



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

EA/2011/0259

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.

Decision: Appeal Refused.

Subject matter: Freedom of Information Act 2000 - Section 50(1),
Environmental Information Regulations 2004 Regulation 12 (5) (e).

DECISION OF THE FIRST-TIER TRIBUNAL:

The Appeal is refused.

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 6th October 2011 (reference FS50369599).
2. The Tribunal Judge and lay members sat to consider this case on the 8th May 2012 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 28th May 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 consisted of five parts in relation to “Term Contracts for Environmental Maintenance 2010 – EMN1, EMS1, EME2, EMW1”.
4. The DRD withheld the parts one and two of the request, under section 43(2) of the FOIA.
5. The DRD disclosed part three of the request.
6. The DRD partly disclosed and partly withheld parts four and five of the request, under section 43(2) of the FOIA. *[It is to be noted that on the evidence before this Tribunal, that during the course of the Commissioners’*

investigation, the remainder of the information sought in parts four and five of the request were disclosed to the Appellant by the DRD.] The Tribunal agrees that disclosed information is not an issue in this appeal.

The Commissioner's Decision:

7. The Commissioner served a Decision Notice dated 6th October 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 could be defined as an administrative measure likely to affect an element of the environment, in this case a maintenance contract to maintain landscape. The Tribunal accepts this interpretation and considers the appeal under the EIR.
8. In withholding part of the requested information, DRD relied on section 43(2) of the FOIA, which is an exemption to protect the commercial interest of any person. The Information Commissioner considered that the FOIA is the incorrect access regime, and considered the equivalent exception under the EIR, namely regulation 12(5)(e) of the EIR. This provides that a public authority may refuse to disclose environmental information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. The Tribunal accepts this analysis as correct in the circumstances, and for the purposes, of this appeal.
9. The Commissioner has set out in detail the applicable legislative framework in the Commissioners Response to this Appeal, and same is not repeated here.
10. In summary, the Commissioner set out, that in order for regulation 12(5)(e) of the EIR to apply, it must be demonstrated that:
 - i. The information is commercial or industrial in nature;

- ii. The information is subject to a duty of confidence provided by law;
 - iii. The confidentiality is required to protect a legitimate economic interest; and
 - iv. The confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure.
11. In addition to the above, the public interest test must be met, namely, the DRD must also demonstrate that the public interest in maintaining this exception outweighs the public interest in disclosure.
12. In relation to parts one and two of the request, the Commissioner was satisfied that the information is commercial in nature, as it concerns monetary figure clearly associated with individual environmental maintenance contractors on various specific proposed functions. The Commissioner accepted that there would be an expectation of commercial confidence provided in law for such information in a situation where competitors are bidding for the same contract. The Tribunal accepts this reasoning.
13. The Commissioner, in the Decision Notice, discusses in detail the balance of arguments for and against disclosure in the public interest. The Commissioner concludes that the withheld information relates to pricing, which is quite specific to each bidder on each activity and differs considerably in price and detail, and that an obligation of confidence is required to protect the economic interests of the bidding companies. Again the Tribunal accepts this reasoning on the papers before us in this appeal.

The Notice of Appeal:

14. The Appellant appealed by way of a notice of appeal dated 27th October 2011. The grounds of appeal are set out at pages 6-8 of the Notice of Appeal. In addition, the Appellant attached a copy of the Decision Notice,

letter dated 28th May 2010 and reply dated 21st June 2010, and also e-mails dated 5th, 7th and 14th of October 2011. This notice of appeal seems to rely on the following grounds as basis for appeal:

- (i) The information requested is not environmental information hence the Commissioner erred in considering the matter under the EIR rather than the FOIA;
- (ii) The DRD did not refer to section 43(2) in its initial refusal notice;
- (iii) The exemption/exception is not engaged;
- (iv) The Commissioner erred in his assessment of the public interest test: he should have found that the public interest in maintaining the exemption/exception was outweighed by that in disclosure of the requested information; and
- (v) The Appellant is dissatisfied that the Commissioner did not seek a 'proper explanation' from the DRD as regards some information (that at items 4 and 5 for contract EMN1 and EME2 which was disclosed to the Appellant during the course of the Commissioner's investigation.

Reasons & Analysis

15. On the evidence before this Tribunal it appears that the information sought under parts three, four and five of the request have been disclosed to the Appellant although some of this information was disclosed late and only after the Commissioner had commenced his investigation.
16. Again on the evidence before this tribunal it appears that the scope of the Commissioners' investigation was only to consider the handling of the request for "Rates" information in parts one and two of the request and we accept, under the EIR and in particular under Regulation 12 (5) (e).
17. In the Decision Notice at paragraphs 20 to 25 the Commissioner sets out clearly the pertinent facts on the issue of Confidentiality in relation to the Monetary figures or "rates" concerned in the information at issue in this appeal. At Paragraph 24 he states: "*Having considered the arguments put*

forward by DRD the Commissioner is satisfied that the information, being commercial in nature, does give rise to a duty of confidence, and that confidentiality of that information is required to protect legitimate economic interest as described. He is further satisfied, having inspected the information, that the disclosure of that information would adversely affect the economic interests of a number of companies". This Tribunal has also considered the information in question and agrees with the Commissioners reasoning and conclusion in the circumstances of this appeal.

18. At paragraphs 26 to 35, the Commissioner has carefully considered the Public Interest arguments for and against disclosure of the disputed information and again has carefully balanced the arguments. The tribunal does not repeat the contents of the decision notice but has also considered these arguments and the balance test and is in agreement with the Commissioners' reasoning and findings therein.

Conclusion

19. In light of the foregoing, the Tribunal refuses this appeal.
20. The Appellant has the right to apply to the Upper Tribunal for permission to appeal. 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.