

**AUDIT AND GOVERNANCE COMMITTEE**

**26 NOVEMBER 2010**

**STATEMENT OF ACCOUNTS 2009/2010 – COURT OF APPEAL'S  
DECISION IN VEOLIA ES V NOTTINGHAMSHIRE COUNTY COUNCIL AND  
OTHERS (2010)**

**Report of the Director of Financial Resources**

**1. Purpose of the Report**

- 1.1 To update members on the position in respect of the formal process required to approve the Statement of Accounts for 2009/2010.

**2. Background**

- 2.1 Members will recall that at the meeting on 30<sup>th</sup> September it was reported that the Council had 'stopped' the right of public inspection process until guidance had been received on an important point of law in respect of the disclosure of commercially sensitive PFI information that a member of the public (the applicant) had requested during the public inspection period.
- 2.2 Reference was made in the report to the Veolia ES v Nottinghamshire County Council case and it was noted that clarification was awaited from the Court of Appeal on the legal position in that case on the provision or otherwise of commercially sensitive information under Section 15(1) of the Audit Commission Act 1998 during the public inspection period. The Court of Appeal's decision in the Veolia case was handed down on 28<sup>th</sup> October.

**3. Court of Appeal's Decision**

- 3.1 In summary, Veolia were successful on the key ground of their appeal that the right of inspection under Section 15(1) does not provide an absolute or unrestricted right to inspect contract documents and associated invoices in their entirety and there is an implied exception in respect of confidential / commercially sensitive information, which is subject to a separate public interest test.

The Court of Appeal held that this exception within Section 15(1) arises by virtue of the European Convention on Human Rights ("ECHR") (in particular Article 1 of the First Protocol of the ECHR, which protects the "possessions" of any legal person (including a company) except where disclosure is in the public interest and in

accordance with the law. There is case law which confirms that for the purpose of Article 1, "possessions" include commercial and contract documents of economic value.

- 3.2 In addition, this exception under Section 15(1) in respect of confidential information also potentially arises as a result of the European Procurement Directive in respect of any information which is provided to the Council during a tender process and designated by the bidder as being confidential.

The Court of Appeal held that there is a strong public interest in maintenance of a contractor's valuable commercial confidential information, which has only been shared with a contracting authority for the purpose of a specific procurement / contract (in particular in the case of PFI projects, where the contractor's profit margin and financial model are shared with the authority due to the long-term nature of the public-private partnership). The Court stated that the public disclosure of confidential information could be anti-competitive and deter contractors from bidding for public contracts. In each case the salient point is whether the relevant information can legitimately be described as being "confidential" in the circumstances.

- 3.3 As a result of this decision, the position under Section 15(1) in respect of confidential information is therefore closely analogous to the established approach under the Freedom of Information Act 2000 where the Council must apply a public interest test in determining whether or not a confidential document or section of a contract should be disclosed.

The Council has already applied this public interest test in respect of the commercial, confidential information contained in the Sandhill Centre PFI Contract as part of its response to a previous FOI request made by the same individual. The Council will review its decision on public interest with Semperian (the Sandhill Centre PFI Contractor) in advance of the next inspection period.

- 3.4 In relation to those PFI contract documents in the Veolia case (including the Financial Model) that have yet to be disclosed by Nottingham County Council and which were the catalyst for Veolia's appeal, the Leading Judge stated that the Council would have grave difficulties in being able to justify a release of these documents under Section 15(1) given their highly sensitive nature.

In addition, the Judge also observed that other sections of the PFI contract (including the payment mechanism) which had been identified as confidential could also have also been lawfully withheld under the exception to Section 15(1).

- 3.5 In light of this decision, the Council now has sufficient clarity in the law regarding its obligations under Section 15(1) regarding the disclosure

of contract documents and can now continue with the existing audit and to advertise and run a new public inspection period.

#### **4. Next Steps**

- 4.1 In anticipation of the new inspection period, the Council has written to both Contractors to seek their updated views on the disclosure of the remaining contract documents in advance of the new inspection period. This will allow the Council to respond promptly to the applicant and any third parties during the inspection period should further requests be made.
- 4.2 As noted above, the Council has already applied a public interest test in respect of the Sandhill Centre PFI Contract as part of its response to the applicant's previous FOI request. The Council will review its decision on public interest with Semperian (the Sandhill Centre PFI Contractor) in advance of the next inspection period.
- 4.3 The Council will also need to undertake the same exercise with the Street Lighting PFI Contractor (Balfour Beatty) in respect of those contract documents that have been withheld.

#### **5. Recommendation**

- 5.1 Members are recommended to note the contents of this report and the revised timetable proposed for public inspection and completion of the audit of the Statement of Accounts for 2009/2010, as set out in Appendix 1.



## **Appendix 1**

### **Revised Timetable for the Audit of the Statement of Accounts for 2009/2010**

Statement of Accounts (Subject to Audit) – Approved 29<sup>th</sup> June 2010

Audited Statement of Accounts – Noted 29<sup>th</sup> September 2010 (as accounts could not be approved at that stage as the public rights of inspection period had been withdrawn subject to the outcome of the appeal in respect of the Veolia Case)

Notice of Audit of Accounts - Advert to be placed in newspaper ('The Sunderland Echo') – 18th November 2010

Public Inspection Period (20 working days) – 2<sup>nd</sup> December to 31<sup>st</sup> December 2010

Date for Exercise of Public Right to Inspect the Accounts – 4<sup>th</sup> January 2011

Audited Statement of Accounts – to be approved on 11<sup>th</sup> February 2011