



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2016/0292**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50605288  
Dated: 10 November 2016**

**Appellant: Conscape Ltd**

**Respondent: The Information Commissioner**

**On the papers**

**Before  
HH Judge Shanks  
and  
Pieter de Waal and Michael Jones**

**Date of decision: 26 April 2017**

**Subject matter:**

Freedom of Information Act 2000 (FOIA)  
Section 43(2) (Commercial interests)

**DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below the Tribunal allows the appeal in part and substitutes the decision notice set out below for that dated 10 November 2016.

**SUBSTITUTED DECISION NOTICE**

**Public Authority:** Police Service of Northern Ireland (PSNI)

**Complainant:** Conscape Ltd

**Decision**

The Public Authority failed to deal with the Complainant's request for information dated 20 July 2015 in accordance with FOIA in that it should have supplied the Complainant with the information requested about the amounts paid to Greentown Environmental in the years 2009-2010 to 2013-2014 as requested.

**Action required**

The Public Authority must supply that information to him by 28 May 2017.

HH Judge Shanks

21 April 2017

**REASONS FOR DECISION**

**Background**

1. On 17 August 2009 Graham Highway Ltd were awarded a contract by PSNI for the "managed service of crowd control police barriers and traffic cylindrical no waiting

cones” in Northern Ireland. Greentown Environmental have acted as sub-contractors in relation to part of the contract.

2. On 29 September 2014 the Appellant, Conscape Ltd, made a request to PSNI under FOIA seeking the following information: (a) the amount paid to Graham Highway in each of the five years 17 August 2009-16 August 2010, 17 August 2010-16 August 2011, 17 August 2011-16 August 2012, 17 August 2012-16 August 2013 and 17 August 2013-16 August 2014, (b) a “percentage breakdown on amounts paid to Greentown Environmental” and (c) “the current status of the contract”. In due course Conscape was told that the cumulative amount paid to Graham Highway as at 31 July 2014 was £256,472 and, on 3 June 2015, following the involvement of the Information Commissioner, they were told that the percentage paid to Greentown Environmental was 4.9089%, although this figure appears to relate to a period running to a date in 2015.
  
3. On 20 July 2015 a further request for information about the contract was made by Conscape Ltd, which is the subject of this appeal. The request sought the following information:
  - (1) the amount paid to Greentown Environmental in each of the five years 17 August 2009-16 August 2010 to 17 August 2013-16 August 2014;
  - (2) “ ... the date by which security vetting was completed and clearance approved for [Greentown Environmental] to operate on the contract ...”
  - (3) the current status of the contract;
  - (4) the winning tenderer on any new contract;
  - (5) whether Greentown Environmental continued as a security approved sub-contractor on any new contract.
  
4. In response to requests (3) to (5), Conscape were informed that the contract was due to expire on 16 September 2015 and that the competitive tender process for a new contract was ongoing. Following an internal review, on 16 October 2015 PSNI took

the position that although it held information answering to request (1), it would withhold such information in reliance on section 43(2) of FOIA (commercial interests); on request (2) PSNI said that it was individuals and not companies that were vetted and that any information requested regarding the vetting of individuals would be covered by section 40(2) (personal information).

5. Conscape applied to the Information Commissioner under section 50 of FOIA. In a decision notice dated 10 November 2016 she decided that the PSNI were entitled to rely on section 43(2) in relation to request (1) and that they did not hold any information within request (2) since individuals were vetted and approved and not companies.
6. Conscape have appealed against the decision notice in relation to both requests (1) and (2). The parties consented to the appeal being resolved on the papers without a hearing. We are satisfied that we can properly resolve the issues in that way.

### **Request (1)**

7. Section 43(2) of FOIA provides:

**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)**

It is well established in the jurisprudence that in order for the section to apply it must be shown that there is a real and significant risk of some commercial disadvantage occurring. If information is exempt under the section it can be withheld by the public authority if the public interest in maintaining the exemption outweighs the public interest in its disclosure.

8. The Commissioner says that as at the time of the request there was a real and significant risk that both the contractor, Graham Highway, and the PSNI would suffer some commercial disadvantage if the information had been disclosed. We have considered the decision notice, the Commissioner's detailed Response to the appeal,

and the material provided to the Appellant and the Commissioner by PSNI and we are not persuaded that disclosure would have given rise to any appreciable risk of commercial disadvantage to Graham Highway or PSNI.

9. So far as Graham Highway is concerned it is suggested that with the information it would have been open to a competing tenderer for the new contract to estimate Graham Highway's "pricing model and costs" which would damage their competitive position in relation to the new tender. We accept that it would have shown a competitor how much Graham Highway had paid a particular sub-contractor for performing its (unspecified) obligations under the old contract and that it may have helped a competitor to see how much Graham Highway had received in total under the old contract (though we note that the amount received up to 31 July 2014 was already in the public domain) but we cannot see how that information would have helped a competitor to work out Graham Highway's pricing model or costs so as to undermine their position in relation to a new tender. It appears from a letter from PSNI to the Commissioner dated 27 April 2016 that Graham Highway's real concern was that "repeated requests [by Conscape] could ultimately lead to the entire financial position of the contract" being disclosed, something they "would not be happy with"; but that concern cannot be relevant to the question whether the disclosure of the particular information in question gave rise to a real and significant risk of commercial harm. The Commissioner also makes the point that the fact that Conscape made the request must indicate that there was value to them in obtaining the information, suggesting (presumably) that such value would relate to a tender by Conscape for the new contract; however, we do not have sufficient material to draw any inference at all as to the use Conscape wished to make of the information, still less that it may have disadvantaged Graham Highway.
  
10. So far as PSNI is concerned, it is said that disclosure of the information requested in the face of Graham Highway's objections would have caused "reputational damage" which would diminish the confidence of potential tenderers and discourage them from engaging in the process, which would ultimately damage PSNI's commercial interest in a full competitive process. We are not persuaded that the release of the requested

information pursuant to a FOIA request by a public authority is likely to cause such damage; all tenderers for public contracts must be well aware of the possibility of such disclosure and, if there was any doubt on the point, we note that the Instructions to Tenderers document relating to the old contract expressly refers to a clause which will be inserted in the contract to the effect that the public authority will be obliged to comply with FOIA.

11. We have therefore reached the view, contrary to that of the Commissioner, that section 43(2) did not apply to the information which was the subject of request (1). In those circumstances, we conclude that PSNI ought to have disclosed it and there is no need for us to consider the public interest balance.

**Request (2)**

12. We accept, as did the Commissioner, that PSNI do not carry out security vetting or give clearance in relation to companies or firms, but only in relation to individuals. On the face of it therefore it must be right that PSNI hold no information under request (2).

13. Conscap in their written response refer to PSNI's vetting procedure which states at p6 that vetting procedures apply to:

- (i) Police officers (including new recruits);**
- (ii) Police staff;**
- (iii) Non-police personnel (i.e. contractors; consultants; agency staff; volunteers; members of other agencies working in partnership with PSNI; any person who requires unescorted access to police premises or uncontrolled access to police information)**

It is right of course that contractors (and indeed consultants) may be firms or companies as well as individuals; but that does not make them "personnel" and the list of possible "non-police personnel" is clearly intended to provide examples of *individuals* who will need to be vetted. We are satisfied that the Commissioner was right on this part of the case.

**Conclusion**

14. We therefore unanimously conclude that:

- (1) The Commissioner was wrong to decide that PSNI could rely on section 43(2) FOIA to withhold the information which was the subject of request (1) and we therefore allow the appeal to that extent;
- (2) She was right to decide that PSNI did not hold information answering to request (2).

HH Judge Shanks

26 July 2016