



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

EA/2011/0306

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: The Tribunal allows the appeals in Parts 1 and 2 of the request but refuses the appeal relating to part 3 of the request.

Subject matter: Freedom of Information Act 2000 - Section 57, Environmental Information Regulations 2004 Regulation 12 (5) (e)

DECISION OF THE FIRST-TIER TRIBUNAL:

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 5th December 2011 (reference FS50398979).
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 17th August 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 three parts in relation to “Term Contracts for Environmental Maintenance 2010 – EMN1 Northern Davison”.
4. In relation to part one of the request, it is true to say that the requested information was ultimately provided but this Tribunal allows the appeal in part one as the Information should have been provided at the outset. Part two of the request, the DRD stated that it did not hold such information. In relation to part three of the request, the DRD withheld this information relying on section 43 of the FOIA.

The Commissioner's Decision:

5. The Commissioner served a Decision Notice dated 5th December 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 Tribunal agrees with the Commissioner's finding in this regard in relation to each part of the request for information for the reason given by the Commissioner. In any event, the Commissioner held that the DRD correctly withheld the information.

6. In relation to part two of the request, the DRD informed the Commissioner that such information concerning the number of weed control applications carried out in accordance with the contract for the Northern Davison in the 2010 period was not collated as part of the contract as it was not required or necessary. The Information Commissioner was satisfied, on the balance of probabilities, that one could reasonably conclude that such information was not held by DRD. The Tribunal disagrees with the Commissioner in this regard. The appellant says that the information should have been held by the DRD and that it was contained within inter-alia work sheets. The Tribunal is surprised that the DRD and the Commissioner say the information sought is not held and find that on the balance of probabilities the information sought was held by the DRD. See contract and work sheets etc. The Tribunal holds that the main Contractor would hold this information on behalf of the Public Authority, the DRD, as per Regulation 3 (2) (b) of the EIR.

7. With respect to part three of the request, the DRD withheld the information, relying 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. The Tribunal agrees with this assessment. 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.

8. 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.

9. 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.

10. 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 information does give rise to a duty of confidence and that confidentiality of that information is required to protect the legitimate commercial interest as described by the DRD in the following terms:
 - the information is specific to the company and formed part of the successful bid for the contract;
 - an obligation of confidence is required to protect the economic interest of the company;

- that disclosure of the information would affect the ability of those contractors to effectively compete for other similar contracts;

and,

- that disclosure of that information would adversely affect the commercial economic interest of a number of companies.

11. In relation to the above, 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 Tribunal has considered the arguments considered by the Commissioner and accepts the reasoning and conclusion reached by the Commissioner and thereby refuses the appeal in relation to part 3 of the request herein for the reason given in the decision notice.

The Notice of Appeal:

12. The Appellant appealed by way of a notice of appeal dated 15th December 2011. The grounds of appeal are set out at pages 6-7 of the Notice of Appeal. In addition, the Appellant attached letters of requests dated 17th August 2010, and letter dated 16th September 2010. 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 Commissioner erred in not asking for an explanation for the later supply of the information requested at item one;
- (iii) The Commissioner erred in finding that the information requested at item two was not held by the DRD; and
- (iv) In respect of the information requested at item 3, the exemption/exception is not engaged, and 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.

Conclusion

13. In light of the foregoing, and on the evidence before this Tribunal and for the reason given above the Tribunal allows the appeal in relation to parts one and two of the request and refuses the appeal in relation to part three of the request.

14. 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.