THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/1173/2011

PARTIES

UK Coal Mining Ltd. (Appellant)

and

The Information Commissioner (First Respondent)

and

Nottinghamshire County Council (Second Respondent)

and

Veolia ES Nottinghamshire Ltd. (Third Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 28 February 2011, following the review on 10 February 2011 under file reference EA/2010/0142, does not involve an error on a point of law. The appeal is therefore dismissed.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

The parties

1. The Appellant in this appeal before the Upper Tribunal is UK Coal Mining Ltd. ("UK Coal"). The First, Second and Third Respondents are respectively the Information Commissioner ("the Commissioner"), Nottinghamshire County Council ("the Council") and Veolia ES Nottinghamshire Ltd. ("Veolia"). The parties' various roles in the proceedings before the First-tier Tribunal (FTT) were different. To avoid confusion, I therefore refer to each party in this decision by the relevant abbreviation as indicated above.

The context of this appeal

2. The context of this appeal can be stated fairly shortly, not least as the underlying circumstances have given rise to other litigation, albeit under a different statutory regime and in respect of another aspect of the same overall contractual arrangements: see *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Others* [2010] EWCA Civ 1214.

3. In summary, UK Coal owns a former colliery site in Nottinghamshire. UK Coal and the Council entered into a complex PFI agreement for an option to lease the site, comprising Contract A and Contract B. Veolia would then sub-lease the site from the Council to operate a waste management facility and an Energy Recovery Facility (an ERF or, in plain English, an incinerator).

4. Unsurprisingly, this proposal generated considerable local interest (and opposition). Mr Dowen, on behalf of People Against Incineration ("PAIN"), asked the Council for copies of the PFI contracts, citing the Environmental Information Regulations 2004 (SI 2004/3391) (EIR) and the Freedom of Information Act 2000 (FOIA). The Council declined to disclose the contracts in full and Mr Dowen complained to the Commissioner.

5. By the time that the Commissioner issued his Decision Notice (FER0206320, dated 30 June 2010), the disputed information comprised various documents (including a head lease, an under lease and a license to sub-let) contained in Schedule 8 to Contract B. The Commissioner concluded that the disputed information engaged regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information) but that the public interest in maintaining that exception did not outweigh the public interest in disclosure. He accordingly ordered that the disputed information in Schedule 8 to Contract B be disclosed.

The proceedings before the First-tier Tribunal

The appeal and the initial decision

6. The Council appealed the Commissioner's Decision Notice to the FTT. In reality, however, UK Coal was for all intents and purposes the appellant in those proceedings. The Council and Veolia played no active part. Neither Mr Dowen nor PAIN was made a party to the appeal before the FTT.

7. The FTT considered the appeal on the papers – involving detailed submissions, principally from UK Coal and the Commissioner – on 24 November 2010 and issued its (initial) decision on 29 December 2010, allowing (what was nominally) the Council's appeal in part.

8. In outline, the FTT concluded that some of the disputed information, which it described as "core financial information", when properly analysed fell within the FOIA regime rather than under the EIR. The FTT considered the applicability of section 43 of FOIA (commercial information) to that information. Insofar as that data constituted what it described as "confidential financial data", the FTT held that the balance of the public interest favoured the maintenance of the exemption (and conversely that section 43 did not relate to the entirety of the contracts). However, the FTT did not specifically identify which parts of the disputed information fell within this confidential category. Instead, the FTT directed that it was for UK Coal "to agree suitable and appropriate redactions" with the Commissioner (in the second and concluding sentence at [81]). The substituted Decision Notice was to the same effect.

The FTT's review decision

9. The Commissioner then applied to the FTT for it to review its decision or in the alternative to give permission to appeal to the Upper Tribunal. The Commissioner only took issue with the FTT's decision as to the disposal of the appeal and as summarised in the preceding paragraph. The Commissioner's principal submission was that the FTT had no power to remit matters to the Commissioner in the way that had been done in this case. Further, it was argued that the FTT's decision had failed to identify the confidential information in question, resulting in a lack of clarity both for the requester and for the Council as to their respective rights and obligations.

10. The FTT sensibly decided to review its decision under rules 43 and 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) and made directions on 26 January 2011 for the conduct of the review. The Commissioner and UK Coal both made further written submissions (open and closed in nature) as to the parts of the disputed information which they argued should be redacted in accordance with the FTT's initial decision.

11. The overall extent of the parties' respective suggestions as regards redaction can be summarised as follows. The disputed information itself ran to 63 pages of printed text in total. UK Coal's proposed redactions, in red, involved the exclusion of approximately 12 pages, including both pages of Schedule 2 to the head lease, setting out the methodology for calculating what was called the "throughput rent". The Commissioner's suggested redactions (also in red, but struck through) totalled about 20 lines of text (less than a page), including the actual numbers and the equation for calculating the throughput rent, but not the rest of Schedule 2.

12. The FTT's review decision, dated 28 February 2011, was in almost identical terms to its initial decision. The only difference of note was the second sentence of paragraph [81], which now read:

> "The Tribunal has redacted the confidential commercial information in a confidential annex that has been sent to the parties and ordered disclosure of all the disputed information not highlighted in yellow by the Tribunal."

13. The FTT's redactions (in yellow) were, for the most part, the same as those proposed by the Commissioner. There were, however, a number of changes at the margins. For example, UK Coal and the Commissioner had both proposed that the definition of the initial rent in the head lease be excluded in its entirety. The FTT's conclusion was that the definition itself could stand, with only the amount of the rent being redacted, as in "£X per annum together with the additional rents set out in the Lease", where X was the commercially sensitive information about the actual rent charged. The FTT also decided that the contractual rent dates should be redacted, whereas the Commissioner would have left that information included. The final redactions to Schedule 2 were, with one small addition, as advocated by the Commissioner. The FTT subsequently granted UK Coal permission to appeal.

The proceedings before the Upper Tribunal

Judicial personnel

14. Initial case management directions were issued in this appeal by Judge Howell QC, but the case has since been transferred to me for decision.

Should there be an oral hearing of this appeal?

15. The decision on whether to hold an oral hearing of an appeal before the Upper Tribunal is a discretionary one (rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)). In reaching that decision I have to consider the parties' views (rule 34(2)).

16. UK Coal does not consider an oral hearing to be necessary. The Council expresses no view either way but indicates that it would only attend a hearing if directed. Veolia has stated that it has no submissions to make on the appeal. The Commissioner suggests that a short oral hearing might be helpful.

17. I have considered the Commissioner's suggestion in the light of the overriding objective of dealing with cases fairly and justly. In my view an oral hearing is unnecessary and disproportionate. It would also inevitably cause some further delay. The appeal concerns a discrete point which has been well argued on paper by the principal protagonists (UK Coal and the Commissioner), responding to Judge Howell QC's directions. I do not think that in the circumstances of this case there would be much (if any) added value in an oral hearing. The principal parties' submissions can be summarised thus.

UK Coal's grounds of appeal

18. UK Coal's central submission, as set out in its grounds of appeal and its reply to the Commissioner's response, is that the FTT's interpretation and application of section 43 of FOIA failed adequately to protect the company's commercial interests. It further submits that the FTT erred in law by taking too narrow a view of "core financial information" and accordingly misdirected itself in ordering the disclosure of so much of the disputed information. The FTT's reference to "commercial and financial information" demonstrated that the confidential data was not confined to financial figures, but included a broader category of information putting such data into context. In particular, UK Coal argued that the entirety of Schedule 2 to the head lease constituted "core financial information", in that it sets out UK Coal's commercial methodology and was thus commercially sensitive and so should have been redacted in full. The company also argues that the FTT's decision is inconsistent with the outcome in the *East Sussex County Council* (FER0099394) and *East Riding*

of Yorkshire (FER0066052) cases. UK Coal requests that the scope of the redactions be expanded to include substantially the same text as the red text in the confidential annex to the FTT's decision.

The Commissioner's arguments

19. The Commissioner opposes UK Coal's appeal. He submits that the company seeks to place too much weight on the phrase "core financial information", which is not a term of art but simply the FTT's term for the information it had identified as exempt as the public interest balance favoured the maintenance of the section 43 exemption. In effect, UK Coal was seeking to challenge the FTT's evaluation of the merits of the case. The FTT's reference to "commercial and financial information" took the appeal no further forward, as this was simply the FTT referring back to its earlier concept of "core financial information" rather than purporting to recognise some wider category of confidential information. In sum, the FTT reached a decision it was entitled to do on the evidence it had received. For example, it had redacted key figures and definitions from Schedule 2 but had left unredacted the surrounding text where the public interest balance favoured disclosure. The FTT's review decision was not inconsistent with the *East Sussex County Council* and *East Riding of Yorkshire* cases, which were in any event Decision Notices by the Commissioner and not even binding on the Commissioner, let alone the FTT.

The Upper Tribunal's analysis

The legislation

20. Section 43 of FOIA provides as follows:

> **Commercial interests**
> **43.** (1) Information is exempt information if it constitutes a trade secret.
> (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
> (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

21. This is a qualified rather than absolute exemption under FOIA. Accordingly, the issue for the FTT to determine was whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b)).

The FTT's decision

22. The FTT's initial and review decision detailed the chronology of the case ([1]-[24]) and similarly set out at some length the respective submissions of the Commissioner ([25]-[50]) and UK Coal ([51]-[63]). There is no dispute but that the FTT correctly directed itself as to the questions it had to answer, namely (1) was the disputed information within the EIR (as the Commissioner contended); (2) had the Commissioner correctly applied the public interest balance required by regulation 12(5)(e); and (3) if the EIR did not apply, was the disputed information protected from disclosure by section 43 of FOIA ([64])? After a reference to the evidence received ([65]), the FTT focussed on its conclusions and the appropriate remedy ([66]-[83]). The FTT's principal conclusions were as follows.

23. First, there was "core financial information" within the disputed information which the FTT recognised as having the quality of "genuinely commercial and confidential information" ([77]).

24. Secondly, that information had no more than a tangential association with the environment and was particular to the PFI contract in question in terms of e.g. pricing. Such information fell within the scope of FOIA, not under the EIR regime, and the public interest supported the maintenance of the exemption under section 43 for such confidential information ([78]-[79]).

25. Thirdly, however, and bearing in mind the requirements of proportionality inherent in the public interest balancing exercise, the disputed information could be supplied to the requestor "with the confidential commercial and financial information redacted" ([80]). UK Coal's appeal to the FTT therefore succeeded to the extent that the operative test was section 43, not regulation 12(5)(e), and that the disputed information could be released, not in its entirety, but rather subject to the redactions highlighted in yellow in the confidential annex ([80]-[81]).

Why this appeal fails

26. It is important that the FTT's statement of reasons is read as a whole, rather than highlighting particular phrases and taking them out of their wider context. The FTT's extensive and detailed discussion of the principal parties' submissions on the appeal makes it plain that the FTT was well aware of the scope of the section 43 exemption under FOIA (relating to information the disclosure of which would, or would be likely to, "prejudice the commercial interests of any person") and the parallel exception under regulation 12(5)(e) of the EIR (where "disclosure would adversely affect the confidentiality of commercial or industrial information" (etc)). The FTT also considered the various factors relevant to the public interest balancing test, acknowledging the Commissioner's argument that the outcome would not be materially different whether section 43 or regulation 12(5)(e) applied.

27. The FTT's conclusion that there was "core financial information" in the disputed information which was "genuinely commercial and confidential information" (at [77]) was, as the Commissioner submits, no more than a convenient way of summarising its finding that, in applying the public interest balancing test, the engagement of the section 43 exemption and the application of the public interest test led to the withholding of only certain parts of the disputed information. The phrases in inverted commas in the previous sentence are not statutory expressions that admit of close textual analysis. This was a quintessential issue of fact and degree for the tribunal at first instance to determine. There is no serious suggestion here that the FTT failed to take account of relevant matters or had regard to irrelevant factors or in some way acted perversely. The bottom line is that UK Coal is essentially seeking to re-argue questions of fact and judgement which have been litigated and adjudicated upon on their merits by the FTT.

28. Moreover, for the reasons advanced by the Commissioner, neither the *East Sussex County Council* nor the *East Riding of Yorkshire* case can stand as any precedent for the FTT in the present case. As Judge Jacobs has commented in the context of the FTT's own earlier decisions, there are dangers in paying too close a regard to previous first instance decisions, as this may elevate issues of fact into issues of law or principle (see *London Borough of Camden v Information Commissioner and Voyias*, GIA/2986/2011, at [20]). This warning applies with even greater force, if that were possible, when one is concerned with the Commissioner's previous Decision Notices. In short, therefore, I agree with the submissions made on behalf of the Commissioner and reject the submissions made on behalf of UK Coal.

29. In reaching this conclusion I have reviewed the suggested redactions proposed by the principal parties and those directed by the FTT in its review decision. The example cited at paragraph [13] above about the definition of the rent

is one indication of how the FTT was astute to sever the information which, properly considered, fell to be protected by the section 43 exemption (or, had it been applicable, the regulation 12(5)(e) exception). Other examples may be cited to similar effect. For instance, the interpretation clause in the head lease defines the term "interest rate". If the agreed redactions by UK Coal and the Commissioner had been adopted by the FTT, this would have simply read as "'Interest Rate' means....". The FTT's final version was slightly less terse: "'Interest Rate' means interest at the rate of....", so excluding the key financial and textual description of how the actual interest rate was to be calculated. These various changes and others persuade me that the FTT approached the task on review of deciding precisely which passages should be redacted with considerable care and precision, bearing in mind the principles underpinning FOIA and in particular the section 43 test.

30. Even assuming the section 43 exemption was engaged in respect of all the disputed information, UK Coal's proposed redactions were, on any analysis, in my view far too wide-ranging to survive the public interest balancing test. Many of the provisions which UK Coal sought to redact (e.g. those relating to the tenant's insurance obligations and the rent review provisions) are commonplace in any commercial lease. In those circumstances the FTT's conclusion that the public interest test favoured disclosure was entirely understandable.

31. The contents of Schedule 2 to the lease, concerning the calculation of "throughput rent", were the subject of specific submissions both before the FTT and also the Upper Tribunal. According to UK Coal, "the entire contents of Schedule 2 ... are core financial information and are commercially sensitive as they set out UK Coal's commercial methodology". This argument simply will not run for two reasons.

32. First, for the reasons explained above, this is a further example of how the appeal is seeking to re-argue the case on its merits, rather than identify an error of law in the FTT's approach.

33. Second, and in any event, the effect of the targeted redactions proposed by the Commissioner, and agreed by the FTT with one addition, do precisely what they are supposed to do – they strike a balance in protecting UK Coal's proper commercial interests under section 43 while ensuring that other information is disclosed, having applied the public interest test. The requestor (and anyone else to whom the redacted version of Schedule 2 is disclosed) will simply have no idea as to either the commercial methodology or the key financial and other numerical variables used in calculating the throughput rent. Any such reader of Schedule 2 will be left with a series of rather unhelpful definitions, with key figures and phrases redacted, along with several terms setting out various consequential obligations, again standard in this type of contract, such as the tenant's obligation to deliver a certificate of the amount of throughput, the default option of referral to an arbitrator in the event of a dispute, and the tenant's duty to make payment of the rent duly calculated. To suggest both that section 43 was engaged and moreover that redaction of these latter clauses was required in applying the public interest balancing test, and that the FTT's decision accordingly demonstrates an error of law, is simply unsustainable.

A postscript

34. Finally, I note that the Commissioner does not seek to challenge any of the FTT's findings which went against him, and in particular whether or not the disputed information was to be properly considered under the EIR. The FTT, of course, had accepted UK Coal's argument that the contracts fell to be considered under FOIA and not under the EIR. The arguments on this point were well-made on both sides before the FTT. Given that the Commissioner has not brought a cross-appeal, and

that it is very unlikely that the outcome would be different according to whether FOIA or the EIR applied, notwithstanding the differing juridical and conceptual routes adopted by those two regimes, I do not need to express a view either way on this issue. It may yet need to be addressed in a subsequent case.

Conclusion

35. I therefore conclude that the First-tier Tribunal did not err in law in its review decision. The appeal by UK Coal to the Upper Tribunal is accordingly dismissed.

36. This means that Judge Howell QC's order (in the directions dated 26 July 2011) suspending the effect of the FTT's decision pending the resolution of this appeal now falls away. The FTT had directed that the disputed information (except that highlighted in yellow in the confidential annex to its decision) should be disclosed within 35 days. I make a direction to the same effect. For the avoidance of doubt, the period of 35 days for disclosure runs from the date that this decision is issued to the parties by the Upper Tribunal office, not the date below on which I have signed the decision on the original.

Signed on the original
on 19 June 2012

Nicholas Wikeley
Judge of the Upper Tribunal

IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)

RULING on an APPLICATION for PERMISSION to APPEAL
By

UK COAL MINING LTD

1. This is an application dated 25 March 2011 by UK Coal Mining Ltd for permission to appeal part of the decision of the First Tier Tribunal (Information Rights) ("FTT") dated 28 February 2011. That decision largely upheld the appeal of Nottinghamshire County Council, Veolia ES Nottinghamshire Ltd and UK Coal Mining Ltd and substituted a new Decision Notice for the Information Commissioner's (IC) Decision Notice FER0206320 dated 30 June 2010.

2. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended ("the Rules").

3. The issue relates to the extent of the redaction of closed, commercially confidential information. UK Coal Mining Ltd's position is that it should be extensive and suggested one approach to the material, the Information Commissioner took a less restrictive approach and the Tribunal adopted a third approach.

4. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of the application raise important points of law which can be more appropriately dealt with in the Upper Tribunal.

5. In this case the grounds of appeal advanced are clearly set out by UK Coal Mining Ltd in its application and the FTT gives permission for UK Coal Mining Ltd to appeal to the Administrative Appeals Chamber of the Upper Tribunal (AAC) on the grounds advanced.

6. Under rule 23(2) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended the IC has one month from the date this Ruling was sent to it to lodge the appeal with:

Upper Tribunal (Administrative Appeals Chamber)

7. The Tribunal agrees to suspend the order to disclose the information pending the appeal to the AAC. This suspension will be automatically lifted if the applicant decides not to pursue the appeal or is time barred from pursuing the appeal. Once the appeal has been accepted by the AAC the applicant should apply for a renewal of the suspension order from the AAC.

Robin Callender Smith
Tribunal Judge
First-tier Tribunal (Information Rights):
30 March 2011

IN THE FIRST-TIER TRIBUNAL Case No. **EA/2010/0142**

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FER0206320
Dated: 30 June 2010

Appellant:	**Nottinghamshire County Council**
Respondent:	**Information Commissioner**
1st Additional Party:	**Veolia E S Nottinghamshire Limited**
2nd Additional Party:	**UK Coal Mining Ltd**

Considered on the papers at 68 Lombard Street, London EC

Date of hearing:	**24 November 2010**
Date of initial decision:	**22 December 2010**
Date of Review:	**10 February 2011**

Before

Robin Callender Smith

Tribunal Judge

and

Darryl Stephenson
Alasdair Warwood

Tribunal Members

Representation:

For the Appellant: Susan Bearman, Solicitor for Nottinghamshire County Council
For the Respondent: James Cornwell, Counsel instructed by the Information Commissioner
For the 1st Additional Party: Veolia ES Nottinghamshire Limited
For the 2nd Additional Party: Nabarro LLP Solicitors

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0142**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

FOIA

Qualified exemptions

- Commercial interests/trade secrets s.43

Environmental Information Regulations 2004

Exceptions, Regs 12 (4) and (5)

- Confidential information (5) (e)

Cases:

Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Others [2010] EWCA Civ 1214; Mecklenburg v Kreis Penneverg-Der Ladrat C-321/926 [1998] ECR I-3809 and *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen C-316/01 [2003] ECR I-05995.*

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0142**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and finds that the relevant statutory regime is the Freedom of Information Act 2000 and, in particular, section 43 relating to commercial interests and trade secrets.

The Tribunal substitutes the following decision notice in place of the decision notice dated 30 June 2010.

SUBSTITUTED DECISION NOTICE

Dated 28 February 2011

Public authority: Nottinghamshire County Council

Address of Public authority: County Hall, West Bridgford, Nottingham NG2 7QP

Name of Complainant: Mr Slomo Dowen and People Against Incineration (PAIN)

The Substituted Decision

For the reasons set out in detail in the Tribunal's determination between Paragraphs 71 and 81 (below), the Tribunal allows the appeal and substitutes its decision in place of the decision notice dated 30 June 2010.

This follows a decision to review the Tribunal's original decision of 22 December 2010 after representations from the Information Commissioner. The decision which follows is the reviewed decision. Permission for the review to proceed was granted by the President of the General Regulatory Chamber on 9 February 2011.

Directions for the review were made on 26 January 2011. The Tribunal's decision in relation to the appropriate redactions has been arrived at having considered submissions on their nature and quantity from the 2nd Additional Party and the Information Commissioner.

Action Required

The appeal by the 2nd Additional Party succeeds insofar as the operative statutory regime is section 43 FOIA and the Disputed Information relates to confidential commercial information.

The Tribunal orders the disclosure of all the disputed information except that highlighted in yellow in the confidential annex to this decision within 35 days.

Robin Callender Smith
Tribunal Judge
28 February 2011

REASONS FOR DECISION

Introduction

1. On 29 April 2006 the Requestor – Mr Slomo Dowen and People Against Incineration (PAIN) - asked Nottinghamshire County Council ("the Appellant") for copies of a proposed PFI contract to outsource to Veolia ES Nottinghamshire Limited (“the 1st Additional Party") certain waste management services in order to enable the Appellant to discharge its statutory waste management obligations.

2. The contract itself did not actually come into existence until 26 June 2006.

3. The PFI contract in question was the largest and most complex contract the Appellant had ever entered into and the contract documents ran to several thousand pages.

4. The request for disclosure by PAIN was made under the provisions of the Environmental Information Regulations Statutory Instrument 2004 No 3391 ("EIR").

5. UK Coal Mining Ltd ("the 2nd Additional Party") owned property at former Rufford Colliery, Rufford, Nottinghamshire, upon which Veolia and the Council proposed to develop a facility to manage waste.

6. On 23 June 2006 UK Coal and Veolia entered into an Option for a Lease with the Council in respect of the Property.

7. The Information Commissioner (“the IC”) considered that it was reasonable to consider PAIN’s correspondence on 2 January 2008 as the Requestor’s latest request.

8. On 1 May 2008 the Appellant wrote to the Requestor with a Refusal Notice and withheld some information from the Contract stating that the EIR applied and relied on the exceptions in Regulation 13(1) (personal data) and Regulation 13(2)(a)(i). It also relied on the exception in Regulation 12(5) (e) (confidential commercial information).

9. On 10 June 2008 the Council disclosed redacted versions of the Contract to the complainant.

10. On 1 July 2008 the Requestor complained to the IC that the Appellant had not acted within the parameters of the decisions in *East Riding of Yorkshire* (FER0066052) and *East Sussex County Council* (FER0099394).

11. On 12 March 2009 the Appellant provided the IC with a full response to the complaint and confirmed that the main exception it had applied was that in Regulation 12(5) (e) with a small amount of information also being withheld under the Regulation 13(1) exception.

12. On 22 March 2009 the Appellant told the Requestor that the Secretary of State had called in the planning approval of the ERF and there was a due and proper process which the Council was duty bound to abide by, including a Public Inquiry.

13. On 24 April 2009 the Council confirmed to the Requestor that there had been an internal review of its decision to withhold part of the information in the Contract.

14. On 25 April 2009 - in a separate but related action heard before the High Court - the Requestor sought to access the full text of the Schedules 6A, 6B, 6C and 7 to Contract A. The 1st Additional Party sought to prevent disclosure by way of judicial review.

15. On 1 October 2009 Cranston J decided that, notwithstanding Veolia's contention that there would be a breach of commercial confidentiality, the complainant was entitled to inspect the Schedules in Contract A.

16. On 7 October 2009 the Council allowed the Requestor to inspect the full information in Schedules 6A, 6B, 6C and 7 of Contract A.

17. On 6 January 2010 the Appellant confirmed to the IC that it continued to rely on the exception contained in Regulation 12(5)(e) and that, while Schedules 6A, 6B, 6C and 7 had been disclosed to the Requestor, they had not been made public.

18. On 10 February 2010 the IC provided the Appellant with a complete preliminary view of his decision. On 28 April 2010 the Appellant made further representations to the IC. On 5 May 2010 the IC gave a further amended preliminary view to the Appellant.

19. On 9 June 2010 the Appellant informed the IC that it would release further information to the Requestor by the end of June 2010.

20. On 30 June 2010 the IC found that the Disputed Information engaged Regulation 12(5)(e) EIR but that the public interest in maintaining that exception did not outweigh the public interest in disclosure.

21. On 1 July 2010 the Appellant received written notification of the Decision Notice. On 28 July 2010 the Appellant appealed against the Decision Notice.

22. On 26 August 2010 the IC served a Response to the appeal. On 9 September 2010 the Tribunal made an Order of Joinder adding the 2nd Additional Party as an additional party to the Appeal. On 28 September 2010 both the 1st and 2nd Additional Parties served Further and Better Particulars.

23. On 29 September 2010 the Appellant indicated that it did not wish to advance any Further and Better Particulars.

24. On 14 October 2010 the IC served a Response and a Confidential Annexe to the Further and Better Particulars. On 20 October 2010 agreed directions were concluded between the Tribunal and the various parties to the appeal.

The Information Commissioner's Position

25. The IC maintained that the public interest in disclosure of the Disputed Information outweighed the public interest in maintaining the exception under Regulation 12 (5) (e) whether in relation to the Appellant's commercial interests or those of the 1st and 2nd Additional Parties.

26. The Appeal had been brought on the basis that disclosure of the Disputed Information would prejudice the commercial interests of the 2nd Additional Party although prior to receipt of the Notice of Appeal it had not been suggested by the Appellant that the Disputed Information might affect any third party other than the 1st Additional Party. At no point during the investigation by the IC did the Appellant make any reference to the second Additional Party's commercial interests and that had deprived the IC of the opportunity to consider the matters raised in this appeal as part of his original investigation.

27. The 2nd Additional Party was the freehold owner of the former Rufford Colliery site in Nottinghamshire. As part of the PFI agreement the second Additional Party had entered into an option for the Appellant to lease the site. The 1st Additional Party would then sublease the site from the Appellant to build and operate a waste management facility and an Energy Recovery Facility (ERF) – more commonly known as an incinerator – on that site. The IC understood that the planning application to develop the

site had been "called in" by the Secretary of State and was subject to planning enquiry.

28. The Disputed Information consisted of the Contractor Option Headlease (ERF), the License to Sublet (ERF), the License to Alter (ERF), the ERF Underlease, the Red-lined Plan 1 for the ERF Site and the Orange Shaded Service Road Plan for the ERF site (in the Schedule 8 Annexures to Contract B).

29. The Environmental Information Regulations were enacted to implement EU Directive 2003/4/EC. The Regulations – because they were enacted to implement an EU Directive – needed to be read so far as possible in accordance with EU law. Article 4 (2) of the Directive states that any exceptions to the right to receive environmental information were to be construed narrowly (*OfCom v Information Commissioner and T-Mobile (UK) Ltd EA/2006/0078)*.

30. Regulation 2 (1) EIR defines "environmental information" as having the same meaning as in Article 2 (1) of the Directive, namely: "…. Any information in written…. form on –

(a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and Marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

(b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

(c) *measures (including administrative measures) such as policies, legislation, plans, programs, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;….".*

31. Under the provisions of the EIR the Appellant had a duty to make environmental information available on request by virtue of Regulation 5 (1).

32. Regulation 12 EIR provided an exception where – under subparagraph 5 (e) – a public authority could refused to disclose information "*to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".*

33. The IC had concluded that the requested information was environmental information and therefore subject to EIR. He expressly drew on and adopted the reasoning in the *East Sussex* and *East Riding* cases which also involved information requests concerning PFI contracts for large waste management schemes. His conclusion in respect of this particular request was that the public interest favoured disclosure. The exceptions to this were information concerning specific systems and technical matters, the costs and profits of contractors, including relevant financial models, the clawback of costs, or technical matters. The IC had provided a confidential schedule setting out his specific decision on each contractual provision in relation to which the Appellant refused disclosure. In relation to the Disputed Information the IC concluded that Regulation 12 (5) (e) was engaged but the public interest in disclosure outweighed the public interest in maintaining the exception.

34. It was only when the 2nd Additional Party – in its later submissions – challenged whether the EIR Regulations were engaged in this appeal rather than exemptions under the Freedom of Information Act that the IC considered this matter.

35. The IC's submitted that the Disputed Information was clearly environmental information. It formed part of the requested information – Contract A and Contract B and the associated documentation – which ran to several thousand pages.

36. The IC did not consider it "*appropriate minutely to dissect this material on an item by item basis to establish what might or might not be environmental information*" but rather looked at it as a whole and adopted the approach consistent with the Tribunal in *Cabinet Office v Information Commissioner EA/2010/0027*.

37. The IC took the view that the waste management outsourcing scheme would potentially have a significant effect on the state of a number of the elements identified under Regulation 2 (1) (a) – particularly air, water, soil and land – and was likely to generate factors such as energy, noise, waste, emissions, or discharges for the purposes of Regulation 2 (1)(b).

38. The two PFI contracts were measures that affected such elements and the Disputed Information formed part of the schedule to one of those contracts. The IC rejected the 2nd Additional Party's assertion that the Disputed Information was commercial in nature or was a "Property Transaction" on the basis that the information could be commercial *and* environmental information provided that the definition in Regulation 2 (1) was satisfied, as it was in this case.

39. Even if the Disputed Information was viewed in isolation it was still environmental information because what constituted such information had to be construed broadly. Leases and sub-leases typically contained covenants and other obligations governing the use that the tenant or sub tenant could make of the land leased to it and the activities that could be performed on it. Such provisions plainly constituted "measures" likely to affect the elements under Regulation 2 (1) (a). The lease, licenses and sub-release that formed the Disputed Information provided the legal underpinning for the occupation of the site which allowed the scheme to build and operate a waste management facility to come into being. That had a potential effect on the elements listed under Regulation 2 (1) (a) and extended to such things as leases and the like.

40. If the Disputed Information fell to be considered by reference to FOIA then the conclusion in relation to the public interest in maintaining the corresponding exemption in section 43 FOIA would not be materially different to the one the IC reached in relation to the Regulations.

41. Although the point had not been raised until late in the appeal the IC accepted that the 2nd Additional Party's commercial interests in the Disputed Information did engage Regulation 12 (5) (e).

42. In terms of factors favouring disclosure the Appellants PFI waste management project was likely to have a significant potential effect on both the local environment and the local population for a number of years creating a strong public interest for the population being this fully informed as possible about the scheme and how it operated, including the individual elements of it. That was particularly so when one of the contracting parties was a public authority which intended to discharge one of its key statutory functions through PFI arrangements for a number of years. The IC rejected the suggestion by the 2nd Additional Party that the Disputed Information was just a "property transaction which did not require public scrutiny".

43. In respect of the public interest in accountability, the public was entitled to be informed about the long-term obligations entered into by the Appellant both in terms of rent to be paid and obligations taken on in terms of site maintenance and making good at the end of the lease. There was a strong public interest in the public being fully informed about the obligations that a public authority succeeded in placing on its contractual partners in relation to a significant parcel of land.

44. That information allowed the public to assess – among other things – the viability of the proposed method waste management, is value for money and the burdens that were being placed on the public authority and, consequentially, the public so that the Appellant could be held to account on those matters.

45. Those factors were particularly relevant when the Disputed Information form part of the contract which was on an unprecedented scale for the Appellant and given the public interest in the avoidance of landfill and the adoption of environmentally friendly waste management.

46. The IC noted that, given the alleged importance of the commercial interests of the 2nd Additional Party it was surprising that neither the Appellant nor the 1st Additional Party had raised those matters during the investigation. This suggested the impact of disclosure on the 2nd Additional Party was not considered to be a particularly pressing concern.

47. The 2nd Additional Party's was resisting disclosure on the basis that it would reveal its pricing and financial information and give a direct insight into the methodology and structures used by the 2nd Additional Party in respect of its deals or its business methodologies, detailed terms, strategies and arrangements. In a witness statement filed in the appeal it was suggested that the Disputed Information was comparable to a "trade secret".

48. From the IC's point of view the Disputed Information consisted largely of what appeared to be fairly standard provisions of commercial land leases. Those provisions were unlikely to tell a competitor anything that it did not already know or could not already have guessed.

49. To the extent that the Disputed Information might reveal genuinely commercially sensitive information such information was likely to be specific to a particular site and project and unlikely to be able to assist

significantly competitors or other parties with whom the Appellant or either of the Additional Parties might seek to contract

50. The IC did not consider that disclosure of the Disputed Information would deter other companies from dealing with public authorities for fear that such commercially sensitive information would be disclosed.

The 2nd Additional Party's Position

51. Regulation 12 (5) (e) EIR permitted public authorities to refuse to disclose information to the extent that disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality was provided by law to protect legitimate commercial interests. The Disputed Information related to the commercial activities of UK Coal as a large commercial landowner.

52. The IC had found in the original decision notice of 30 June 2010 that the information being withheld in connection with the Contract was commercial in nature. The IC had further found that some of the withheld information had the necessary "quality" of confidence and was satisfied that some of the information did have the necessary quality of confidence because it was not trivial and not available from other sources. The 2nd Additional Party's assertion was that the Disputed Information had such a quality of confidence in respect of UK Coal's commercial interests as it was a commercial contract, was not trivial and contains information which was not available by other means.

53. Because the Disputed Information contained terms which were imparted in circumstances which created an obligation of confidence – arm's-length commercial negotiations – that duty of confidentiality existed in the Disputed Information.

54. Because UK Coal was a large landowner (holding around 43,500 acres of land in the United Kingdom) it frequently entered into commercial arrangements with both public and private sector entities as part of the management of its estate. UK coal had an active market position in parts of its loan portfolio which were all would be the subject of commercial transactions potentially for energy from waste facilities. This was a specialist area of operation and, because of the nature of the transactions in the "energy from waste" sector, there were a limited number of landowners able to participate in this market. As a result the commercial terms that operated in the specialist sector were particularly sensitive.

55. The option agreement in this part of the Disputed Information was entered into in June 2006 but time did not reduce the commercial sensitivity of it.

56. The 2nd Additional Party would be put at a commercial disadvantage if the Disputed Information had to be disclosed because the terms of its agreements and options – and methods of business – would become available to competitors and would damage its ability to develop a commercial advantage because the direct insight into the methodology and structures used would permit competitors unfettered access. This would damage the 2nd Additional Parties legitimate commercial interests.

57. If third parties including competitors became aware of the pricing, terms of the option and other financial information in the Disputed Information that could detrimentally affect the negotiating position of the 2nd Additional Party and would significantly compromise its ability to secure a commercial advantage in the marketplace. It was entitled to expect that the Disputed Information should be kept confidential in order to protect a legitimate economic interest and to prevent it suffering commercial prejudice.

58. The disclosure of the Disputed Information would not significantly add to the public awareness about how environmental legislation was implemented - and any impact on the environment - because the Disputed Information was not directly related to an environmental issue. It dealt, instead, with the commercial management of the land in question. As such, disclosure of the Disputed Information would not assist public debate.

59. In any event the 2nd Additional Party maintained that the Disputed Information was not "*environmental information*" within the meaning of Regulation 2 EIR.

60. The waste management agreements had been disclosed pursuant to EIR. The Disputed Information was simply a commercial contract dealing with an option to lease and a sub-lease and was not sufficiently connected to the environment as to fall within Regulation 2 EIR. Disclosure would not add materially to the debate on environmental matters.

61. The nature of the Disputed Information did not assist in promoting accountability and transparency in respect of public sector decisions or in relation to the spending of public money. The Disputed Information was property transaction which did not require public scrutiny. That point was

supported by the fact that the detail of such land transactions did not necessarily have to be a matter of public record at the Land Registry.

62. The Disputed Information did not deal with issues like health and safety or other public health issues and did not directly affect any individual or group of individuals. On that basis the 2nd Additional Party maintained that the factors in favour of the disclosure of information set out in the IC's Awareness Guidance No 3 were not met.

63. The public interest could be damaged more generally if landowners lost confidence in contracting with public authorities on the basis that the private sector could not have confidence in the fact that the commercial details of deals reached would remain confidential. That would have a detrimental effect on commercial relationships and could reduce the likelihood of the private sector contracting with public authorities and potentially reducing competition and opportunities to obtain value for money.

The questions for the Tribunal

64. The issues raised by the Appellant's Notice of Appeal and the 2nd Additional Party's further and better particulars were:

(1) Whether the Disputed Information was environmental information under the EIR regime?

(2) Whether the IC had correctly concluded that the public interest in disclosure outweighed the public interest in maintaining the exception under Regulation 12 (5) (e)?

(3) If the Disputed Information was not environmental information, then was it protected from disclosure under the provisions of section 43 of FOIA (falling within the qualified exemption of being information relating to commercial interests or trade secrets).

Evidence

65. The Tribunal had the advantage of considering the totality and context of the information forming the subject of the Disputed Information as it received the detail of the Disputed Information in a closed form together with closed submissions from the 2nd Additional Party.

Conclusion and remedy

66. The submissions from both of the active parties in this appeal have been set out in some detail both for the record and because the points made on behalf of both the IC and the 2nd Additional Party were both helpful and instructive in assisting the Tribunal to reach its decision.

67. The Tribunal accepts that – from the point of view of the IC - the shape of this appeal did not become fully apparent until the 2nd Additional Party filed its further and better particulars and submissions in the closing stages of this appeal process.

68. The issues being raised by then were more detailed and specific than anything that had been considered at the initial stage when the IC issued his decision notice.

69. In Additional Directions ahead of the paper hearing the Tribunal invited all parties to consider the effect of the Court of Appeal judgement in the judicial review proceedings between the Appellant and the 1st Additional Party (*Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Others [2010] EWCA Civ 1214)*.

70. The IC's position is that the Court of Appeal decision had no impact on this particular appeal for three specific reasons:

    (1) The information in the present appeal was different from that in issue in the Judicial Review proceedings, that different Schedules of the contracts were involved and that the IC had concluded (within the EIR analysis) that these should not be disclosed.

(2) The Judicial Review proceedings in that case were limited to the issue of access to contractual documents by way of a request under the Audit Commission Act 1998. The Court of Appeal's decision turned on the particular interpretation of section 15 (1) of that Act (whether viewed on its own or in the light of Veolia's ECHR rights in respect of Article 8). The present appeal related to a request under an entirely different statutory regime, namely the EIR.

(3) The Court of Appeal's view that Veolia's ECHR rights required a proportionality analysis to be applied to the question of whether to disclose confidential information was the same as the balancing exercise to be used in assessing the public interest both for and against maintaining EIR exceptions. The Court of Appeal had said nothing to alter the way in which the public interest balance should be assessed under the EIR.

71. The Tribunal considered in detail Paragraphs 117 – 121 of that Court of Appeal decision and the judgement of Rix LJ :

"117. The ECHR. Article 8 of the ECHR provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

118. In Varec SA v. Belgium [2008] 2 CMLR 24*, the European Court of Justice, in a judgment concerning the protection of confidential information in the context of public procurement under Directive 93/36/EEC (the forerunner of the 2004 Directive), cited jurisprudence of the European Court of Human Rights in support of the proposition that the use of confidential information in professional or commercial activities of even legal persons could be protected as an element of their "private life", subject to a question of justification: see at [48] – [50]. One of those authorities is* Niemietz v. Germany (1993) 16 EHRR 97*, which might suggest that article 8 is a proper home for the issue of the legitimacy of state interference in access to private information, albeit its particular facts are more narrowly concerned with a state prosecutor's search of a lawyer's office.*

119. Article 1 of the first protocol provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

120. The concept of "possessions" is broad and covers a wide range of things which have significant economic value. It extends to business goodwill and to various forms of intellectual property, including copyright, although there is apparently no case which expressly covers confidential information: see for instance Regina (Nickolds) v. Security Industry Authority [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067 at [70]*, citing Strasbourg authority for the concept to include shares, patents, planning permissions, leases and licences, social security and pensions, and choses in action, and at [71] touching on goodwill, the Strasbourg jurisprudence concerning which was discussed in* R (Malik) v. Waltham Forest NHS Primary Care Trust [2007] EWCA Civ 265, [2007] 1 WLR 2092*.*

*121. Although the parties were unable to cite any Strasbourg authority which expressly covers confidential information as a form of "possessions", no case was cited against that proposition. I can see no reason, in the light of the Strasbourg jurisprudence which does exist, why valuable commercial confidential information, such as the evidence in this case demonstrates is in question here, particularly with respect to the second disputed documents, cannot fall within the concept of "possessions" [*the emphasis in that of the Tribunal*]. Of course, its protection is subject to the question of justification under the second paragraph of article 1 of the first protocol.*

122. In the circumstances, it is unnecessary to take a view about the engagement of article 8. Suffice it to say that none of the parties before us disputes that one or other of the two ECHR articles in question is potentially engaged; that unrestricted disclosure of the disputed documents amounts to an interference which would have to be justified; and that section 15(1) can be read down so as to exclude confidential information protected by the ECHR (as to which see further under para 159 below).

72. The Tribunal takes the view – reflecting Rix LJ's comments above – that valuable commercial confidential information *can* clearly fall within the concept of "possessions" which are the property of the 2nd Additional Party.

73. If the Disputed Information is a "possession", then the 2nd Additional Party has Article 8 (1) ECHR rights which the Tribunal believes are clearly engaged in this appeal subject to the provisions of Article 8 (2).

74. In that event, these later provisions result in the same kind of proportionality balancing exercise that is already inbuilt with the exceptions and exemptions within FOIA and EIR.

75. Tribunal has also considered the decision of the Fifth Chamber of the European Court in *Glawischnig* (at Paragraphs 24 and 25) where it found:

> *"24. The Community legislature's intention was to make the concept of information relating to the environment defined in Article 2 (a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities (see* Mecklenburg, Paragraphs 19 and 20*).*
>
> *25. Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2 (a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision."*

76. In other words, simply because information has a slight or tangential association with "*the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and Marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements,*" that mere or tangential association with not necessarily bring it within the scope of EIR.

77. The reality is that there is core financial information within the Disputed Information that the Tribunal recognises – having seen all of the closed material – is genuinely commercial and confidential information.

78. It is information which:

(a) has no bearing on the environment (as described in the paragraph above) and

(b) is particular to that contract in terms of pricing and other factors.

79. The litmus test is that this information – and the key financial indicators within it – can be adjusted over a broad commercial range of negotiation in terms of the confidential information without having any effect on environmental issues. This brings it firmly within the FOIA regime, outside the EIR regime and is of a nature where the public interest in maintaining the

exemption in section 43 is fully supported by all the 2nd Additional Party's arguments set out at Paragraphs 52 – 63 above.

80. The Tribunal recognises that – even then – issues of proportionality still remain. The Contractual Documents in question could be supplied to the original Requestor with the confidential commercial and financial information redacted.

81. The appeal by the 2nd Additional Party succeeds insofar as the operative statutory regime is section 43 FOIA and the Disputed Information relates only to confidential commercial information, not the entirety of the contracts. The Tribunal has redacted the confidential commercial information in a confidential annex that has been sent to the parties and ordered disclosure of all the disputed information not highlighted in yellow by the Tribunal.

82. Our decision is unanimous.

83. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) we are now constituted as a First-tier Tribunal. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date the Tribunal's decision was sent. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith
Tribunal Judge
28 February 2011

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0142**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FER0206320
Dated: 30 June 2010

Appellant:	**Nottinghamshire County Council**
Respondent:	**Information Commissioner**
1st Additional Party:	**Veolia E S Nottinghamshire Limited**
2nd Additional Party:	**UK Coal Mining Ltd**

Considered on the papers at 68 Lombard Street, London EC

Date of hearing: 24 November 2010

Date of decision: 29 December 2010

Before

Robin Callender Smith

Judge

and

Darryl Stephenson
Alasdair Warwood

Tribunal Members

Representation:

For the Appellant: Susan Bearman, Solicitor for Nottinghamshire County Council

For the Respondent: James Cornwell, Counsel instructed by the Information Commissioner

For the 1st Additional Party: Veolia ES Nottinghamshire Limited

For the 2nd Additional Party: Nabarro LLP Solicitors

IN THE FIRST-TIER TRIBUNAL Case No. EA/2010/0142
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

FOIA

Qualified exemptions

- Commercial interests/trade secrets s.43

Environmental Information Regulations 2004

Exceptions, Regs 12 (4) and (5)

- Confidential information (5) (e)

Cases:

Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Others [2010] EWCA Civ 1214; Mecklenburg v Kreis Penneverg-Der Ladrat C-321/926 [1998] ECR I-3809 and *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen C-316/01 [2003] ECR I-05995.*

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0142**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and finds that the relevant statutory regime is the Freedom of Information Act 2000 and, in particular, section 43 relating to commercial interests and trade secrets.

The Tribunal substitutes the following decision notice in place of the decision notice dated 30 June 2010 and requires the 2nd Additional Party (UK Coal Mining Ltd) and the Information Commissioner to agree between them the appropriate specific redactions.

SUBSTITUTED DECISION NOTICE

Dated 29 December 2010

Public authority:	Nottinghamshire County Council
Address of Public authority:	County Hall, West Bridgford, Nottingham NG2 7QP
Name of Complainant:	Mr Slomo Dowen and People Against Incineration (PAIN)

The Substituted Decision

For the reasons set out in detail in the Tribunal's determination between Paragraphs 71 and 81 (below), the Tribunal allows the appeal and substitutes its decision in place of the decision notice dated 30 June 2010.

Action Required

The appeal by the 2nd Additional Party succeeds insofar as the operative statutory regime is section 43 FOIA and the Disputed Information relates only to confidential financial data, not the entirety of the contracts. It is for the 2nd Additional Party to agree suitable and appropriate redactions with the Information Commissioner to achieve this.

Robin Callender Smith
Judge

29 December 2010

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

REASONS FOR DECISION

Introduction

1. On 29 April 2006 the Requestor – Mr Slomo Dowen and People Against Incineration (PAIN) - asked Nottinghamshire County Council ("the Appellant") for copies of a proposed PFI contract to outsource to Veolia ES Nottinghamshire Limited ("the 1st Additional Party") certain waste management services in order to enable the Appellant to discharge its statutory waste management obligations.

2. The contract itself did not actually come into existence until 26 June 2006.

3. The PFI contract in question was the largest and most complex contract the Appellant had ever entered into and the contract documents ran to several thousand pages.

4. The request for disclosure by PAIN was made under the provisions of the Environmental Information Regulations Statutory Instrument 2004 No 3391 ("EIR").

5. UK Coal Mining Ltd ("the 2nd Additional Party") owned property at former Rufford Colliery, Rufford, Nottinghamshire, upon which Veolia and the Council proposed to develop a facility to manage waste.

6. On 23 June 2006 UK Coal and Veolia entered into an Option for a Lease with the Council in respect of the Property.

7. The Information Commissioner ("the IC") considered that it was reasonable to consider PAIN's correspondence on 2 January 2008 as the Requestor's latest request.

8. On 1 May 2008 the Appellant wrote to the Requestor with a Refusal Notice and withheld some information from the Contract stating that the EIR applied and relied on the exceptions in Regulation 13(1) (personal data) and Regulation 13(2)(a)(i). It also relied on the exception in Regulation 12(5) (e) (confidential commercial information).

9. On 10 June 2008 the Council disclosed redacted versions of the Contract to the complainant.

10. On 1 July 2008 the Requestor complained to the IC that the Appellant had not acted within the parameters of the decisions in *East Riding of Yorkshire* (FER0066052) and *East Sussex County Council* (FER0099394).

11. On 12 March 2009 the Appellant provided the IC with a full response to the complaint and confirmed that the main exception it had applied was that in Regulation 12(5) (e) with a small amount of information also being withheld under the Regulation 13(1) exception.

12. On 22 March 2009 the Appellant told the Requestor that the Secretary of State had called in the planning approval of the ERF and there was a due and proper process which the Council was duty bound to abide by, including a Public Inquiry.

13. On 24 April 2009 the Council confirmed to the Requestor that there had been an internal review of its decision to withhold part of the information in the Contract.

14. On 25 April 2009 - in a separate but related action heard before the High Court - the Requestor sought to access the full text of the Schedules 6A, 6B, 6C and 7 to Contract A. The 1st Additional Party sought to prevent disclosure by way of judicial review.

15. On 1 October 2009 Cranston J decided that, notwithstanding Veolia's contention that there would be a breach of commercial confidentiality, the complainant was entitled to inspect the Schedules in Contract A.

16. On 7 October 2009 the Council allowed the Requestor to inspect the full information in Schedules 6A, 6B, 6C and 7 of Contract A.

17. On 6 January 2010 the Appellant confirmed to the IC that it continued to rely on the exception contained in Regulation 12(5)(e) and that, while Schedules 6A, 6B, 6C and 7 had been disclosed to the Requestor, they had not been made public.

18. On 10 February 2010 the IC provided the Appellant with a complete preliminary view of his decision. On 28 April 2010 the Appellant made further representations to the IC. On 5 May 2010 the IC gave a further amended preliminary view to the Appellant.

19. On 9 June 2010 the Appellant informed the IC that it would release further information to the Requestor by the end of June 2010.

20. On 30 June 2010 the IC found that the Disputed Information engaged Regulation 12(5)(e) EIR but that the public interest in maintaining that exception did not outweigh the public interest in disclosure.

21. On 1 July 2010 the Appellant received written notification of the Decision Notice. On 28 July 2010 the Appellant appealed against the Decision Notice.

22. On 26 August 2010 the IC served a Response to the appeal. On 9 September 2010 the Tribunal made an Order of Joinder adding the 2nd Additional Party as an additional party to the Appeal. On 28 September 2010 both the 1st and 2nd Additional Parties served Further and Better Particulars.

23. On 29 September 2010 the Appellant indicated that it did not wish to advance any Further and Better Particulars.

24. On 14 October 2010 the IC served a Response and a Confidential Annexe to the Further and Better Particulars. On 20 October 2010 agreed directions were concluded between the Tribunal and the various parties to the appeal.

The Information Commissioner's Position

25. The IC maintained that the public interest in disclosure of the Disputed Information outweighed the public interest in maintaining the exception under Regulation 12 (5) (e) whether in relation to the Appellant's commercial interests or those of the 1st and 2nd Additional Parties.

26. The Appeal had been brought on the basis that disclosure of the Disputed Information would prejudice the commercial interests of the 2nd Additional Party although prior to receipt of the Notice of Appeal it had not been suggested by the Appellant that the Disputed Information might affect any third party other than the 1st Additional Party. At no point during the investigation by the IC did the Appellant make any reference to the second Additional Party's commercial interests and that had deprived the IC of the opportunity to consider the matters raised in this appeal as part of his original investigation.

27. The 2nd Additional Party was the freehold owner of the former Rufford Colliery site in Nottinghamshire. As part of the PFI agreement the second Additional Party had entered into an option for the Appellant to lease the site. The 1st Additional Party would then sublease the site from the Appellant to build and operate a waste management facility and an Energy Recovery Facility (ERF) – more commonly known as an incinerator – on that site. The IC understood that the planning application to develop the site had been "called in" by the Secretary of State and was subject to planning enquiry.

28. The Disputed Information consisted of the Contractor Option Headlease (ERF), the License to Sublet (ERF), the License to Alter (ERF), the ERF Underlease, the Red-lined Plan 1 for the ERF Site and the Orange Shaded Service Road Plan for the ERF site (in the Schedule 8 Annexures to Contract B).

29. The Environmental Information Regulations were enacted to implement EU Directive 2003/4/EC. The Regulations – because they were enacted to implement an EU Directive – needed to be read so far as possible in accordance with EU law. Article 4 (2) of the Directive states that any exceptions to the right to receive environmental information were to be construed narrowly (*OfCom v Information Commissioner and T-Mobile (UK) Ltd EA/2006/0078)*.

30. Regulation 2 (1) EIR defines "environmental information" as having the same meaning as in Article 2 (1) of the Directive, namely: "…. Any information in written…. form on –

(a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and Marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

(b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

(c) *measures (including administrative measures) such as policies, legislation, plans, programs, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;….".*

31. Under the provisions of the EIR the Appellant had a duty to make environmental information available on request by virtue of Regulation 5 (1).

32. Regulation 12 EIR provided an exception where – under subparagraph 5 (e) – a public authority could refused to disclose information "*to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".*

33. The IC had concluded that the requested information was environmental information and therefore subject to EIR. He expressly drew on and adopted the reasoning in the *East Sussex* and *East Riding* cases which also involved information requests concerning PFI contracts for large waste management schemes. His conclusion in respect of this particular request was that the public interest favoured disclosure. The exceptions to this were information concerning specific systems and technical matters, the costs and profits of contractors, including relevant financial models, the clawback of costs, or technical matters. The IC had provided a confidential schedule setting out his specific decision on each contractual provision in relation to which the Appellant refused disclosure. In relation to the Disputed Information the IC concluded that Regulation 12 (5) (e) was engaged but the public interest in disclosure outweighed the public interest in maintaining the exception.

34. It was only when the 2nd Additional Party – in its later submissions – challenged whether the EIR Regulations were engaged in this appeal rather than exemptions under the Freedom of Information Act that the IC considered this matter.

35. The IC's submitted that the Disputed Information was clearly environmental information. It formed part of the requested information – Contract A and Contract B and the associated documentation – which ran to several thousand pages.

36. The IC did not consider it "*appropriate minutely to dissect this material on an item by item basis to establish what might or might not be environmental information*" but rather looked at it as a whole and adopted the approach consistent with the Tribunal in *Cabinet Office v Information Commissioner EA/2010/0027*.

37. The IC took the view that the waste management outsourcing scheme would potentially have a significant effect on the state of a number of the elements identified under Regulation 2 (1) (a) – particularly air, water, soil and land – and was likely to generate factors such as energy, noise, waste, emissions, or discharges for the purposes of Regulation 2 (1)(b).

38. The two PFI contracts were measures that affected such elements and the Disputed Information formed part of the schedule to one of those contracts. The IC rejected the 2nd Additional Party's assertion that the Disputed Information was commercial in nature or was a "Property Transaction" on the basis that the information could be commercial *and* environmental information provided that the definition in Regulation 2 (1) was satisfied, as it was in this case.

39. Even if the Disputed Information was viewed in isolation it was still environmental information because what constituted such information had to be construed broadly. Leases and sub-leases typically contained covenants and other obligations governing the use that the tenant or sub tenant could make of the land leased to it and the activities that could be performed on it. Such provisions plainly constituted "measures" likely to affect the elements under Regulation 2 (1) (a). The lease, licenses and sub-release that formed the Disputed Information provided the legal underpinning for the occupation of the site which allowed the scheme to build and operate a waste management facility to come into being. That had a potential effect on the elements listed under Regulation 2 (1) (a) and extended to such things as leases and the like.

40. If the Disputed Information fell to be considered by reference to FOIA then the conclusion in relation to the public interest in maintaining the corresponding exemption in section 43 FOIA would not be materially different to the one the IC reached in relation to the Regulations.

41. Although the point had not been raised until late in the appeal the IC accepted that the 2nd Additional Party's commercial interests in the Disputed Information did engage Regulation 12 (5) (e).

42. In terms of factors favouring disclosure the Appellants PFI waste management project was likely to have a significant potential effect on both the local environment and the local population for a number of years creating a strong public interest for the population being this fully informed as possible about the scheme and how it operated, including the individual elements of it. That was particularly so when one of the contracting parties was a public authority which intended to discharge one of its key statutory functions through PFI arrangements for a number of years. The IC rejected the suggestion by the 2nd Additional Party that the Disputed Information was just a "property transaction which did not require public scrutiny".

43. In respect of the public interest in accountability, the public was entitled to be informed about the long-term obligations entered into by the Appellant both in terms of rent to be paid and obligations taken on in terms of site maintenance and making good at the end of the lease. There was a strong public interest in the public being fully informed about the obligations that a public authority succeeded in placing on its contractual partners in relation to a significant parcel of land.

44. That information allowed the public to assess – among other things – the viability of the proposed method waste management, is value for money and the burdens that were being placed on the public authority and, consequentially, the public so that the Appellant could be held to account on those matters.

45. Those factors were particularly relevant when the Disputed Information form part of the contract which was on an unprecedented scale for the Appellant and given the public interest in the avoidance of landfill and the adoption of environmentally friendly waste management.

46. The IC noted that, given the alleged importance of the commercial interests of the 2nd Additional Party it was surprising that neither the Appellant nor the 1st Additional Party had raised those matters during the investigation. This suggested the impact of disclosure on the 2nd Additional Party was not considered to be a particularly pressing concern.

47. The 2nd Additional Party's was resisting disclosure on the basis that it would reveal its pricing and financial information and give a direct insight into the methodology and structures used by the 2nd Additional Party in respect of its deals or its business methodologies, detailed terms, strategies and arrangements. In a witness statement filed in the appeal it was suggested that the Disputed Information was comparable to a "trade secret".

48. From the IC's point of view the Disputed Information consisted largely of what appeared to be fairly standard provisions of commercial land leases. Those provisions were unlikely to tell a competitor anything that it did not already know or could not already have guessed.

49. To the extent that the Disputed Information might reveal genuinely commercially sensitive information such information was likely to be specific to a particular site and project and unlikely to be able to assist significantly competitors or other parties with whom the Appellant or either of the Additional Parties might seek to contract

50. The IC did not consider that disclosure of the Disputed Information would deter other companies from dealing with public authorities for fear that such commercially sensitive information would be disclosed.

The 2nd Additional Party's Position

51. Regulation 12 (5) (e) EIR permitted public authorities to refuse to disclose information to the extent that disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality was provided by law to protect legitimate commercial interests. The Disputed Information related to the commercial activities of UK Coal as a large commercial landowner.

52. The IC had found in the original decision notice of 30 June 2010 that the information being withheld in connection with the Contract was commercial in nature. The IC had further found that some of the withheld information had the necessary "quality" of confidence and was satisfied that some of the information did have the necessary quality of confidence because it was not trivial and not available from other sources. The 2nd Additional Party's assertion was that the Disputed Information had such a quality of confidence in respect of UK Coal's commercial interests as it was a commercial contract, was not trivial and contains information which was not available by other means.

53. Because the Disputed Information contained terms which were imparted in circumstances which created an obligation of confidence – arm's-length commercial negotiations – that duty of confidentiality existed in the Disputed Information.

54. Because UK Coal was a large landowner (holding around 43,500 acres of land in the United Kingdom) it frequently entered into commercial arrangements with both public and private sector entities as part of the management of its estate. UK coal had an active market position in parts of its loan portfolio which were all would be the subject of commercial transactions potentially for energy from waste facilities. This was a specialist area of operation and, because of the nature of the transactions in the "energy from waste" sector, there were a limited number of

landowners able to participate in this market. As a result the commercial terms that operated in the specialist sector were particularly sensitive.

55. The option agreement in this part of the Disputed Information was entered into in June 2006 but time did not reduce the commercial sensitivity of it.

56. The 2nd Additional Party would be put at a commercial disadvantage if the Disputed Information had to be disclosed because the terms of its agreements and options – and methods of business – would become available to competitors and would damage its ability to develop a commercial advantage because the direct insight into the methodology and structures used would permit competitors unfettered access. This would damage the 2nd Additional Parties legitimate commercial interests.

57. If third parties including competitors became aware of the pricing, terms of the option and other financial information in the Disputed Information that could detrimentally affect the negotiating position of the 2nd Additional Party and would significantly compromise its ability to secure a commercial advantage in the marketplace. It was entitled to expect that the Disputed Information should be kept confidential in order to protect a legitimate economic interest and to prevent it suffering commercial prejudice.

58. The disclosure of the Disputed Information would not significantly add to the public awareness about how environmental legislation was implemented - and any impact on the environment - because the Disputed Information was not directly related to an environmental issue. It dealt, instead, with the commercial management of the land in question. As such, disclosure of the Disputed Information would not assist public debate.

59. In any event the 2nd Additional Party maintained that the Disputed Information was not "*environmental information*" within the meaning of Regulation 2 EIR.

60. The waste management agreements had been disclosed pursuant to EIR. The Disputed Information was simply a commercial contract dealing with an option to lease and a sub-lease and was not sufficiently connected to the environment as to fall within Regulation 2 EIR. Disclosure would not add materially to the debate on environmental matters.

61. The nature of the Disputed Information did not assist in promoting accountability and transparency in respect of public sector decisions or in relation to the spending of public money. The Disputed Information was property transaction which did not require public scrutiny. That point was supported by the fact that the detail of such land transactions did not necessarily have to be a matter of public record at the Land Registry.

62. The Disputed Information did not deal with issues like health and safety or other public health issues and did not directly affect any individual or group of individuals. On that basis the 2nd Additional Party maintained that the factors in favour of the disclosure of information set out in the IC's Awareness Guidance No 3 were not met.

63. The public interest could be damaged more generally if landowners lost confidence in contracting with public authorities on the basis that the private sector could not have confidence in the fact that the commercial details of deals reached would remain confidential. That would have a detrimental effect on commercial relationships and could reduce the likelihood of the private sector contracting with public authorities and potentially reducing competition and opportunities to obtain value for money.

The questions for the Tribunal

64. The issues raised by the Appellant's Notice of Appeal and the 2nd Additional Party's further and better particulars were:

(1) Whether the Disputed Information was environmental information under the EIR regime?

(2) Whether the IC had correctly concluded that the public interest in disclosure outweighed the public interest in maintaining the exception under Regulation 12 (5) (e)?

(3) If the Disputed Information was not environmental information, then was it protected from disclosure under the provisions of section 43 of FOIA (falling within the qualified exemption of being information relating to commercial interests or trade secrets).

Evidence

65. The Tribunal had the advantage of considering the totality and context of the information forming the subject of the Disputed Information as it received the detail of the Disputed Information in a closed form together with closed submissions from the 2nd Additional Party.

Conclusion and remedy

66. The submissions from both of the active parties in this appeal have been set out in some detail both for the record and because the points made on behalf of both the IC and the 2nd Additional Party were both helpful and instructive in assisting the Tribunal to reach its decision.

67. The Tribunal accepts that – from the point of view of the IC – the shape of this appeal did not become fully apparent until the 2nd Additional Party filed its further and better particulars and submissions in the closing stages of this appeal process.

68. The issues being raised by then were more detailed and specific than anything that had been considered at the initial stage when the IC issued his decision notice.

69. In Additional Directions ahead of the paper hearing the Tribunal invited all parties to consider the effect of the Court of Appeal judgement in the judicial review proceedings between the Appellant and the 1st Additional Party (*Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Others [2010] EWCA Civ 1214)*.

70. The IC's position is that the Court of Appeal decision had no impact on this particular appeal for three specific reasons:

(1) The information in the present appeal was different from that in issue in the Judicial Review proceedings, that different Schedules of the contracts were involved and that the IC had concluded (within the EIR analysis) that these should not be disclosed.

(2) The Judicial Review proceedings in that case were limited to the issue of access to contractual documents by way of a request under the Audit Commission Act 1998. The Court of Appeal's decision turned on the particular interpretation of section 15 (1) of that Act (whether viewed on its own or in the light of Veolia's ECHR rights in respect of Article 8). The present appeal related to a request under an entirely different statutory regime, namely the EIR.

(3) The Court of Appeal's view that Veolia's ECHR rights required a proportionality analysis to be applied to the question of whether to disclose confidential information was the same as the balancing exercise to be used in assessing the public interest both for and against maintaining EIR exceptions. The Court of Appeal had said nothing to alter the way in which the public interest balance should be assessed under the EIR.

71. The Tribunal considered in detail Paragraphs 117 – 121 of that Court of Appeal decision and the judgement of Rix LJ :

"117. The ECHR. Article 8 of the ECHR provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

118. In Varec SA v. Belgium [2008] 2 CMLR 24*, the European Court of Justice, in a judgment concerning the protection of confidential information in the context of public procurement under Directive 93/36/EEC (the forerunner of the 2004 Directive), cited jurisprudence of the European Court of Human Rights in support of the proposition that the use of confidential information in professional or commercial activities of even legal persons could be protected as an element of their "private life", subject to a question of justification: see at [48] – [50]. One of those authorities is* Niemietz v. Germany (1993) 16 EHRR 97*, which might suggest that article 8 is a proper home for the issue of the legitimacy of state interference in access to private information, albeit its particular facts are more narrowly concerned with a state prosecutor's search of a lawyer's office.*

119. Article 1 of the first protocol provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

120. The concept of "possessions" is broad and covers a wide range of things which have significant economic value. It extends to business goodwill and to various forms of intellectual property, including copyright, although there is apparently no case which expressly covers confidential information: see for instance Regina (Nickolds) v. Security Industry Authority [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067 at [70]*, citing Strasbourg authority for the concept to include shares, patents, planning permissions, leases and licences, social security and pensions, and choses in action, and at [71] touching on goodwill, the Strasbourg jurisprudence concerning which was discussed in* R (Malik) v. Waltham

Forest NHS Primary Care Trust [2007] EWCA Civ 265, [2007] 1 WLR 2092.

*121. Although the parties were unable to cite any Strasbourg authority which expressly covers confidential information as a form of "possessions", no case was cited against that proposition. I can see no reason, in the light of the Strasbourg jurisprudence which does exist, why valuable commercial confidential information, such as the evidence in this case demonstrates is in question here, particularly with respect to the second disputed documents, cannot fall within the concept of "possessions" [*the emphasis in that of the Tribunal*]. Of course, its protection is subject to the question of justification under the second paragraph of article 1 of the first protocol.*

122. In the circumstances, it is unnecessary to take a view about the engagement of article 8. Suffice it to say that none of the parties before us disputes that one or other of the two ECHR articles in question is potentially engaged; that unrestricted disclosure of the disputed documents amounts to an interference which would have to be justified; and that section 15(1) can be read down so as to exclude confidential information protected by the ECHR (as to which see further under para 159 below).

72. The Tribunal takes the view – reflecting Rix LJ's comments above – that valuable commercial confidential information *can* clearly fall within the concept of "possessions" which are the property of the 2nd Additional Party.

73. If the Disputed Information is a "possession", then the 2nd Additional Party has Article 8 (1) ECHR rights which the Tribunal believes are clearly engaged in this appeal subject to the provisions of Article 8 (2).

74. In that event, these later provisions result in the same kind of proportionality balancing exercise that is already inbuilt with the exceptions and exemptions within FOIA and EIR.

75. Tribunal has also considered the decision of the Fifth Chamber of the European Court in *Glawischnig* (at Paragraphs 24 and 25) where it found:

> *"24. The Community legislature's intention was to make the concept of information relating to the environment defined in Article 2 (a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of*

excluding from the scope of that directive any of the activities engaged in by the public authorities (see Mecklenburg, Paragraphs 19 and 20*).*

25. Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2 (a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision."

76. In other words, simply because information has a slight or tangential association with "*the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and Marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements,*" that mere or tangential association with not necessarily bring it within the scope of EIR.

77. The reality is that there is core financial information within the Disputed Information that the Tribunal recognises – having seen all of the closed material – is genuinely commercial and confidential information.

78. It is information which:
(a) has no bearing on the environment (as described in the paragraph above) and
(b) is particular to that contract in terms of pricing and other factors.

79. The litmus test is that this information – and the key financial indicators within it – can be adjusted over a broad commercial range of negotiation in terms of the confidential information without having any effect on environmental issues. This brings it firmly within the FOIA regime, outside the EIR regime and is of a nature where the public interest in maintaining the exemption in section 43 is fully supported by all the 2nd Additional Party's arguments set out at Paragraphs 52 – 63 above.

80. The Tribunal recognises that – even then – issues of proportionality still remain. The Contractual Documents in question could be supplied to the

original Requestor with the confidential commercial and financial information redacted.

81. The appeal by the 2nd Additional Party succeeds insofar as the operative statutory regime is section 43 FOIA and the Disputed Information relates only to confidential financial data, not the entirety of the contracts. It is for the 2nd Additional Party to agree suitable and appropriate redactions with the Information Commissioner.

82. Our decision is unanimous.

83. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) we are now constituted as a First-tier Tribunal. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith
Judge

29 December 2010