



Access to commercially sensitive environmental information

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Abstract

There is an inherent tension between the right of EU citizens to access environmental information and the desire of the private sector to protect commercially sensitive information such as pricing structures or intellectual property. In England, the dividing line between these two competing interests has been explored in a number of cases, including the landmark case of the *Office of Communications v the Information Commissioner*. This article considers lessons that can be learned from the experience in the United Kingdom.

Keywords

Access to documents, Environmental information, Aarhus Convention, Sensitive information, Intellectual property rights

Introduction

As the great English philosopher, scientist, author, politician and lawyer, Sir Francis Bacon, might¹ once have said, *scientia potentia est*: knowledge is power. The existence of the Aarhus Convention² on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is testament to the truth of that statement. It is accepted wisdom that, in the field of the environment, improved access to information and public participation in decision-making enhances the quality and the implementation of decisions, contributes to public awareness of environmental issues and gives the public the opportunity to express its concerns and take part in the debate – indeed, that wisdom is enshrined in the preamble to the Aarhus Convention itself.

However, there is a natural tension between openness and transparency in decision-making and the protection of commercially sensitive information such as pricing structures or intellectual property.

This article explores that tension from the perspective of a practitioner of environmental law within the United Kingdom with a particular focus on English law. It will come as no surprise that in England, as elsewhere, the law is still evolving and the boundaries are only just emerging as a body of case-law fleshes out the principles. This article looks at some of the key English cases and some of the practical issues on the ground.

Access to information within the English legal system

The two primary routes for accessing information in the UK are the Freedom of Information Act 2000 (“FoIA”) and the Environmental Information Regulations 2004 (“the EIR”). These two regimes are mutually exclusive. FoIA is domestic whereas the EIR implements the Aarhus Convention and European Directive 2003/4/EC on public access to environmental information (“Directive 2003/4/EC”).

Although this article examines access to environmental information under the EIR, it should be noted that the tension between public access and transparency of Government on the one hand and confidentiality on the other is not unique to environmental information. When in opposition in the 1990s, the UK Labour Party made greater political transparency one of the cornerstones of its manifesto and duly enacted FoIA following its landslide victory. After less than a decade of FoIA in action, the party leader and Prime Minister at the time, Tony Blair, now cites FoIA as one of his greatest mistakes whilst in office.

The interaction between EIR and FoIA

FoIA and the EIR are mutually exclusive. Information deemed to be “environmental information” under the EIR is “exempt information” under FoIA. Therefore, requests for “environmental information” are channelled to the EIR.

The distinction between what is, and what is not, “environmental information” is therefore an important one in UK law, and one that has generated some debate³. The definition of environmental information under the EIR mirrors (and indeed refers back to) the equivalent provision in Directive 2003/4/EC. Regulation 2(1) provides:

““environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material 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,

1 The phrase is often attributed to him, although there is some doubt about whether that is correct.

2 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998

3 See, for example, “Are the EIRs too broad, and is it time to revisit the concept of “remoteness”?”, Damien Welfare, F.O.I. 2012, 8(4), 5-8.

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, programmes, 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;*
- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)..."*

The interpretation by the English Information Commissioner of "environmental information" under this definition has been broad and has included the installation of a pedestrian crossing, a list of potential sites for the siting of large prisons, and a commercial agreement on the delivery of a school building project (including commercially sensitive information such as core costs and the annual value of the agreement). The approach appears to be that, if a "measure" has an environmental consequence, then information on that measure constitutes environmental information, whether or not the information itself is closely connected to the environmental consequence.

Scotland's Information Commissioner may be taking a slightly narrower approach. In the case of Tony Kane and Scottish Water (Decision 012/2012, 19 January 2012) the Scottish Commissioner acknowledged that "*information will not necessarily be environmental simply because it has a slight or tangential association with the state of the elements of the environment*".

Operation of the EIR

Requests to a public authority must be addressed within 20 working days of receipt. There is no requirement for the request to be in writing, let alone to specify that the request is made pursuant to the EIR, but in practice it is helpful to spell it out to avoid the situation where a request languishes in an in-tray. The public authority can extend the period by an additional 20 days if it is impractical to respond within the default time-frame. The public authority must confirm that it holds the information or notify the applicant that it does not unless to do so would adversely affect international relations, defence, national security or public safety.

The starting point is a presumption in favour of the disclosure of information to the public but with a list of possible exceptions. None of the exceptions are absolute: in each case, the public body must carry out a balancing exercise between the public interest served by disclosure against the public interest served by non-disclosure. The presumption in favour of disclosure means that, where the scales are finely balanced, the information must be disclosed.

Challenging a public authority's decision

An applicant that wishes to challenge a refusal must first raise the issue with the public body a second time for redetermination. Unlike the initial request, the resubmission must be in writing and set out the areas of disagreement and it must be submitted within 40 days of the refusal. The public authority must then reconsider the application. If the applicant is not content with the redetermination, it can complain to the Information Commissioner. The Information Commissioner will investigate the complaint and will issue a Decision Notice. The Decision Notice is legally binding and can compel a public authority to disclose the information (or part of the information) requested.

Either the applicant or the public authority can appeal the Decision Notice to the First-Tier Tribunal (Information Rights). The Tribunal will reconsider the facts and the law and make its own decision.

There is a right of further appeal on points of law but the First-Tier Tribunal (Information Rights) is the final arbiter of fact. The appeal is to the Upper Tribunal (Administrative Appeal Chamber). Further appeals on points of law can be made to the Court of Appeal and ultimately the Supreme Court – the UK's highest Court and final arbiter of the law. References can be made to the European Court of Justice from either Tribunal or from the Courts.

The exceptions to disclosure

The exceptions to disclosure are set out in regulation 12 which provides as follows:

- (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if–
 - (a) an exception to disclosure applies under paragraphs (4) or (5); and*
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.**
- (2) A public authority shall apply a presumption in favour of disclosure.*
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.*
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that–*

- (a) *it does not hold that information when an applicant's request is received;*
 - (b) *the request for information is manifestly unreasonable;*
 - (c) *the request for information is formulated in too general a manner and the public authority has complied with regulation 9;*
 - (d) *the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or*
 - (e) *the request involves the disclosure of internal communications.*
- (5) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect–*
- (a) *international relations, defence, national security or public safety;*
 - (b) *the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;*
 - (c) *intellectual property rights;*
 - (d) *the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;*
 - (e) *the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;*
 - (f) *the interests of the person who provided the information where that person–*
 - (i) *was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*
 - (ii) *did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*
 - (iii) *has not consented to its disclosure; or*
 - (g) *the protection of the environment to which the information relates.*

This article focuses on the exceptions that are most relevant to commercially sensitive information: the intellectual property rights exception and the confidentiality of commercial or industrial information exception.

The intellectual property rights exception

The information requested may of course be subject to some form of intellectual property protection, such as copyrights, patents, trademarks and database rights. Those rights may be held either by the public authority itself or by a third party and in the case of third party rights the public authority may be either holding the information on behalf of a third party or under some form of licence.

The fact that information is subject to intellectual property rights is not a sufficient ground to exempt it from disclosure. As is

explained above, there are no absolute exceptions under the EIR and in each case the public authority must carry out the public interest balancing test set out above.

There have been relatively few UK cases on the exercise of this exception but there are two worth noting in passing and one that has important consequences and is worth examining in detail.

Veterinary Medicines Directorate⁴

It was held that the public authority must specify the intellectual property right which is said to be infringed and it is not enough to simply assert that the type of information in question is commonly protected by intellectual property rights in general.

Queen's University Belfast⁵

It was held that the simple fact that the information in question could be protected by an intellectual property right was not enough – it is necessary to demonstrate that an actual intellectual property right is infringed and that there is an actual adverse effect on the holder of that right.

The Office of Communications v The Information Commissioner⁶ (“The Ofcom case”)

The Ofcom case is the only EIR case to reach England's highest courts and is an important case not just for guidance on the public interest test for the intellectual property rights exception, but also for the operation of the public interest test itself, as explained below. Therefore, it is worth setting out some of the facts and background to this decision.

The case concerned access to information on the precise location (including grid reference numbers) of base stations for the mobile telephone network. Concerns that there was a potential risk to health from electromagnetic radiation emitted from mobile phones and from base stations arose during the 1990s and this led the Department of Health to commission a report (chaired by Sir William Stewart) on the health risks. The Stewart Report came out in 2000 and, although it concluded that radiation from mobile phones did not create an adverse health risk, it nevertheless put forward a number of recommendations to ensure a precautionary approach until further scientific analysis could be completed. The Stewart Report recommended a national database so that the public could find out whether there were base stations within a defined geographical area.

This recommendation resulted in the establishment of the Sitefinder website run by the Office of Communications (“Ofcom”). The Sitefinder website enables people to discover whether there is a base station in a particular area by imputing a post code, town name or street name and examining a map with the approximate locations of the base station.

To create this website, the commercial mobile network operators (“MNOs”) provided datasets with all of the grid references for all base stations to Ofcom on a voluntary basis. Ofcom was also provided with the locations for all of the base stations used by the emergency services’ ‘TETRA’ network.

4 FER0137609

5 FS50163282

6 [2009] EWCA Civ 90

The Sitefinder website does not give the address of the base station or its post code, national grid reference or latitude/longitude co-ordinate and it does not indicate whether the base station is mounted on a particular building or structure.

On 11 January 2005 Mr Henton, an employee of Health Protection Scotland (an arm of the National Health Service), requested a list of all mobile phone base stations on the database in a form which he could use for epidemiological research.

Ofcom refused on 27 February 2005 on the grounds that the information was already substantially available on the Sitefinder website. The applicant challenged this decision on the grounds that the information was not in a format which enabled him to utilise it for epidemiological purposes. He stated:

"If I were to obtain base station information from the website I would need to enter approximately 140,000 post codes for Scotland alone and I would still not have the base station grid references. This would also be extremely time-consuming especially when you already hold the information I require."

Ofcom reviewed the decision and upheld the refusal to disclose on two grounds. The first was under regulation 12(5)(a) on the grounds that criminal enterprises may be able to target those sites used by the police and this would have an adverse effect on public safety. The second was under regulation 12(5)(c) on the basis that disclosure would adversely affect the intellectual property rights of the MNOs who had provided the information to Ofcom on a voluntary basis and who would otherwise be able to obtain licence fees for use of the information.

The applicant complained to the Information Commissioner. In a Decision Notice dated 11 September 2006 the IC reversed the decision and ordered Ofcom to make the disclosure. In turn, Ofcom appealed to the Tribunal. One of the MNOs, T-Mobile, was also joined as an additional party.

The Tribunal reconsidered the decision of the IC. It held that the exceptions under regulation 12(5)(a) and regulation 12(5)(c) were engaged and therefore the public interest balancing test was required, but concluded that in each case the public interests of maintaining the exception did not outweigh the public interest in disclosing the information.

It was argued before the Tribunal that the Tribunal should aggregate the public interest in maintaining the exceptions when carrying out the balancing act against the public interest in favour of disclosure. The Tribunal rejected this argument, stating:

"We think this would produce a nonsensical outcome and it is not a procedure we propose to adopt"

The Tribunal weighed each exception separately against the public interest in disclosure and found that neither exception was sufficient to overturn the presumption in favour of disclosure. The Tribunal therefore upheld the Information Commissioner's decision and ordered Ofcom to disclose the information.

Ofcom appealed to the High Court (at that time, the appeal was to the High Court rather than the Upper Tribunal) on three points of law:

- Did the Tribunal fall into error when carrying out the public interest balancing exercise under regulation 12(1)(b), by looking at each applicable exception separately and failing to consider whether the aggregate public interest in maintaining the exceptions outweighed the public interest in favour of disclosure? ("the aggregation argument")
- Did the Tribunal fall into error by taking into account, as an aspect of the public interest in disclosure, the "benefit" arising from the use of the information for epidemiological research, even though such use would breach the intellectual property rights of the MNOs? ("the intellectual property argument")
- Was the Tribunal entitled to find that the public interest in maintaining the exception in regulation 12(5)(c) did not outweigh the public interest in disclosing the names of the MNOs (as distinct from the disclosure of the remainder of the requested information)? ("the identity argument")

The High Court sided with the Tribunal on all three issues, resulting in a further appeal on all three points of law to the Court of Appeal.

The Court of Appeal upheld the Tribunal and High Court decisions on the intellectual property issue and the identity issue, but unanimously overturned the decision on the aggregation argument, holding that it was permissible to aggregate the exceptions and weigh the public interest of the aggregate of the exceptions against the public interest in disclosure. This issue was subject to a further appeal to the Supreme Court and a reference to the European Court of Justice and is discussed below.

The Court of Appeal spent some time considering the nature of the intellectual property rights and the correct application of the public interest test in relation to that exception and it is worth examining the judgment in some detail.

The Tribunal and appellate Courts all accepted that the data sets provided by each of the MNOs to Ofcom for use on the Sitefinder database was protected by a "database right". A database right is a sui generis right created by the Copyright and Rights in Databases Regulations 1997. Regulation 6 defines a database as "a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way and (b) are individually accessible by electronic or other means". Regulation 13(1) provides that an intellectual property right will subsist in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database. Regulation 16 provides that "a person infringes a database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database".

Ofcom's argument was that the Tribunal had erred in its substantive finding that disclosure of the databases would be of value in epidemiological investigations because it could be "searched, sorted or otherwise manipulated for statistical and illustrative purposes" (paragraph 41 of the Tribunal's decision). The 'manipulation' which the Tribunal had held to be of value to the public when conducting the public interest test was by its very nature a breach of the intellectual property rights of the MNOs and was therefore unlawful. Ofcom contended that it was not open to the Tribunal to rely on an unlawful breach of intellectual property rights as giving rise to a public interest benefit that would then weigh in favour of disclosing the information protected by that right. It was argued that it cannot be in the public interest that recipients of information are assumed to benefit the public through a subsequent unlawful infringement of third parties' intellectual property rights. It was also argued that it was against public policy for a public authority to facilitate a breach of the rights of third parties. Further, intellectual property is "property" within the meaning of Article 1 of the First Protocol of the European Convention of Human Rights and as such public authorities must act in a manner consistent with the Human Rights Act 1998.

The Court of Appeal agreed that the contemplated use of the information for epidemiological research would constitute a *prima facie* infringement of the intellectual property rights in question.

The Court of Appeal noted that there was nothing in the EIR that would preclude reliance by the MNOs on their rights to prevent or restrict post-disclosure use of the information disclosed. Therefore, the MNOs could take action against the recipient of the information if the data sets were manipulated for epidemiological research. However, it was also acknowledged that, in practice, this would be difficult, especially for electronic data that could be manipulated in such a way that it would be difficult to trace those responsible for the manipulation and to enforce the right against them.

However, ultimately the Court of Appeal did not agree with Ofcom's argument. Giving the leading judgement, Lord Justice Richards said:

"in the case of the EIR, since an adverse effect on intellectual property rights is the subject of a specific exception under regulation 12(5)(c), it is obvious that breaches of intellectual property rights can and must be taken into account both by determining the application of the exception and in assessing, under regulation 12(1)(b), the public interest in maintaining the exception. It is plain, too, that regard can and must be had not just to the immediate effect of disclosure, but also to its wider consequences, including subsequent use of the information disclosed: it was the adverse effect of subsequent use for epidemiological research that was at the heart of the Tribunal's finding that the intellectual property rights exception applied in this case. But if such use also has beneficial consequences, furthering the policy of the disclosure regime (as was also the case on the Tribunal's findings here), in my view it is implicit in the EIR that such consequences can be taken into account on

the other side of the balance as an aspect of the public interest in disclosure".

The Court of Appeal judgment is significant. Private sector businesses providing environmental information to a public authority under a licence for the public authority to use the intellectual property are at risk of the disclosure of that intellectual property to third parties under the EIR. The applicant who receives that information does not have a right to use it – the intellectual property rights remain in the possession of the private sector business – but the practical ability to enforce a breach is limited.

It is interesting to note that, at the time of the Court of Appeal decision, the MNOs had stopped providing updates to Ofcom because of their concerns over this precise issue.

The Court of Appeal resolved the intellectual property argument but the aggregation argument was appealed to the Supreme Court and then referred to the European Court of Justice. The ECJ held:

"...where a public authority holds environmental information or such information as is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, take into account cumulatively a number of grounds for refusal set out in that provision."

The case was remitted to the First-Tier Tribunal (Information Rights) and on 12 December 2012 the Tribunal released its written decision concluding that the information must be disclosed. The Tribunal accepted submissions from the IC that aggregation was permissive rather than mandatory, and that "aggregation may not be engaged if a specific exception or exceptions otherwise being addressed and engaged are so fundamentally different that any viable aggregation is simply not appropriate or feasible". The Tribunal opined that the aggregation was not mathematical, whereby values were ascribed to each exception and added together, but that the mechanism was rather more "impressionistic". The Tribunal concluded that aggregating the public security arguments in regulation 12(5)(a) with the private law rights protecting intellectual property in regulation 12(5)(c) was "artificial" and a good example of "apples and pears".

Everything Everywhere (formed through the merger between T-Mobile and another MNO, Orange) continued to act as an additional party and sought to raise two new exceptions – that the information was commercially confidential under regulation 12(5)(e) and that the information had been provided voluntarily, invoking regulation 12(5)(f). The Tribunal concluded that it was beyond its remit to look at exceptions not argued before the original tribunal but did not appear to give the exceptions a great deal of weight in any event. It would have been interesting to see how these arguments would have been aggregated given that regulations 12(5)(c), 12(5)(e) and 12(5)(f) are close in nature and therefore, presumably, apples and apples.

Ofcom sought permission to appeal the decision of the First-Tier Tribunal but permission was refused.

The use of information protected by intellectual property rights after disclosure

The Ofcom case makes it abundantly clear that there is nothing in the EIR to permit the subsequent use of information protected by intellectual property rights after it has been “made available” by the public authority. Therefore, in the Ofcom case, those who manipulated the data sets disclosed would be breaching intellectual property rights, notwithstanding the fact that the Tribunals and Courts perceived there to be a public benefit in doing so.

This is also the case if the owner of the intellectual property rights is the public authority itself. The Re-use of Public Sector Information Regulations 2005 (which give effect to Directive 2003/98/EC on the re-use of public sector information) provides that public authorities are allowed to charge for re-use, but where charges are made, the total income should not exceed the cost of collection, production, reproduction, dissemination of the documents and a reasonable rate of investment.

It may be of interest to note that the Environment Agency charges £50 plus VAT (currently 20%) for the commercial use of any information that it discloses under the EIR. This allows businesses to make commercial use of the information provided.

The Environment Agency demands this charge in advance of the disclosure of the information in question and therefore applicants are not provided with an opportunity to examine whether it wishes to reuse that information in advance of disclosure. Given the relatively low value of the copyright licence, it is not surprising that there have been no major challenges to this policy to date as, in most cases, the applicant will be prepared to pay the charge simply to access the documents (the Environment Agency refuses to disclose the documents until the charge is paid). If the documents disclosed do not have any commercial use then that appears to be just hard luck for the applicant!

The confidentiality exception

There have been a number of important cases on the exception in regulation 12(5)(e) which protects “*the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*”.

The most recent case to consider the issue is *Roy Jones (on behalf of Swansea Friends of the Earth) v Information Commissioner, Environment Agency and S I Green (UK) Ltd (EA/2011/0156)*, 27 April 2012.

The case concerned the financial security provisions required under the UK’s implementing regulations for the EU Landfill Directive (now contained in the Environmental Permitting (England and Wales) Regulations 2010). The UK regulations require the landfill operator to provide financial security for the

period of operation of the landfill and for sixty years after its closure. The purpose is to ensure that funds are available to the Environment Agency to remedy issues that arise at the landfill in the event that the operator is unwilling or unable to do so itself. Often the security is provided in the form of a performance agreement and a bond in favour of the Environment Agency. The amount of security is site specific and is a matter of negotiation between the Environment Agency and the operator.

S I Green (UK) Ltd applied for a permit for landfilling a disused quarry near Swansea in Wales and it negotiated security with the Environment Agency Wales in the usual manner. The applicant, Mr Jones, applied for information relating to the landfill and was supplied with a number of documents including the performance agreement and bond but with the financial information redacted. Mr Jones complained to the Information Commissioner but the IC dismissed the complaint on the grounds that the exception in regulation 12(5)(e) had been properly applied.

The applicant appealed to the First-Tier Tribunal (Information Rights). The key issue was whether the confidentiality of the information was “provided by law”.

The Tribunal relied on the articulation of the English law of breach of confidence set out in a case from the 1960s, *Coco v AN Clark (Engineers) Ltd (1968)* FSR 415 Ch D: The information must be confidential in quality, it must be imparted so as to import an obligation of confidence, and there must be an unauthorised use of that information to the detriment of the party communicating it. The Tribunal concluded that, because the financial information was obtained through negotiation between the Environment Agency Wales and S I Green, it had not been “imparted” so as to import an obligation of confidence and as such was not subject to confidentiality provided by law.

The Tribunal also rejected an argument that the confidentiality was created by the UK regulatory regime. The Environmental Permitting Regulations and its predecessors allow operators to agree that certain information is confidential and should be withheld from the Environment Agency’s public registers. S I Green has specifically asked for other information within its application to be treated as confidential but (tellingly, as far as the Tribunal was concerned) it did not make this request for the financial information in the bond and performance agreement.

The Tribunal also rejected S I Green’s argument that the financial information could be ‘reverse engineered’ to enable competitors to calculate its business model.

The Tribunal concluded that the purpose of the financial provisions were to ensure that there were adequate funds to protect the public in the event of an environmental issue at the landfill in the future and therefore it was important for the public to have access to that information.

Unfortunately, the reasoning behind the decision is not convincing and is at odds with other decisions of the Tribunal.

The Tribunal appears to have taken the test in *Coco* as a definitive statement of the law without looking at the cases on

confidentiality over the past 40 years. The Tribunal took a similar position in an FoIA case (*Home Office v BUAV*) a few years ago and was subject to criticism for doing so on appeal in the High Court. On appeal, Mr Justice Eady stated:

"The Tribunal ... proceeded on the assumption that "the law of confidence" was to be found only in ... Coco v Clark... with respect, however, this does not seem to me to be necessarily the case. Much will depend on context."

Has the Tribunal in the Jones case repeated this mistake? The Tribunal does not appear to have considered the other ways in which English law protected confidential information. Nor did it consider the impact of human rights jurisprudence – confidential information is a "possession" and therefore subject to Article 1 of the First Protocol to the European Convention on Human Rights (discussed in more detail below).

Jones is also at odds with an earlier decision of the Tribunal in *South Gloucestershire CC v IC and Bovis Homes (EA/2009/32)* in which the Tribunal concluded that a public authority's own information could attract the protection of the law of confidence notwithstanding the fact that it was its own information, and therefore had not been imparted by a third party as required by *Coco*.

The Jones case is currently on appeal and it is anticipated that these arguments will be aired in detail.

On the subject of the exception for confidential information, it is also worth noting the recent judgment of the European Court of Justice in Case C-416/10 *Jozef Križan and others v Slovenská inšpekcia životného prostredia* in which disclosure of an urban planning decision concerning the establishment of a landfill could not be refused on the grounds of the protection of the confidentiality of commercial and industrial information.

A novel approach: The Veolia case

The case of *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council* [2009] EWHC 2382 ("the Veolia case") is an example of more creative attempts to access confidential environmental information.

Veolia entered into a waste management contract with Nottinghamshire County Council and the contract included commercially sensitive schedules setting out the pricing mechanisms. The Council disclosed sections of the contract but omitted the commercially sensitive schedules. A local resident (advised by Friends of the Earth Rights and Justice Centre) sought to access these commercially sensitive schedules. The applicant tried the conventional EIR route, but was unsuccessful on the grounds of commercial confidentiality. Undeterred, the applicant tried a novel approach: using section 15(1) of the Audit Commission Act 1998 ("the ACA"). The purpose of the ACA is to enable local taxpayers to monitor the spending of their local authority with the objective being that transparency leads to closer scrutiny and better governance.

Section 15 of the ACA provides:

15(1) At each audit under this Act ... any persons interested may -

- (a) inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them; and*
- (b) make copies of all or any part of the accounts and those other documents.*

The ACA contains an exemption for "personal information" to ensure compatibility with the Data Protection Act 1998 but no other exceptions or exemptions, and the Council considered that it had no discretion to withhold the information on the grounds of commercial confidentiality.

In the subsequent judicial review, the High Court agreed with the Council. There was considerable argument over the scope of "the accounts to be audited" and the documents "relating to them" but the Court held that the scope was wide enough to include the pricing schedules to the contract.

Veolia then argued that the Court should interpret the ACA to incorporate the principles of the protection of confidential information that are contained in the EIR and FoIA. The Court rejected this submission. The Court was sympathetic to Veolia's concerns that the information was valuable to Veolia's competitors and would affect their ability to compete for other local authority contracts and to hold down their sub-contract prices on existing and future contracts. However, the Court looked at the origins of the ACA in the Poor Law Act 1844 and noted that, unlike FoIA and the EIR, the roots of the ACA lie "*in democratic accountability, rather than the policy of transparency and openness behind the modern legislation*" and that the purpose of section 15(1) was to "*enable those with a real and close interest in a council's activity to scrutinise its accounts in the audit process*". One of the key features of such accountability was to consider "*whether in incurring any liability for expenditure the body under audit has made proper arrangements for securing value for money*" and as such the Court agreed that the confidential schedules should be disclosed.

Veolia appealed to the Court of Appeal. Giving the leading judgment, Lord Justice Rix was rather more creative in his reading of the ACA. He held that confidential information was a species of possession protected by Article 1 of the First Protocol of the European Convention on Human Rights and as such the state could not interfere without justification. The Court, as institution of the state, has a duty to "read down" legislation in a way that is compatible with the ECHR. The Court unanimously held that local authorities were therefore required to give weight to A1P1 rights by carrying out a balancing act under the ACA to see whether the disclosure of confidential information would be justified. This exercise was said to be comparable to the balancing act required under the EIR (and in the case of Veolia, one that had already been exercised in favour of maintaining confidentiality).

The decision of the Court of Appeal has therefore shut down this 'back door' route for obtaining confidential information that has been refused under the EIR. However, the desire to access such information will ensure that lawyers will continue to look for novel approaches.

Conclusions

Individuals, NGOs and private businesses are alive to the opportunities that the law provides to access environmental information and the attempts to access that information are

often innovative and creative. Businesses need to be aware of the limitations in the "commercial interests" exception under the EIR and the fact that intellectual property provided under licence to a public authority might be disclosed to the public at which point enforcement of those intellectual property rights might become more difficult. Some steps can be taken to protect commercially sensitive environmental information provided to public authorities but risks remain and business must understand those risks and act accordingly.



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Biography

Simon Tilling is an environment and energy lawyer practicing as a senior associate at Burges Salmon LLP, one of the UK's leading law firms. The environment and energy practice at Burges Salmon LLP is recognised as a market leader and advises on projects, transactions, disputes and compliance throughout the UK and on an international basis.

Outside of the UK, Simon has recently advised on an environmental indemnity claim in the Courts of New York, a contamination claim at a pharmaceuticals facility in Sweden, a dispute over contaminated groundwater in a small island state and an indemnity claim for the costs of a US EPA-driven clean-up of contaminating materials in Texas.

Within the UK, Simon advises on a wide range of issues, from public law challenges to policy and regulatory appeals to civil disputes over emissions. Examples of Simon's cases include two successful judicial reviews of the English Environment Agency's hydroelectric power policies and permitting decisions, negotiating liability for the costs of remediation of Brofiscin Quarry in Wales, one of Britain's most contaminated sites⁷, acting in a "landmark criminal prosecution"⁸ by the habitats and wildlife regulator Natural England, negotiating the first civil sanction as an alternative to prosecution for water pollution in Wales⁹ and acting on the first regulatory appeal under the greenhouse gas emissions trading scheme in Northern Ireland. Simon also acts in civil and regulatory claims relating to noise, odour, dust, fumes and other emissions and recently negotiated the successful resolution of a dispute in a rural English village between the villagers, the church and the local council over the noise of church bells at night¹⁰!

As a practitioner, Simon has first-hand experience of the tension between access to environmental information and the protection of commercially sensitive material and has advised Government bodies, businesses and individuals on how to access, and how to protect, confidential or commercially sensitive environmental information.

⁷ The Guardian (UK national newspaper), 12 February 2007

⁸ The Times (UK national newspaper), 18 November 2007

⁹ Environment Agency press release, 12 July 2012

¹⁰ The Sunday Times (UK national newspaper), 2 December 2012

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