Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0051**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0549474
Dated: 2 February 2015

Appellant:	**Conscape Ltd**
Respondent:	**The Information Commissioner**
Date of hearing:	**14 July 2015**
Venue:	**Field House**
Representation:	**Appellant: Geoffrey Johnston** **Respondent did not appear**

Before

HH Judge Shanks

Judge

and

Steve Shaw and **David Wilkinson**

Tribunal Members

Date of Decision: 20th July 2015

Subject matter:

Environmental Information Regulations 2004

Reg 12(4)(a)	Whether information held

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows Conscape Ltd's appeal and issues the following decision notice in substitution for that issued by the Commissioner on 2 February 2015.

SUBSTITUTED DECISION NOTICE

Dated: 20th July 2015

Public authority: Department for Regional Development, Belfast

Name of Complainant: Conscape Ltd

The Substituted Decision

For the reasons set out below, the Public Authority did not deal with the Complainant's request for information in accordance with the Environmental Information Regulations 2004 in that it did hold information answering the Complainant's request and ought to have disclosed it.

Action Required

The Public Authority is to review its records and disclose to the Complainant such information as it holds as to weed control applications per section in its Northern Area for the years 2010 to 2013 by 16 October 2015.

REASONS FOR DECISION

1. This case concerns weed control on highways in Northern Ireland. Weed control is the responsibility of the Department of Regional Development. The Department contracts the work to private contractors following a tender process. Conscape Ltd was a contractor during the period 2005 to 2010 but failed in its bid for a contract for the period 2010 to 2015.

2. On 11 June 2014 Conscape made a request under the Environmental Information Regulations 2004 to the Department seeking " … all [weed control] applications as recorded per section [in its Northern Area] for the years 2010, 2011, 2012, 2013". The Department responded by letter dated 25 June 2015 saying that it did not hold information "…on weed spray applications per section for years 2010-2013" and that they had also checked with the main contractor who had "… confirmed that they do not hold details on the number of weed spray applications across the area." We understand the reference to the main contractor to be a reference to a company called Road Safety Contracts Ltd.

3. Conscape applied to the Information Commissioner who found, in a decision notice dated 2 February 2015, that on the balance of probabilities the information requested was not held by the Department and that the Department were therefore entitled to rely on regulation 12(4)(a) of the Regulations to refuse to disclose it.

4. Conscape appealed against the Commissioner's decision notice. The sole issue raised by the appeal is whether the Commissioner was right in his conclusion or whether such information was in fact held by the Department. The burden was on Conscape to persuade this Tribunal on the balance of probabilities that the information was held. Unfortunately the Department did not apply to be made a party to the appeal and the Commissioner did not attend so that the only party present at the hearing on 14 July 2015 was Conscape, which was represented by Mr Johnston (who we take to be its

managing director), and we have had to do our best with the written material put before us and the information supplied to us by Mr Johnston.

5. For obvious reasons, Mr Johnston had the tender documents for the 2010 contract for environmental maintenance including weed control in the Northern Area and they were put into a bundle he prepared for the Tribunal alongside that produced by the Commissioner.

6. The tender documents include at page S16 a page dealing with payment. That page provided for payment to be made following inspections where a "100% kill rate" would be expected. 70% of the total contract sum would be paid if there was a successful inspection four weeks after first treatment (which was to take place no later than 30 June); if an "area or length" (we have not been told what that phrase means or how exactly it relates to "sections") was not satisfactory "remedial treatment" would be ordered; if it was satisfactory on a second inspection payment would be made in respect of it; if not, no payment would be made. The balance of 30% would be paid following a final joint inspection (presumably in the Autumn) if there was "100% kill rate" in a particular "area or length"; if there was not a "100% kill rate" in a particular "area or length" the 30% payment would be withheld.

7. At pages S37 and S38 of the tender documents was an Appendix entitled "Programme of Works Weed Control". Page S37 contained a provision that the contractor should make regular inspections and carry out further treatment as necessary and send details of inspections and action taken to the Department weekly. There was also a requirement that the first treatment should be completed by 31 May and the work required for this should be done in the order required by the Department and notified as it progressed. On page S38 there was reference to a form which had to be returned by the contractor at the end of each week giving details of each treatment carried out by reference to area treated, date, and type of herbicide. In bold letters there was also a provision stating: "Failure to provide this information … may result in payment being withheld for that quantity of work". At page S64 was a copy of the form with a repetition of the warning about non-payment.

8. Mr Johnston informed us that during the period when Conscape had the contract they complied with the requirements we have set out in paragraph 7 above and that the Department was meticulous in applying its contractual terms. He also told us that the payment provisions while Conscape had the contract differed from those we outline in paragraph 6 only in that a full 100% payment was made at the outset with no retention of 30% until a final inspection. We have no reason to doubt his word about these points. His case before us was disarmingly simple: the tender documents and therefore the contract required that the contractor provide weekly information as to weed control applications on the contractual form; it can safely be inferred that the contractual provisions have been adhered to; the Department must therefore hold copies of the forms which contain the very information he is seeking.

9. Unfortunately the Department had informed the Commissioner during his investigation that the relevant contract did not specify a requirement for numbers of weed spray applications to be recorded (see decision notice para 10) and was not expressly asked about the contractual documents we refer to until late in the appeal process. Its account is contained in an email dated 10 June 2015 to the Commissioner at pages 135A to 137 of our main bundle. In short it is said that under the current arrangements payment is made against results, that the method of weed control and number of applications are matters entirely within the discretion of the contractor, that the provisions about weekly reporting of treatments is a "legacy from earlier contracts" and that the Department does not in fact require (or, by implication, receive) weekly reports. The email also says that it has been agreed internally that the contract documents will be amended to reflect this position in respect of future contracts.

10. Although it is very unsatisfactory that the Department should (it appears) have given a misleading impression to the Commissioner, in the face of the email dated 10 June 2015 we would be very reluctant to reach a firm conclusion that the weekly reports have in fact been supplied since 2010 as contemplated by the contractual documentation and the previous practice described to us by Mr Johnston, since it

would almost inevitably follow from that conclusion that we were being deliberately and seriously misled by the Department on a straightforward matter of fact.

11. However, looking at the whole picture presented to us, we have reached the view on the balance of probabilities that, even if the Department does not receive the weekly reports, it must have some sort of record of the weed control applications carried out by its contractor for each "section" in the years 2010 to 2013, from which it could give at least a partial answer to Conscape's request. We consider that even if payments are made purely by results, there must be on-going liaison between the Department and the contractors throughout the summer involving some written material as to what is required from time to time to keep the roads free of weeds and there must at the very least be a record of "first sprays" and "second sprays" (as referred to in some minutes we have seen dated 15 April 2011 at page 22 of the bundle) and occasions when "remedial action" has been required under the payment provisions we have referred to.

12. In the circumstances we propose to allow the appeal and require the Department to supply such information as it has. If it turns out for some reason on further consideration that the Department does have relevant contractual weekly reports we would expect these to be supplied. But assuming the weekly reports do not exist, we are conscious that our decision may impose a substantial burden on the Department to find and supply what information they have about the applications per section for the relevant years and we will therefore allow the Department three months to provide the information to Conscape.

13. This decision is unanimous.

HH Judge Shanks

20th July 2015