial and industrial confidentiality, including intellectual property.

material supplied by a third party without that party being under a legal obligation to do so.

I*nformation held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above.*

3. A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner.

4. A public authority shall respond to a person requesting information as soon as possible and at the latest within two months. The reasons for a refusal to provide the information requested must be given.

Article 4

A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system.

The Environmental Information Regulations 1992 (the Regulations) were made pursuant to the directive and came into force on the 3lst December l992. The material regulations are as follows:

2(1) These Regulations apply to any information which-

(a) relates to the environment,

(b) is held by a relevant person in an accessible form and otherwise than for the purposes of any judicial or legislative function;

2(2) For the purpose of these Regulations information relates to the environment if, and only if, it relates to any of the following, that is to say-

(a) the state of any water or air, the state of any flora or fauna, the state of any soil or the state of any natural site or other land:

(b) any activities or measures (including activities giving rise to noise or any other nuisance) which adversely affect anything mentioned in sub-paragraph (a) above or are likely adversely to affect anything so mentioned:

(c) any activities or administrative or other measures (including any environmental management programmes) which are designed to protect anything so mentioned.

The Department is a 'relevant person' for the purposes of the Regulations.

> *3(1) Subject to the following provisions of these Regulations, a relevant person who holds any information to which these Regulations apply shall make that information available to every person who requests it.*
>
> *3(2) It shall be the duty, of every relevant person who holds information to which these Regulations apply to make such arrangements for giving effect to paragraph (1) above as secure-*
>
> > *(a) that every request made for the purpose of that paragraph is responded to as soon as possible;*
> >
> > *(b) that no such request is responded to more than two months after it is made; and*
> >
> > *(c) that, where the response to such a request contains a refusal to make information available, the refusal is in writing and specifies the reasons for the refusal*
>
> *3(3) Arrangements made by a relevant person for giving effect to paragraph(1) above may include provision entitling that person to refuse a request for information in cases where a request is manifestly unreasonable or is formulated in too general a manner.*
>
> *3(6) Without prejudice to any remedies available apart from by virtue of this paragraph in respect of any failure by a relevant person to comply with the requirements of these Regulations, the obligation of such a person to make information available in pursuance of paragraph (1) above shall be a duty owed to the person who has requested the information.*
>
> *4(1) Nothing in these Regulations shall-*
>
> > *(a) require the disclosure of any information which is capable of being treated as confidential; or*

(b) authorise or require the disclosure of any information which must be so treated.

4(2) For the purposes of these Regulations information is to be capable of being treated as confidential if and only if it is-

(e) information relating to matters to which any commercial or industrial confidentiality attaches or affecting any intellectual property.

4(3) For the purposes of these Regulations information must be treated as confidential if, and only if, in the case of a request made to a relevant person under regulation 3 above-

(a) it is capable of being so treated and its disclosure in response to that request would (apart from regulation 3(7) above) contravene any statutory provision or rule of law or would involve a breach of any agreement;

(c) the information is held by the relevant person in consequence of having been supplied by a person who-

(i) was not under, and could not have been put under, a legal obligation to supply it to the relevant person;

(ii) did not supply it in circumstances such that the relevant person is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure.

4(4) Nothing in this regulation shall authorise a refusal to make available any information contained in the same records as, or otherwise held with, other information which is withheld by virtue of this regulation unless it is incapable of being separated from the other information for the purposes of making it available.

Mrs Dixon's reply on the 26th August said, in part:

Notwithstanding these provisions, I will consider further your request under the Environmental Information Regulations 1992. Since the Concession Agreement includes a clause restricting either party from

disclosure without the other party's written consent, I shall need to discuss your request with Midland Expressway Ltd, which may take a little time. However, I will endeavour to, reply to your request as soon as possible.

The Alliance was not the only objector to the BNRR requesting a copy of the Agreement under the Regulations. By letter dated the 26th August 1997 from Mr Langley of the Government Office for the West Midlands, Friends of the Earth was refused a copy, in these terms:

> *As you know, a Concession Statement for the scheme was published on 15 June 1993 in accordance with the Concession Statement (,Prescribed Information) Regulations 1993. The Department has considered carefully whether, in the light of the Environmental Information Regulations 1992. the full Concession Agreement should be made public, but has concluded that it should not. Regulation 4 of the above Regulations indicates that the disclosure of any information which is capable of being treated as confidential is not required. Regulation 4(2) defines five class of information capable of being treated as confidential One of these - Regulation 4(2)(e) -. concerns 'information relating to matters to which any commercial or industrial confidentiality attaches or affecting any intellectual property'. The Department considers that the Birmingham Northern Relief Road Concession Agreement falls into this category.*

The Applicants' solicitors wrote to Mrs Dixon on the 1st September, referring to Mr Langley's letter and asking her to confirm:

> *1. That the decision set out in the letter still stands.*
>
> *2. Which of the heads set out in Regulation 4(2)(e) of the Environmental Information Regulations 1992 is being relied upon to justify non-disclosure.*
>
> *3. The reasons for non-disclosure of the agreement, in view of the fact that its provisions would not appear to fall within Regulation 4(2)(e).*

She replied on the 23rd September, 1997, as follows:

> *The Concession Agreement is confidential under Article 4(1)(a) of the Regulations, because Article 4(2)(e) applies by reason that commercial confidentiality attaches to it. Accordingly your request for disclosure of the Agreement is refused.*

It is that decision which is the subject of these proceedings for Judicial Review. Following service of Form 86A and a supporting affidavit, Mrs Dixon swore an

affidavit in reply on behalf of the First Respondents. In her affidavit she says this about the Agreement:

> *In accordance with Section 1 of the Act, the Agreement appoints MEL to enjoy the right to charge tolls in respect of the Birmingham Northern Relief Road in return for undertaking obligations specified in the Agreement. These obligations relate to design, construction and completion of the works, and the financing, operation and maintenance of the project facilities, including the Motorway Service Area. The Agreement also deals at length with the exercise of highway functions by the Concessionaire, as permitted by Section 2 of the Act.*

Having referred to the application for judicial review she says:

> *5. The Applicants' case is that the Respondent erred in law in arguing that the Agreement falls within Article 4(2)(c) of the Regulations. On reviewing my letter of 23 September I see that I refer to the wrong sub-paragraph of the Article 4(1) and that I should have referred to Article 4(1)(b) of the Regulations for the reasons stated in paragraphs 6 and 7 below. The position is that the Agreement appears to come, within Article 4(2)(e) and is also covered by Article 4(3), such that the Respondent has no authority to disclose it.*
>
> *6. The Respondent recognises that parts of the Agreement set out information provided to him in confidence, in relation to which the Department has no discretion to disclose by virtue of Article 4(3)(c). That information is identified on the list which is now produced and shown to me marked "CMD1".*
>
> *7. In addition, the Agreement cannot be disclosed because it appears to fall within Article 4(3)(a) of the Regulations. Thus MEL contends that disclosure of the Agreement would place the Respondent in breach of his Agreement with MEL. This is because:*
>
> *(i) there is an express confidentiality provision in the Agreement, and/ or*
>
> *(ii) it is to be implied.*

8. I refer to the Affirmation of Thomas Smith. In paragraph 8 thereof he sets out clause 25.7 of the Agreement I am advised that, if this applies to the Agreement itself, then. by virtue of Articles 4(1)(b), 4(2)(e), and 4(3)(a) of the Regulations, the Respondent has no discretion to disclose the Agreement to the Applicants. I am further advised, however, that the question of whether this confidentiality clause applies to the Agreement itself is arguable and the proper construction of this clause must be determined by the Court.

9. What ever the construction placed on the clause, however, it appears from the Department's files that the Department and MEL have always understood the Agreement to be confidential and have treated if accordingly at all times.

10. For all these reasons it would appear that the Respondent has no authority to disclose the Agreement to the Applicants.

The Thomas Smith referred to is the Managing Director of MEL whose affidavit states that the agreement is a commercial document primarily concerned with the allocation of responsibility and risk. He goes on to say:

6. I am advised that the Agreement and the information it contains are confidential for the following reasons:

(i) The Agreement contains confidential information of third parties.

(ii) there is an express confidentiality provision in the Agreement, and

(iii) it is to be implied.

7. Third Party Information

Any information that MEL had in 1992, when the Concession Agreement was signed. was derived from and provided by MEL's shareholders or associated companies of the shareholders or derived from the Department of Transport

during the tendering process for the BNRR project. Although such information was provided by MEL's shareholders and their group companies on commercial terms for valuable consideration, it was not provided as a result of legal obligation. I am informed by Mr C King of KCDL and Mr R Starace of Autostrade that neither they, nor the relevant associated companies, consent to any disclosure of such information. Further, MEL or its shareholders may well in future seek to carry out other works or projects exploiting the information and expertise deployed in the BNRR project and revealed in the Concession Agreement.

8. Express Provision

Further. the Secretary of State has agreed with MEL that the following express confidentiality clause in the Agreement should be disclosed to the Applicants:

"25.7 Each party shall hold in confidence all documents and other information whether technical or commercial supplied by or on behalf of the other party (including without limitation all documents and information supplied in the course of proceedings under the Disputes Resolution Procedure) and shall not publish or otherwise disclose the same otherwise than for the purposes contemplated by the Concession Agreement save:-

25. 7. 1 with the other party's written consent, or

25.7.2 as may necessarily be required by law, any relevant stock exchange or other competent regulatory authority; or

25.7.3 as the Secretary of State may require for the purpose of the design or the construction of Works or the operation, maintenance or improvement of the Project Facilities or Motorway Service Area in the event of termination of the Concession Agreement, subject to the provisions of paragraph 1.3.2 of Section 3 [Other Compensation on Termination] of part 2 of Schedule 8; or

> *25.7.4 that which is in or enters the public domain other than as a result of a breach of the obligations imposed by this clause 25.7, provided that the provisions of this clause 25.7 shall not restrict either party, from passing such information to its professional advisers and that the Concessionaire may subject to appropriate confidentiality restrictions pass to the Funders such documents and other information as is reasonably required by such Funders in connection with the raising of finance for the Project or which it is obliged to support by the terms of the Funding Agreements."*

In paragraph 9 he refers to the Parliamentary Debates on the 1991 Act and in paragraphs 10 and 11 he says:

> *10. At no time has the Concession Agreement been released or reproduced in whole or in part for public purposes. As is custom and practice with commercial documents, the information remains confidential, principally because it reflects MEL's and its shareholder's approach to privately financed infrastructure projects, which are subject to competitive tender, and it contains information as to the means by which MEL would seek to fund the project. Further the Agreement demonstrates the extent and the level of risk which MEL is prepared to accept in such arrangements. This is an important piece of commercially confidential information to MEL and its shareholders, which if disclosed could cause MEL and its shareholders to suffer a competitive disadvantage in other projects with other clients.*

> *11. The Agreement reflects the outcome of a tendering process. As a matter of commercial practice, all tendering processes are confidential. This has been recognised by local and central Government . . The reason for this is that it encourages tenderers to provide their best offer.*

He emphasises the fact that MEL has supplied a very considerable amount of environmental information, relating to the BNRR. In particular, a multi-volume Environmental Impact Statement running to over 1500 pages in total was published, and was subjected to extensive debate at the public enquiry. The Inspector concluded that this Statement was;

> *"A thorough and comprehensive document which covered the required field in a manner which. was entirely adequate for its purpose." (Paragraph 10.10.1, Inspector's Report).*

Before turning to the issues which arise in this application it is helpful to complete this résumé of the factual background by referring to the Department's Guidance on the implementation of the Regulations, which was published in 1992. Having referred to the public registers of environmental information, paragraph 3 says:

> *3. The Government has also played a leading part in the moves through the European Community towards making more environmental information publicly available. This culminated in 1990 with the EC Environmental Ministers adopting Directive 90/313/EEC on the freedom of access to information on the environment.*

Paragraph 4 sets out Article 1 of the Directive and adds:

> *Providing access to information on the environment held by public authorities was seen by the Council as a positive action that will improve environmental protection.*

Dealing with the meaning of environmental information paragraph 20 says:

> *20. By definition, information relating to the environment also includes activities and measures adversely affecting, or likely so to affect, the state of the environment, and activities and measures designed to protect the state of the environment. Activities and measures are interpreted to include administrative measures and environmental management programmes (e.g. planning and transport development).*

Paragraph 39 answers the question "who may apply" for environmental information under regulation 3(1), as follows:

> *39. Any person or organisations may apply for access to information. Access is not confined to UK citizens and permanent residents; foreign nationals may apply. The applicant is not required to prove an interest; in other words he need not say why he wants the information. It follows that a body may not attach any importance to any stated interest, or lack of it, when judging whether a request is reasonable or not.*

The opening sentence of paragraph 40 sets out the underlying approach:

> *40. The presumption is that environmental information should be released unless there are compelling and substantive reasons to withhold it.*

Paragraphs 55-60 deal with commercial confidently and are worth setting out in full:

> *55. Information affecting matters to which any commercial or industrial confidentiality attaches or any intellectual property must not be released if it is subject to existing statutory restrictions on disclosure (see paragraph 63). When not subject to other statutory restrictions it may be withheld. There will be circumstances where the disclosure of information would prejudice the commercial interests of an individual or business. There might be occasions when information produced for or by a body itself is confidential or whose ownership rests elsewhere (e.g. data generated by a government laboratory for a*

private customer as part of a contract, copyright material produced for sale). Bodies may restrict access to information on these grounds. But they should be careful not to restrict the release of information unreasonably.

56. In the case of information received from a third party under contract or statute, two ways of proceeding are suggested here: to classify information when it is received or to classify it when access is first requested. Circumstances will vary and bodies will need to decide which offers the more practicable and efficient approach. If adopting the first approach, the supplier of environmental information should be informed that it is subject to public release. If the supplier believes that its release would prejudice his commercial interests, he should be asked to write:

- *identifying the information to be protected,*

- *giving, if deemed necessary by the body, cogent evidence of the need for the protection of such information on the grounds of confidentiality; and*

- *justifying a period of time over which protection is sought.*

58. When appropriate, the body can decide on the merits of the evidence whether the release of the identified information would prejudice the supplier's commercial interests. It is not possible to it will not normally be appropriate to give hard and fast rules for making such a decision. However, withhold information in response to a general claim that disclosure might damage the reputation of the supplier and hence his commercial competitiveness. Neither will it be reasonable to withhold information which could be obtained or inferred from other publicly accessible sources. Where it is agreed that information should be withheld. this should be limited to the minimum time necessary to safeguard the commercial or industrial interests. Information retained in this way should be kept under review with the intention of early release.

59. Where a body believes that the information should not be withheld or the retention period is too long. the supplier should be told and the reasoning given. Bodies should consider taking legal advice before declassifying and releasing information in this way. In some cases there may be statutory grounds for appeal against the decision before the information can be made publicly available. In the event of an

appeal, disclosure of information should await the outcome and then be in accordance with any general or specified directions.

60. If adopting the second approach (i.e. classifying the information once a request for access is first received). the body should seek the views of the supplier before releasing any information that might have a commercial value. This approach should also be adopted for historic information (i.e. that supplied to a body before the 31st December 1992 when the Regulations came into force). If the supplier believes that its release would prejudice his commercial interests, the procedure described in paragraph 57 - 59 could be followed.

Finally, paragraphs 71 and 72 deal with appeals:

Any applicant dissatisfied with a refusal by a body to make information available, or who considers that a request for information has been inadequately answered or delayed may seek a remedy in a number of ways.

72. Aggrieved applicants may wish to ask bodies to review their reasons for refusing or delaying access. In some cases there may be a statutory right of appeal under other legislation: the applicant should be fold of his rights to use such an appeal procedure in any refusal letter. Otherwise, the applicant might appeal to the head of the body concerned. Where the request for information is made of local government, the applicant may already apply to the local government ombudsman on grounds of maladministration giving rise to injustice. The applicant can also use the usual democratic channels (i.e. ask- the local MP to pursue the matter). If all else fails, an action to enforce the duty provided for in Regulation 3(6) may be taken in the national Courts who, in turn, and in appropriate circumstances, may need to refer questions of Communities law to the European Court of Justice. In such circumstances, it would be for each body to defend its reasons for refusing access.

The Guidance refers to other public registers of environmental information. These are required to be maintained in respect of pollution control, waste management and disposal, contaminated land, and water resources, by the Environmental Protection Act 1990 and the Water Resources Act 1991, both as amended by the Environment Act 1995. Confidential information is excluded from these registers. The provisions which deal with its exclusion are in common form. It is sufficient to set out those relating to the register which deals with pollution control. By Section 22 of the 1990 Act:

22(1) No information relating to the affairs of any individual or business shall be included in a register maintained under section 20

above, without the consent of that individual or the person for the time being carrying on that business, of and so long as the information-

(a) is, in relation to him, commercially confidential: and

(b) is not required to be included in the register in Pursuance of directions under subsection (7) below;

but information is not commercially confidential for the purpose of this section unless it is determined under this section to be so by the enforcing authority or, on appeal. by the Secretary of State.

22(8) Information excluded from a register shall be treated as ceasing to be commercially confidential for the purposes of this section at the expiry of the period of four years beginning with the date of the determination by virtue of which it was excluded; but the person who furnished it may apply to the authority for the information. to remain excluded from the register on the ground that it is still commercially confidential and that the authority shall determine whether or not that is the case.

22(11) Information is, for the purpose of any determination under this section, commercially confidential, in relation to any individual or person, if its being contained in the register would prejudice to an unreasonable degree the commercial interests of that individual or person.

Against that background I turn to the issues which arise in this application. There was broad agreement between the parties as to the questions which have to be answered. I find it helpful to group the parties submissions, and my answers to the list of issues, under the following headings.

(1) <u>What is the basis upon which questions arising under the Regulations should be determined by the Court?</u>

Mr Howell QC for the Applicants submits that where issues arise as to whether information relates to the environment, and if it does whether any of the exceptions set out in regulation 4 are applicable, those questions fall to be determined by the court upon the basis of the facts as found by the Court itself. The Court is not limited to reviewing the Secretary of State's view of the facts to see if that view is Wednesbury perverse.

He points to the language of the Regulations which is couched in objective terms. The Regulations apply to any information which "relates to the environment", not to information which in the opinion of the relevant person relates to the environment. The exception relates to information "which is capable of being treated as confidential", not information which is confidential in the opinion of the relevant person.

In R v British Coal Corporation Ex Parte Ibstock Building Products Ltd. [1995) Env. LR 277, Harrison J. having set out the factual material before him reached his own conclusions as to whether the information sought from the respondents related to the environment and whether it was exempt from disclosure under regulation 4(2)(a). Question (1) (above) does not appear to have been raised before Harrison J.

Regulation 3(6) imposes a duty upon the relevant person which "shall be a duty owed to the person who has requested the information". Thus, it is submitted that the individual making the request may commence ordinary civil proceedings if his request is refused in breach of that duty. In such proceedings the Court would have to reach its own view upon the evidence. See also paragraph 72 of the Department's 1992 Guidance (above).

Recital 13 to the Directive requires that there should be an appeal against the public authority's decision. That means an effective appeal, on both fact and law, and the reference to seeking "a judicial or administrative review of the decision" in Article 4 of the Directive must be read in that context. Confining any challenge to a review of the relevant body's decision on Wednesbury grounds would make it virtually impossible or excessively difficult for the individual seeking environmental information to challenge a refusal, because the Court could not review the merits of the refusal in the light of the evidence. This, submits Mr Howell would be in breach of Community Law: See Hodgson v The Commissioners of Custom & Excise [1997] 3 CMLR 1082 at pp 1093-1098.

Mr Howell accepts that the Regulations do confer an element of discretion upon the relevant person (in this case the Secretary of State) if the information which is

requested falls within regulation 4(1)(a). Whether it falls within that regulation is for the Court to decide, but if it does, then the Secretary of State has a discretion as to whether to disclose. In exercising that discretion he would, no doubt, bear in mind the Guidance given by his Department in 1992.

Mr Sales, on behalf of the Secretary of State accepts that whether the Agreement contains information which relates to the environment, and whether it may, or must be treated as confidential are to be determined, on an objective basis, by the Court. Mr Pleming QC on behalf of MEL did not go so far. He submitted that an individual whose request for information was refused was limited to a challenge by way of judicial review, and in such a challenge the Court should not engage, as in an ordinary writ action in the ascertainment of the primary facts. He submitted that since paragraph (a) of regulation 4(1) conferred a discretion upon the Secretary of State. which was reviewable only on Wednesbury grounds it was unlikely that a refusal to disclose information under paragraph (b) could be challenged on any wider basis.

I accept Mr Howell's submissions in answer to question (1). The language used in the Regulations is clear: whether information relates to the environment is capable of being treated as confidential, and if so, whether it falls within any of the categories in regulation 4(3) are all factual questions, to be determined in an objective manner. It would have been possible to incorporate a subjective element into the Regulations as has been done in Section 22(1) of the 1990 Act (above). Under Section 22(1) information

> *"is not commercial confidential for the purpose of this Section unless it is determined under this Section to be so by the enforcing authority or, on appeal, by the Secretary of State"*.

There is a clear distinction between resolving the primary issues of fact whether the information sought does relate to the environment and whether it is capable of being treated as confidential and deciding, if the information falls within paragraph (a) of regulation 4(1), whether. it should be disclosed. The latter is a discretionary decision, reviewable only on Wednesbury grounds.

Whilst it is unusual for the court to have to resolve disputed factual issues in applications for judicial review, questions of precedent fact can arise: see the discussion on page 252 of De Smith Woolf and Jowell's Judicial Review of Administrative Action, 5th Edition., and in an immigration context the decision of the House of Lords in R v Secretary of State for the Home Department Ex Parte Khawaja [1984] AC 74, per Lord Fraser at page 97D. In my view this is a precedent fact case, for the reasons advanced by Mr Howell.

(2) Should the Secretary of State's decision be quashed in any event because the reasons given were inaccurate and/or inadequate?

Regulation 3(2)(c) provides that a refusal to make information available must be in writing and must specify the reasons for the refusal. Mr Howell submits that Mrs Dixon's letter dated the 23rd September, 1997 (above) does not comply with regulation 3 because it is:

> (a) inaccurate, in that it relies on regulation 4(1)(a), but we know from her affidavit that this was an error, and that the Secretary of State now contends that regulation 4(1)(b) applies; and
>
> (b) inadequate, in that it is not sufficient merely to identify a regulation upon which the refusal is based without any explanation as to why the information falls within that regulation.

As to the admitted inaccuracy, he submits that the court should decline to admit the evidence in Mrs Dixon's affidavit insofar as it seeks to advance a different reason for refusal. He relies, in particular, upon the Judgement of Hutchison LJ (with whom Thorpe and Nourse LJJ agreed) in R v Westminster City Council Ex Parte Ermakov [1996] 2 All ER 302, at pp 315-316.

Turning to the inadequacy of the reasons given in Mrs Dixon's letter, he submits that the purpose of giving reasons for a refusal is to provide the person seeking the information with sufficient material to enable him to ascertain whether the refusal is well founded, or whether it may be based upon some error of fact or law which would be susceptible to challenge: see Eugenio Branco Ltd. V Commissioners of the European Communities [1995] ECR II 45, at p. 57, para. 32.

Mr Sales and Mr Pleming for the Respondents say that Ermakov is distinguishable both in principle because it was concerned with a very different statutory framework, and on its detailed facts. Under the Housing Act 1985 it was for the housing authority to satisfy themselves that the applicant became homeless intentionally. If they were so satisfied "they shall at the same time notify him of their reasons", see Ermakov at p.309. This may be contrasted with the Regulations which impose an obligation upon the relevant person not to disclose information which must be treated as confidential. Regulation 4(3) protects the right of third parties who have supplied information to the relevant person. Those rights cannot be abrogated because he refuses to provide the information on the wrong ground. They point out that Hutchinson LJ emphasised at page 316 h that his conclusions related "only to the provisions of Section 64 of the 1985 Act".

They submit that even if the Ermakov approach is applicable in principle, this is a case where an obvious error is being corrected. Mrs Dixon's earlier letter of the 26th August (above) had referred to the existence of a clause restricting either party from disclosure without the other party s written consent and to the need for discussion with MEL, thus making it plain that regulation 4(1)(b) and (3)(a) might well be applicable. The adequacy of the reasons given must be judged in the context of the information already available to the applicants, as set out in paragraph 65 of the Secretary of State's decision letter dated 23rd July 1997 (above). If information is refused on grounds of confidentiality it may be difficult to amplify the reasoning without breaching the confidentiality.

I agree with the Respondents that Ermakov is distinguishable. Under Section 64 of the 1985 Act the Council had to be satisfied that the applicant had become homeless intentionally. The reasons why they were so satisfied were clearly of crucial importance. In the light of my answer to question (1) (above) the issue is not whether the Secretary of State is satisfied that the agreement contains information relating to the environment, and whether that information may, or must be treated as confidential, but whether those conditions are, in fact established. The Secretary of State's reasoning, whilst it may well be persuasive, is not decisive. Moreover, I agree with the Respondents' submission that if information does, in fact, fall within regulation 4(3) the Secretary of State has no power to disclose it and cannot confer power upon himself by an erroneous reference to regulation 4(1)(a), instead of 4(1)(b) in his refusal letter. For these reasons I consider that the evidence in Mrs Dixon's affidavit as to the grounds of refusal is admissible.

That said, I accept Mr Howell's submission that the reason given in Mrs Dixon's letter dated 23rd September 1997, if accurate, would have been inadequate. The purpose of Article 3.4 of the Directive, as reflected in regulation 3(2)(c) of the Regulations, is to enable an individual who is refused information to ascertain whether the refusal is well founded in fact and law, or whether it is susceptible to challenge. That purpose is not fulfilled by the bare assertion that the Agreement is confidential under a particular regulation. It should be possible to provide some, albeit brief explanation as to why the information sought is confidential without breaching that confidentiality.

Even though the reasons given are acknowledged to have been erroneous. and I would have regarded them as inadequate even if they had been correct I do not consider that I am bound to adopt the approach in Ermakov and quash the Secretary of State's decision in any event. I am entitled to have regard to the reasons now advanced in Mrs Dixon's affidavit and it is for. me to decide whether they are justified in the light of the factual material available to the Court.

(3) Does the Agreement fall within the description of any information which relates to the environment?

The Applicants say that it does. I have listed this as an issue because although it was conceded from the outset on behalf of the Secretary of State that the answer to this question is in the affirmative, MEL in both Mr Smith's affidavit and Mr Pleming's Skeleton Argument initially contended to the contrary on the basis that the Agreement was a "purely commercial document". In his submissions, Mr Pleming retreated from this blanket denial, and conceded that it would be difficult to contend that the Agreement contains no information which relates to the environment.

In my view he was right to do so. The fact that the Agreement can be described as a "commercial document" does not mean that it does not contain information which relates to the environment. It simply means that if such information is contained in the Agreement it may fall within one of the exceptions in regulation 4. We know from Section 1(1) of the 1991 Act from the Concession Statement and from Mrs Dixon's affidavit that MEL's obligations under the Agreement relate to the design, construction, signing, completion, day to day operation and maintenance of the BNRR during the Concession period of 53 years. In particular the Agreement requires MEL to provide and maintain works to mitigate the environmental effects of the construction or use of the BNRR.

On the face of these documents the answer to question 3 must be "yes". As paragraph 20 of the Department's Guidelines in 1992 points out:

> *"Activities and measures are interpreted to include administrative measures and environmental management programmes (e.g. planning and transport development)".*

Mr Pleming submitted that the Agreement was only indirectly related to an "activity", the construction of the BNRR, which was likely to adversely affect some aspects of the environment. if the Agreement fell within regulation 2, then a very large range of documentation could equally well be said to relate to the environment.

The definition of "information relating to the environment" in Article 2 of the Action is very broad in my view deliberately so, and this broad definition has been carried through into the Regulations. It would have been possible to define more narrowly the obligation to disclose environmental information but that was not the intention of either the Council of the European Communities, or Parliament. In the British Coal

Corporation case Harrison J adopted a broad interpretation of the scope of regulation 2. I respectfully agree with his approach. The fact that upon such an approach,

regulation 2 may cover a large range of documentation, is not a valid argument for a narrow interpretation. The obligation to disclose information relating to the environment is subject to the exceptions contained in regulation 4, and regulation 3(3) gives the relevant body power to refuse requests which are manifestly unreasonable or formulated in too general a manner.

(4) Is the Agreement "capable of being treated as confidential" under regulation 4(2)(e), and if so must it be treated as confidential under regulation 4(3)(a)?

Mr Howell submitted that the Secretary of State had not established that the Agreement or any part of it fell within regulation 4(2)(e), thus it could not fall within regulation 4(3)(a). Underlying his approach was the proposition that "commercial or industrial confidentiality" in regulation 4(2)(e) means specific information which a business needs to keep confidential in order to protect its competitive position, technological know how, or production methods. There has to be clear evidence of the need for protection, and there is none here.

The Respondents contended that the Agreement as a whole fell within regulation 4(2)(e) by virtue of its very nature as a commercial document which contained a bundle of rights and obligations, which would have financial implications for the parties, and which the parties had agreed should be treated as confidential. It was unnecessary for there to be evidence of specific harm as required by Mr Howell, it was enough that the Agreement embodied the terms on which MEL was prepared to construct the BNRR. MEL was entitled to keep those terms confidential in order to protect its position against rivals in the field of private finance initiatives.

It would have been possible to decide between these two "all or nothing" approaches without looking at the Agreement itself, but having heard Mr Howell's opening submission and the Respondents' arguments, I provisionally concluded that there might be a middle path: some parts of the Agreement might fall within regulation 4(2)(e), whilst others might not. In the event of that being the correct approach. regulation 4(4) would come into play.

When the proceedings commenced Mr Howell indicated that he wished to make an application for

(a) production of the Agreement under RSC Order 24 r.13; and

(b) cross examination of Mrs Dixon and Mr Smith.

So that the factual basis for his application could be better understood it was agreed that his application should be deferred until after I had heard his and the Respondent's submissions, but before his reply. It was recognised that if his application was successful the parties would have to be given the opportunity to make further submissions in the light of any new material.

He referred to Wallace Smith Trust Co Ltd v Deloitte Haskins & Sells [1997] 1 WLR 257 and submitted that disclosure of the Agreement was necessary for the fair disposal of the Application. The Court could not answer questions (3) and (4) if it had not seen the Agreement, and the Applicants were disadvantaged in making their submissions because they did not know what was in the Agreement.

On the 8th May, before the Respondents replied to Mr Howell's procedural application I indicated a provisional view that if I decide to inspect the Agreement and if as a result of that inspection I decided to order that there should be a measure of disclosure, I did not think. it necessary for the fair disposal of the proceedings to order disclosure of so much of the agreement as deals with compensation payable by or to the Secretary of State in the event of the BNRR not proceeding. I indicated that subject to Mr Howell's reply;

> *"I can see no sensible basis on which it could be concluded that the compensation provisions in the agreement fall outside the provisions of either Regulation 4(1)(a) or regulation 4(1)(b) of the Environmental (Information) Regulations 1992. Commercial confidentiality, in my view, plainly attaches to compensation provisions of the kind described in section 1(4) and (5) of the 1991 Act and in Mr Prescott's letter".*

Neither of the Respondents objected to my inspecting the Agreement although both contended that its disclosure to the Plaintiff was unnecessary for the fair disposal of the proceedings and that cross examination was unnecessary, there being no lack of clarity in the affidavits.

Having heard Mr Howell's reply I ruled that cross examination was unnecessary, decided to inspect the Agreement and confined the provisional view set out above.

Having inspected the agreement which is a lengthy document of 87 pages together with 15 schedules, I decided that a redacted version, with substantial blanking out so as to mitigate the inevitable loss of confidentiality from the Respondent's point of view, should be disclosed to the Applicants' legal advisers only, and I made an order

to that effect on the 2nd June. In applying the dicta of the Court of Appeal in the Wallace Smith case I was very conscious of the fact that the central issue in this action is whether the Agreement is confidential so that it may not or must not be disclosed to the Applicants. Whilst question (3) (above) could be answered on the basis of the information already before the, Court and question (4) (above) could be answered on an "all or nothing" basis without sight of the agreement inspection of the redacted agreement would give the Plaintiffs a "litigious advantage" if they wished to refute the Respondent's approach that the whole agreement must be regarded as confidential and advance their fall back submission that parts of the Agreement are not capable of being treated as confidential.

When giving my ruling on the 2nd June I indicated that because of the volume of the Agreement and its accompanying schedules I might well have overlooked passages which the Respondents would regard as particularly confidential and that there would inevitably be numerous cross references to deleted clauses which would need to be "tidied up", and stated that I would be prepared to consider an application from the Respondents in respect of such matters.

In trying to ensure the fair disposal of an Application where the issue at stake was the confidentiality of the document in question, I considered that the Applicants would not suffer any unfair disadvantage if they were unable to see the whole of the Agreement. It was important that the material disclosed to them should indicate the overall structure and content of the Agreement. Thus, I ensured that the Index and Index of Schedules were retained in full together with the headings of those clauses and Schedules which were blanked out. By way of example, clause 27 relating to "compensation events", and clause 28 relating to "payments" were blanked out. For the purposes of determining this application it is not necessary to know what were the compensation events, or the details of the payments to be made. It is enough to know that the Agreement contains clauses which deal with such matters, in addition to clauses which deal with such matters as Motorway Service Areas (clause 19), and Fossils and Antiquities (clause 29).

Similarly, in the case of the Schedules, it is not necessary for the fair disposal of the application to look at the documents listed in Schedule 6, which include a letter from the Concessionaire's Financial Advisor. It is sufficient to know that documents of that kind are included in the Schedules by contrast with the technical requirements set out in Schedule 7.

Clause 25 deserves a special mention. Since clause 25.7 had been relied on by the Second Respondent it was necessary for the Applicants to see the whole of this clause (with one deletion) in order to be able to construe clause 25.7 in its immediate context.

The Second Respondent applied by letter for further redactions. The great majority fell within the description of "tidying up" - deleting cross references to clauses which had been blanked out, and delete definitions which related to such clauses. I approved these further redactions. The letter also sought further redactions which in my view went beyond the scope of "tidying up" and proceeded on the basis that the approach towards disclosure of the Agreement should be more restrictive. I disallowed those further redactions. I am satisfied that the redacted version of the Agreement as finally supplied to both the Applicants and myself enables a fair disposal of this application. At the hearing on the 2nd June the parties agreed that their further submissions would be made in writing.

I have mentioned this process at some length, because the Applicants in their further submissions suggest that the Agreement should have been inspected for the purpose of deciding whether its production in whole or in part was necessary for the fair disposal of the application. It should not have been inspected for the purpose of deciding any question arising in the application itself. They submitted that *"it must be assumed in determining the application that those parts of the Concession Agreement which have not been ordered to be produced do not contain any material to which the Applicants are not entitled for any reason which may depend in any respect of its contents. It would be inconsistent with the requirements of fairness for any finding adverse to the Applicants to be made on any particular provision on which no opportunity has been given to make submissions in the light of its contents. If this assumption is not made, then it is submitted that you should recuse yourself.*

As will be clear from the matters set out above, I inspected the Agreement for the purpose urged by the Applicants, and not for the purpose of deciding any question arising in the application. I have decided the substantive application on the basis of the redacted version of the Agreement as supplied to myself and the Applicants. I consider it unnecessary for me to know the details of clause 28 or clause 29 in order to decide whether they fall within any of the exceptions in regulation 4. Accordingly, I see no reason to recuse myself, and will proceed to answer question (4) (above).

I have summarised the parties "all or nothing" submissions (above). They sought to justify them as follows. Mr Howell submitted that the underlying purpose of the Directive was to make environmental information held by public authorities freely available, subject to certain derogations. Those derogations should be construed strictly and proportionately to their objective. In Thomas v Chief Adjudication Officer [1991] 2 QB 164, Slade LJ (with whom Stocker LJ and Sir Denys Buckley agreed), having said that it was necessary to adopt a purposive construction of the relevant article in the Council Directive in issue in that case, said this:

Secondly, the phrase "possible consequences" in article 7(1) (a) being part of a derogation from individual rights conferred by directive (79/7/EEC) must be construed strictly.

Thirdly, in considering a derogation such as this, the court should have in mind the aim of the Community authorities in view of which the derogation was included.

Fourthly, the phrase "possible consequences" must be construed in accordance with the general principle of Community law known as "the principle of proportionality, " which requires that a derogation from an individual right conferred by a Council Directive remains within the limits of what is appropriate and necessary for achieving the aim in view.

Fifthly, it is for the national court to determine consistently with the four propositions set out above, whether in any given case. the principle of proportionality has been observed by a member state which has sought to invoke the derogation permitted by Article 7(1) (a).

The eleventh recital to the Directive refers to the possibility of a refusal being justified in "specific and clearly defined cases". In such a context reference to commercial and industrial confidentiality must mean specific protect its competitive position, not information which an enterprise needs to keep confidential in order to general knowledge of business organisation or methods (see Herbert Morris Ltd v Saxelby [1916] 1 AC 688 Per. Lord Atkinson at pp. 703 - 705); or "know how", as described by Brightman J (as he then was) in Amway Corporation v Eurway International Limited [1974] RPC 82 at pp. 85 - 87.

Since the Directive was intended to reduce disparities between the laws of the member states concerning access to information (recital 9), what was or was not confidential should not be determined by reference to English law relating to confidentiality. One had to look at the "objective nature" of the information in question. A Concession Agreement was not intrinsically confidential. The terms on which public authorities procured goods or services were open to public scrutiny. Where a Concession Agreement was made with a local highway authority (rather than with the Secretary of State) local electors had aright to inspect and make copies of it: see section 17(1) of the Local Government Finance Act 1982.

Some of the provisions of the agreement would be in the public domain in any event, e.g. the charges that could be made would be reflected in the toll regime. Other provisions, such as those relating to design, construction and environmental mitigation were not a matter of commercial or industrial confidentiality. As for Mr Smith's contention that the Agreement taken as a whole demonstrated the extent and level of use which MEL was prepared to accept in such a private finance arrangement, that information, dated February 1992, was now only of historic interest. The Department's Guidance (above) makes it clear that disclosure may be withheld only where it would prejudice he commercial interests of an individual or business. There must be cogent evidence of the need for protection on the ground of confidently, and the period of time over which protection is sought must be justified. The test in respect of other registers of environmental information (above) was whether disclosure "would prejudice to an unreasonable degree the commercial interests of that individual or person".

The Respondents, whilst accepting that any derogation should be construed in the manner set out above, submitted that the objective of Article 3(2) was to protect commercial and industrial confidentiality), and third party rights. Since Community Law did not provide a common definition of the various matters listed in article 3(2), which include "public security", and matters which are *sub judice*, they must of necessity be defused in accordance with the differing laws of the member states.

On its face, regulation 4(2)(e) was not confined to "intellectual properties, which would cover trade secrets, trade marks etc. Financial information, in particular prices, is regarded as commercially confidential see p. 705 of the Saxelby case. The totality of the rights and obligations contained in the agreement represents MEL's successful bid. Collectively, all of its terms will have financial implications: indicating the terms on which MEL is prepared to contract in a novel and expanding area of business. It is, therefore, confidential and it is relevant for the purposes of Regulation 4(2)(e) that the parties have agreed to treat it as such. The agreement was "a purely commercial document" and, as such, was confidential. The Respondents pointed to the debates recorded in Hansard (above) and submitted that they showed that Parliament recognised that Concession Agreements, as commercial documents, should remain confidential hence the need for a Concession Statement.

I accept the proposition that any derogation contained in the Directive must be construed strictly and proportionately, in a manner which is consistent with achieving the underlying objection of the Directive. But the objective of the Directive, as described in Article 1, is not merely to ensure freedom of access to information about the environment, but also to set out the basic terms and conditions on which such information should be made available.

The purpose of Article 3(2) is to ensure that commercial and industrial confidentiality and third party rights are protected. This is reinforced by the obligation to separate out information where it is not confidential. Thus, the directive strikes a balance, and that balancing exercise is carried over into the Regulations. In the absence of any common definitions of the various interests listed in Article 3.2, it is inevitable that each member state will decide what information is confidential or when matters are *sub judice*, according to its own national law.

I do not find the passages from Hansard (above) of any great assistance in resolving the issue before me. Ministers recognised that Concession Agreements "will contain information which is commercially confidential". but that is not the same thing as saying that the Agreement as a whole is confidential. Moreover, Concession Statements were also required because there was a need to present a mass of technical information in an easily comprehensible format. Having had to examine the whole of the Agreement and all of its accompanying Schedules, I can see the good sense of Mr Freeman's statement to the House of Commons.

Whilst an agreement between the parties to a document that they will treat it as confidential is relevant for the purpose of deciding whether any commercial or industrial confidentiality attaches for the purpose of Regulation 4(2)(e), it is not determinative of that question. Regulation 4(3)(a) does not require information to be treated a confidential merely because the parties have agreed that it should not be disclosed. The information must be both capable of being treated as confidential within regulation 4(2)(e) and the parties must have agreed that it should be so treated, so that its disclosure would involve a breach of agreement.

I do not accept the Respondent's submission that the agreement as a whole falls within regulation 4(2)(e) because it is a "commercial document" which contains a bundle of rights and obligations which individually and collectively, have financial implications for MEL. The Respondent's formulation would apply to any commercial agreement as a whole. If it had been intended to exempt "any agreement" or "any commercial agreement" from disclosure, it would have been easy to say so in regulation 4(2). Adopting the Saxelby approach (above), a commercial agreement may well contain information to which commercial or industrial confidentiality attaches, prices are an obvious example, but it may also contain other more general information to which such confidentiality does not attach. Insofar as sight of the Agreement would give the reader an insight into MEL's "general method of business", or as Mr Pleming puts it, to its approach to contracts of this kind, I consider that such information falls within the category of "know how", rather than information to which commercial confidentiality attaches.

To treat the entire Agreement as commercially confidential because it is a commercial document would be contrary to the advice in the Department's Guidance. Whilst the Guidance is not authoritative as to the law, it does, in my view, set out a sensible approach to a practical problem.

Even though the wording in section 22(11) of the 1990 Act differs from that in regulation 4(2)(e) it would be surprising if Parliament intended that by comparison with other registers of environmental information, a markedly more restrictive approach to disclosure should be adopted in response to requests under the 1992 Regulations.

As a matter of common sense, one would expect a commercial document, and in particular a contract to contain information which was commercially confidential. In striking the balance seen in Article 3 of the Directive, it is easy to see why particular information, e.g. relating to prices, in a commercial agreement should be exempted from disclosure. It is much less easy to see how a blanket exclusion in respect of commercial agreements as a whole could be justified as being proportionate to the objective of ensuring freedom of access to environmental information whilst protecting commercial and industrial confidentiality.

Taking the present Agreement as an example, it is difficult to see why clause 29, which deals with "Fossils and Antiquities should be treated as confidential as it is easy to understand without the need for detailed evidence why clause 28 which deals with "payment" should be excluded from disclosure. Although the agreement was made in 1992 I do not accept that financial information relating to "Payment" or to "Compensation Events" is now only of historical interest. It would be a relative simple matter for competitors to up-date prices by reference to the appropriate indices.

Having rejected the "all or nothing" approaches one is left with the difficulty of where to draw the line. The fact that it is difficult to draw the line in terms of some abstract principle is not in my view, a reason to adopt either the Applicants' or the Respondent's approach. Regulation 4(4) recognises that it may be necessary to separate out information which is, and is not confidential. Whilst all of the rights and obligations in a commercial agreement may, as Mr Sales puts it have contingent costs implications, with a measure of common sense it should not be too difficult in practice, to distinguish between those clauses which are so closely related to. prices. costs trade secrets etc. that they are commercially confidential and those which are of a more general nature whose disclosure would not on any reasonable view, cause any prejudice to the commercial undertaking-. "Compensation Evens" and "Payments" (clauses 27 and 28) are obvious examples of the former; whereas "Construction

Period Traffic Management" and "Fossils and Antiquities" (clauses 14 and 29) are obvious examples of the latter.

My conclusion in respect of the first part of question (4) is that whilst the Agreement as a whole does not fall within regulation 4(2)(e). it is plain from the Index and the Index of Schedules that much of the information within it does relate to matters to which commercial confidentiality attaches.

Specifically, I have no doubt that those provisions in the agreement which enable MEL to seek compensation from the Secretary of State if he decides not to proceed with the BNRR, as referred to in Mr Prescott's letter (above) and in paragraphs 5 and 11 of the Applicants' Form 86A, do fall within regulation 4(2)(e). Even if one adopts a very restrictive view of what information is to be regarded as confidential in a commercial agreement, a compensation provision of that kind is, in my view, a paradigm of information to which commercial confidentiality attaches.

I turn to look at the second limb of regulation 4(3)(a). The following questions arise. Is disclosure of that information within the Agreement which is capable of being treated as confidential prohibited by regulation 4(3)(a) because:

(i) Disclosure would be in breach of clause 25.7 of the Agreement;

(ii) Disclosure would be in breach of an implied term;

(iii) There is an estoppel by convention prohibiting disclosure; or

(iv) Disclosure would be in breach of an equitable obligation of confidence?

I will deal with each of these questions in turn.

Clause 25.7

MEL, but not the Secretary of State, contended that there was an express agreement contained in clause 25.7 of the Agreement that it should be confidential. I have set out the terms of clause 25.7 (above). MEL argues that clause 25.7 requires each party to hold in confidence documents supplied by the other party. The obligation bites on documents supplied before or after entry into the Agreement. The Agreement is a document which was passed between the parties, hence it falls within clause 25.7.

The Applicants contend that clause 25 appears to have been adopted from clause 28 in the Concession Agreement relating to the Severn River Crossing. That agreement was made publicly available by placing it in the House of Commons library. The Agreement is not a document "supplied by or on behalf of the other party". It had been intended to provide that the Agreement itself should be confidential that would have been specifically stated.

I do not consider that any useful analogy can be drawn with the, Agreement relating to the Severn Crossing, which was dealt with under the Private Bill Procedure. I accept Mr Howell's remaining submissions on clause 25.7. Clause 25 deals with the supply of documents and information between the parties. When considered in isolation, clause 25.7 appears to distinguish between the Agreement itself and the documents and information with which the parties will supply each other pursuant to the Agreement. That view is reinforced when clause 25.7 is set in the context of clauses 25.1 - 25.6, which deal with the documents and information which are to be supplied. If the parties had intended clause 25.7 to apply to the Agreement in addition to the documents supplied under the Agreement. it would have been easy to say so, but that was not done. I therefore conclude that disclosure of these parts of the Agreement which are capable of being treated as confidential would not be in breach of any express agreement.

Implied Term

Mr Smith's affidavit states that the parties intended that the Agreement should remain confidential he refers to the Parliamentary debate (above) and to "custom and practice with commercial documents". Mrs Dixon states that "it appears from the Department's files that the Department and MEL have always understood the agreement to be confidential and have treated it accordingly at all times". The Respondents submit that, on the basis of these facts, there is an implied term that the Agreement is confidential: see Shirlaw v Southern Foundries [1939] 2 KB 206 at p. 227 per MacKinnon LJ.

Mr Howell submits that the test is one of necessity, not reasonableness, see Chitty on Contracts paras 13-006 and 13-008. Whilst it might have been sensible to incorporate a confidentiality clause relating to the Agreement as a whole, it was not necessary to do so in order to make the contract work. Moreover, clause 25.7 shows that the parties applied their minds to the question of confidentiality, their agreement as to a limited confidentiality clause was inconsistent with the implication of a broader restriction. That was reinforced by clause 37 of the Agreement which is entitled "Entire Agreement" and states:

> "The Concession Agreement supersedes any previous agreement arrangement or understanding between the parties in relation to the matters dealt with herein and represents the entire understanding between the parties in relation thereto".

I have already referred to the Parliamentary debates. In my view the references in Hansard do not demonstrate an intention that Concession Agreements should not be disclosed because they were confidential in their entirety. They were not to be disclosed for two reasons: because they would contain confidential information and because it would be desirable to have an intelligible summary of a mass of technical information.

Whatever may have been said in Parliament there is no reason to doubt Mrs Dixon's claim that the parties themselves have always understood the Agreement to be confidential and treated it as such. At least one objector requested a copy of the Agreement during the public inquiry. His request was refused on the ground of confidentiality. The Inspector was not impressed by the Department's response, but it was adhered to in paragraph 65 of the Secretary of State's decision letter (above). During the course of the inquiry the Department added to the material available in the Concession Statement by saying that "the concessionaire had taken on the full financial risks of the development of the BNRR".

However, I do not consider that this conduct is a sufficient basis for an implied term that the Agreement must be treated as confidential. Clause 37 does not prevent the Court from implying a term if the tests for implication are met it reinforces the parol evidence rule: see Chitty on Contracts para 12-089. But the fact remains that the parties chose to address the issue of confidentiality in a particular way in clause 25.7. Whilst it might well have been sensible to include a provision that the Agreement itself should be confidential that was not done. Implying a clause to that effect might well improve the contract from the parties point of view, but it is not necessary in order to make the contract work in commercial terms.

Estopple by Convention

The Respondents submit that by reason of their conduct and understanding over the years as described above, an estoppel by convention has arisen, such that the Secretary of State is estopped from denying that the Agreement is confidential: see Republic of India v India Steamship Co Ltd (No 2) [1997] 2 WLR 538, per Staughton LJ at pp. 548-550, and [1997] 3 WLR 818, per Lord Steyn at pp. 829F - 830A; and The Vistafjord [1988] 2 Lloyd's Rep. 343, at pp. 349-352. The Secretary of State and MEL had proceeded upon the shared assumption that clause 25.7 prohibited disclosure of the Agreement: see for example Mrs Dixon's letter dated 26th August 1997 (above).

Mr Howell submits that there is no evidence which is capable of supporting the existence of an estoppel by convention. Clause 37 makes it clear that the Agreement supersedes any understanding reached between the parties during the negotiations. MEL is not able to establish that it would be unconscionable for the Secretary of State to disclose the Agreement. Even if an estoppel operates as between the Secretary of State and MEL that cannot bind third parties exercising their fight to seek environmental information under the Regulations.

I do not accept Mr Howell's submission that the evidence does not support the existence of a convention. Mr Smith's reliance on the references in Hansard is misplaced for the reasons set out under Implied Term (above). Clause 37 makes it difficult for the parties to place reliance upon any assumption that they may have shared during the negotiations leading up to the agreement. But it is clearly the case that following the agreement, the parties did proceed upon the assumption that clause 25.7 prevented disclosure. They said as much to objectors at the public inquiry, to the Inspector, in the Secretary of State's decision letter, and in Mrs Dixon's letter of the 26th August 1997.

Thus. as between the Secretary of State and MEL there is a foundation for an estoppel by convention. But merely because there has been a common mistaken assumption it does not follow that there must be an estoppel: it must be unjust or unfair for one of the parties to resile from the convention, and the estoppel will apply "only for the period of time and to the extent required by the equity which the estoppel has raised": see Bingham LJ (as he then was) at p. 352 of The Vistafjord.

The public inquiry was held in 1994 - 1995. It is now 1998 and the Secretary of State has decided that the BNRR shall be built by MEL. Even after this lapse of time it might still be unconscionable for the Secretary of State to decide, of his own motion and for some purpose of his own, to release details of the Agreement. But it does not follow that it would be unconscionable for him to disclose those details pursuant to a request made to him under the Regulations.

Moreover, even if there is an estoppel as between MEL and the Secretary of State the Alliance is not estopped from asserting that disclosure of the Agreement would not involve a breach of clause 25.7. Mr Sales submitted that regulation 4(3)(a) was concerned with obligations between the Secretary of State and MEL. Reverting to my answer to question (1) (above), regulation 4(3)(a) is concerned with whether disclosure would in fact involve a breach of any agreement. Even if the Secretary of State is still estopped from asserting the contrary in the context of a request under the Regulations, which I doubt in proceedings brought by the Applicants the Court is entitled to look at the facts as they really are. For the reasons set out above I am satisfied that disclosure would not be in breach of any agreement.

Obligation of Confidence.

On behalf of MEL Mr Pleming submits that the Secretary of State is under a duty of confidence, not to disclose the Agreement because both parties recognised that it was confidential and treated it as such, so that it would be just that both parties should be precluded from disclosing its contents to third parties: see Attorney General v Observer Ltd and others [1990] 1 AC 109 per Lord Goff at pp. 281-283 (the "Spycatcher case"); and the discussion in paras. 3.01 - 3.05 of Toulson and Phipp's Confidentiality. Such a duty of confidence may arise in equity independently of any express or implied contractual term. Thus, he submitted, even if disclosure would not be in breach of any agreement, it would be in breach of a rule of (private) law.

Mr Howell submits that even if there was a duty of confidence, disclosure would not "contravene .... a rule of law", that there is no evidential basis for a finding that the duty exists, that the duty applies only, to confidential information that there is no evidence that the Agreement was imparted to the Secretary of State in confidence, and that the public interest that confidence should be preserved is outweighed in this case by the public interest in the disclosure of environmental information: see Lord Goff at p. 282E of the "Spycatcher case".

If the evidence supported the proposition that disclosure by the Secretary of State would be in breach of an equitable duty of confidence it would "contravene a rule of law". I see no reason to construe those words as excluding breach of such a duty. In view of my answer to the first part of question (4) we are concerned only with those parts of the Agreement which are capable of being treated as confidential under regulation 4(2)(e). The Secretary of. State, of course, believes that not merely those parts of the Agreement but the Agreement as a whole is confidential.

Thus, the requirements for a duty of confidence are met subject to the question whether, in the light of those facts, it would be "just in all the circumstances that the Secretary of State should be precluded from disclosing the information to others". In deciding that question it is necessary to consider whether the public interest that confidence should be protected is outweighed by the public interest in the disclosure of environmental information under-the 1992 Regulations.

It is clear from Mrs Dixon's evidence that the Secretary of State did not undertake such a balancing exercise. He considered that by reason of estopped he had "no authority to disclose the Agreement to the Applicants". In his submissions before me Mr Sales did not contend that the Secretary of State was bound by a separate equitable duty of confidence if the Court concluded that there was no estoppel. In my view he was right not to do so.

There is a paucity of evidence on which the Court can carry out the balancing exercise, but in view of the passage of time since the Agreement was entered into, and the fact that the Secretary of State would not be disclosing the contents of the Agreement in order to gain some commercial advantage for himself, or with a view to damaging MEL's commercial interest, but in response to a request under the 1992 Regulations, which are themselves an acknowledgement of the public interest in the disclosure of information which relates to the environment. I do not consider that it would be "just ... that (he) should be precluded from disclosing the information" in response to such a request.

That is not to say that the Secretary of State is required to disclose the information falling within regulation 4(2)(e). He has a discretion to disclose such information under regulation 4(1)(a). But I do not consider that the evidence supports the proposition that it would be just to preclude him from disclosing the information if he thought that was the proper course to adopt in response to the request from the Alliance. For these reasons I do not consider that disclosure by the Secretary of State would contravene any rule of law or involve a breach of any agreement.

<u>Transposition of the Directive.</u>

Mr Howell submitted that if Regulation 4(3)(a) does apply it is inconsistent with European law in that it leaves no room for discretion. The eleventh recital in the Directive recognises that it "May be justified" to refuse a request in certain clearly defined cases, which are then defined in Article 3(2). Whilst refusal may be justified in such cases, that will not always be the case. The harm that might be done by a particular disclosure might be very little when weighed against the public interest in

having the material disclosed, but regulation 4(3)(a) confers no discretion on the relevant body. Such an extensive derogation is disproportionate: see Thomas (above) at p. 179, the fourth and fifth points listed by Slade LJ.

The Respondents submitted that the operative, part of the Directive which carried the eleventh recital into effect was Article 3(2), and that Regulation 4(3)(a) fell within the derogations permissible under that Article. Proportionality should be applied to both elements of Article 3, ensuring that environmental information is disclosed, and that in so doing commercial and industrial confidentiality is protected.

Since I have concluded that regulation 4(3)(a) does not apply, this argument does not strictly speaking arise. But Mr Howell advanced a similar argument in respect of regulation 4(3)(c), and it is sensible to deal with it at this stage. I accept the Respondent's argument that regulation 4(3) including both paragraph (a) and (c), is within the derogations that are permissible under Article 3(2). In distinguishing between information which is capable of being treated as confidential and information which must be treated as confidential regulation 4 incorporates a measure of flexibility and is a proportionate response to Article 3 read as a whole.

Question (5) Does regulation 4(3)(c) apply to any part of the Agreement and if so which parts?

Both Respondents say that the answer to the first part of this question is 'yes', but they differ as to which parts of the Agreement are covered by Regulation 4(3)(c). Mr Sales submits that it is the information listed in Mrs Dixon's exhibit CMD1. It is unnecessary to set out the list in full. It includes such documents as the Sponsor's Support Agreement and a letter from the Concessionaire's Financial Adviser (Schedules 2 and 6, Part 1. to the Agreement).

Mr Pleming submits that all of the information which is now embodied in the Agreement, insofar as it emanates from the MEL side of the negotiations is third party information within regulation 4(3)(c). This is because MEL, as a separate legal entity, did not have any information of its own when the agreement was entered into in 1992. All of the information on its side was produced by the two shareholders identified by Mr Smith, KCDL and Autostrade. Mr Smith states that neither of the two shareholders, nor their group companies who also provided some information to MEL, consent to the disclosure of the information.

Mr Howell submits that Mrs Dixon's affidavit does not address the three requirements in regulation 4(3)(c):

> (i) that the persons supplying the information listed in exhibit CMDl were not under, and could not have been put under any obligation to supply the information to the Secretary of State;
>
> (ii) there is no evidence as to the circumstances in which the information is supplied; and
>
> (iii) no evidence that those persons have not consented to disclosure.

Mr Smith's affidavit stated that the shareholders to MEL had produced the information to MEL for onward transmission into the agreement "on commercial terms". The inference was, therefore, that this was pursuant to some contractual arrangement so that requirement (c)(i) was not met.

I consider that Mr Howell's criticisms of paragraph 6 of Mrs Dixon's affidavit are unrealistic, and I accept Mr Sales' submissions in answer to question (5). There is nothing to suggest that the suppliers of the documents listed in CMD1 were, or could have been put under any legal obligation to supply, e.g. the Sponsor's Support Agreement, to the Secretary of State. Mrs Dixon states that these parts of the agreement were recognised by the Secretary of State as having been supplied in confidence. Not merely is there no indication whatsoever that any, of the suppliers have consented to disclosure, in view of the description of the documents in CMD1 it is inherently unlikely that they have consented. I am also satisfied that all of the documents listed in CMD1 fall within the first limb of regulation 4(3): they are capable of being treated as confidential.

I do not accept Mr Pleming's broader submission. It would appear (although the evidence on this point is scanty) that MEL obtained information from its shareholders for a consideration. It then used that information during the lengthy negotiations leading up to the making of the Agreement in 1992. There is no evidence as to the extent to which, or the form in which, that information was embodied into the Agreement. It may well have been merely background information which was useful during negotiations. As a result of the negotiations the information supplied by the shareholders may have been amended or replaced.

Moreover, it seems to me that the information contained in the Agreement is held by the Secretary of State in consequence of its having been supplied to him by MEL. Mr

Smith's affidavit states that MEL and the Secretary of State entered into a Memorandum of Agreement on 12th August 1991, whereby MEL became the preferred bidder. No details of that Memorandum of Agreement are available, but it would be surprising if it did not contain some form of "best endeavours" clause, whereby each party would take such steps as were necessary, including the exchange of information, to enable them to conclude the Agreement which they did the following February.

Thus I am not persuaded that requirement (c)(i) is met in the case of Mr Pleming's broader submission. Even if I had been so persuaded, I consider that the information contained in the Agreement as a result of negotiations between the parties is not fairly described as information "supplied" by one party to the other. In that respect the main body of the Agreement may be distinguished from e.g. Schedule 6 part 1 which is a letter supplied by another party.

Conclusions on Regulation 4.

For the reasons set out above I conclude that:

(a) Not every part of the Agreement falls within regulation 4(2)(c).

(b) Parts of the Agreement do fall within regulation 4(2)(e).

(c) Regulation 4(3)(a) does not apply.

(d) Regulation 4(3)(c) applies to these parts of the Agreement listed in CMD1

(e) The compensation provisions in the Agreement do fall within regulation 4(2)(e)

It follows that the Applicants are entitled to have made available to them those parts of the Agreement which do not fall within regulation 4(2)(e). The Secretary of State has a discretion to disclose those parts of the Agreement which fall within regulation 4(2)(e) but are not listed in CMD1. He has no power to disclose the documents listed in CMD1.

It is, at least initially, for the Secretary of State to decide whether the information falling under my paragraphs (b) (d) and (e) (above) is capable of being separated from the information contained in the remainder of the Agreement. My own exercise in redaction although conducted for a different purpose, as explained above, may be of some assistance in this respect. If there is a disagreement as to whether separation is possible, the Court will have to resolve the dispute.

If the Secretary of State concludes that extensive redaction is necessary he may wish to consider whether a request which requires such redaction is "manifestly unreasonable" under regulation 3(3). An assessment of the amount of information relating to the environment which is contained within the Agreement and which is not already publicly available, in greater detail in other documents such as the Environmental Impact Statement may be relevant if regulation 3(3) is to be considered.

Question (6) Discretion.

Mr Pleming submits that the Court should, in the exercise of its discretion, decline to quash the Secretary of State's decision. He submits that the purpose of the Applicants in seeking the Agreement is to deploy it, and in particular the compensation provisions within it as part of their challenge to the orders authorising the construction of the BNRR. There is no genuine search for environmental information. Moreover, insofar as the Secretary of State has discretion to disclose information under regulation 4(1)(a), he is bound to give effect to the estoppel between the parties, so quashing his decision would be a pointless exercise.

I note that is not the position adopted by the Secretary of State. I have explained why I am doubtful as to whether there is an estoppel as between MEL and the Secretary of State in the context of a request for disclosure under the regulations. If he is not precluded from disclosing the Agreement the Secretary of State will have to weigh two competing public interests: the maintenance of confidentiality, and the disclosure of environmental information. It would not be right for me to speculate as to how he might strike the balance between them.

Mr Howell submitted firstly that the Applicants were not simply concerned to obtain a copy of the Agreement for the purpose of making a collateral challenge to the BNRR orders, they were concerned to vindicate their right to obtain information relating to the environment under the 1992 Regulations. That claim is also made in an affidavit

from the Second Applicant. Secondly, he submitted that it did not matter what was the Applicants purpose in asking for the Agreement. Article 3.1 provides that a person seeking information does not have to prove an interest. That is carried through into regulation 3(1). Subject to regulation 4, information which relates to the environment must be made available "to every person who requests it". The Applicants did not have to give, much less substantiate, any reason for their request.

I accept the second of those submissions but not the first. It is clear from the Form 86A that the purpose of seeking the Agreement was to use the compensation provisions therein as a ground for challenging the Secretary of State's decision to make the orders authorising the construction of the BNRR. In view of both the lengthy Environmental Impact Statement and the function of a Concession Agreement under Section 1 of the 1991 Act, it could not reasonably have been expected that (setting the compensation provisions on one side), this Concession Agreement would contain any significant environmental information that was not already to hand, in much greater detail in other publicly available documents. But the fact that the request was most unlikely to yield any new environmental information, apart from the compensation provisions, which were required for the purposes of a collateral challenge, is not a proper ground for refusal under the Regulations: see paragraph 39 of the Department's Guidance (above).

It is for the Secretary of State to decide whether the compensation provisions should be disclosed under Regulation 4(1)(a), and any question arising under regulations 3(3) and 4(4). It would not be right for me to pre-empt those decisions by exercising my discretion not to grant relief. For the same reason it would not be right for me to grant the order of Mandamus requiring the Secretary of State to disclose the Agreement, sought in the Form 86A. I do, however, quash the decision of the Secretary of State dated 23rd September 1997. He will have to decide in the light of this judgement how to respond to the Applicants' request.

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