



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

EA/2011/0246

B E T W E E N:-

CONSCAPE LTD

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

DEPARTMENT FOR REGIONAL DEVELOPMENT (NORTHERN IRELAND)

Second Respondent

Tribunal

**Judge Kennedy QC
Roger Creedon
Jacqueline Blake**

**Hearing: 8th May 2012.
Field House, London.
Decision: Appeal Allowed.**

Subject matter: Freedom of Information Act 2000 - Section 50(1), Regulation 2(1) of the Environmental Information Regulations 2004 ("EIR")

DECISION OF THE FIRST-TIER TRIBUNAL:

Appeal Allowed.

Reasons:

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the Decision Notice”) dated 27th September 2011 (reference FS50406998).
2. The Tribunal Judge and lay members sat to consider this case on the 8th day of May 2012 and decided it on the papers

Factual Background to this Appeal:

3. Full details of the background to this appeal, the Appellant’s request for information made on 2nd June 2010, and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns a request made by the Appellant to the Second Respondent, the Department for Regional Development (Northern Ireland) (“the DRD”). The Appellant’s request was in relation to “Term Contracts for Environmental Maintenance 2010: EMN1 Northern Division” and implicit in that, the Tribunal find, the subcontractors engaged by the principal contractor.
4. The DRD responded to this request, informing the Appellant that they did not hold the requested information.

The Commissioner's Decision:

5. The Commissioner served a Decision Notice dated 27th September 2011. The Commissioner's decision was that the DRD should have handled the request under the Environmental Information Regulations 2004 ("the EIR") as opposed to the FOIA. The Commissioner came to this decision on grounds that the information concerned contracts on environmental maintenance activities. The Tribunal agrees that the subject matter should be dealt with under the EIR Regulations and accepts the Respondents reasoning that the contractor information can be defined under Regulation 2 (1) (c) as a measure or activity, in this case a contract, affecting or likely to affect the state of the elements as defined under regulation 2 (1) (a), in this case the landscape.
6. The DRD had relied on section 1(1)(a) of the FOIA to inform the Appellant that it did not hold the requested information. The Commissioner considered that the equivalent section under the EIR was regulation 12(4)(a).
7. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.
8. The DRD informed the Commissioner that in some circumstances it would hold the information requested, but that in relation to the specific contract in question, it did not hold the requested information. The Commissioner requested a comprehensive explanation to be given by the DRD as to why, in the circumstances of this particular request, the information was not held, outlining the procedures regarding the recording and handling of contracting and sub-contracting. DRD provided the Commissioner with an explanation as to why the information was not held by it but this was not set out in the decision notice.
9. Based on all of the information before the Commission, and having considered the wording of the request, on the balance of probabilities the

Commissioner accepted the arguments put forward by DRD that at the time of the request it did not hold the information.

10. The Commissioner has set out in detail the applicable legislative framework in the Commissioners Response to this Appeal, and same is not repeated here.

The Notice of Appeal:

11. The Appellant appealed by way of a notice of appeal dated 21st October 2011. The grounds of appeal are set out at page 6 of the Notice of Appeal. In addition, the Appellant attached a copy of the Decision Notice, copies of letters dated 2nd June 2010, copies of replies, and a copy of letter dated 5th November 2010.
12. It would appear that the Appellant's principle ground of appeal is that the Appellant has already received the information requested from the DRD, so the Commissioner's finding that the information was not held must be incorrect.
13. The Appellant also complains that:
 - a) The Commissioner provided insufficient explanation about the efforts made by the DRD to establish whether the requested information was held;
 - b) The wording in paragraph 23 of the Decision Notice as regards the wording of the request is unclear and the Appellant would like an explanation.

Reasons & Analysis

14. On the evidence before this Tribunal we are of the opinion that neither respondent made any or adequate inquiries as to whether or not the contractor was holding the requested information on behalf of the DRD.

15. Clause 85 of the contract between the DRD and the main contractor confirms that the DRD could have insisted on provision of the names of the sub-contractors. The Tribunal is of the view that the names of the sub-contractors were available to the DRD. There is no evidence before the Tribunal that it would not be in the public interest to disclose the names of the sub contractors. From the evidence available to us, the Commissioner has not been provided with reasons why the names of the sub-contractors could not have been sought by the DRD from the principal contractor under the terms of the contract. The communication from David Crabbe of the DRD to the Senior Case Officer for the Commissioner dated 22nd August 2011 confirms inter-alia: *“—An approval process should have taken place after the contract was awarded, but this did not happen in this instance, and no list of sub-contractors for approval was received by the Department”*.
16. Regulation 3(2)(b) of the EIR indicates that the information is held by the Public Authority if held by another person on behalf of the Public Authority. Exemption may or may not be claimed but it seems to the Tribunal that the disputed information in this case was held by the main contractor on behalf of the DRD since they were required under the terms of the contract to seek approval of the subcontractors from the Public Authority.. The appellant has demonstrated that the information was within the possession of and/or held by the DRD, post facto, with direct inquiries to employees of the DRD.
17. It is the view of this Tribunal that the Commissioner has given no detail of searches or efforts undertaken to see if the Information existed or should have existed. We consider paragraph 22 of the DN to be insufficient in the circumstances.

Conclusion

18. In light of the foregoing, the Tribunal allows this appeal and directs the DRD to provide the information sought by the appellant or to demonstrate that it is exempt or not in the public interest to do so.

19. The Respondents have the right to appeal to the Upper Tribunal. Any such application must be made to the Tribunal in writing within 28 days of this decision.

Brian Kennedy QC
Tribunal Judge

12th June 2012.