



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

EA/2011/0258

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**

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

DECISION OF THE FIRST-TIER TRIBUNAL:

Appeal Refused:

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 6th October 2011 (reference FS50398972).
 2. The Tribunal Judge and lay members sat on the 8th day of May 2012 and decided the appeal 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 8th 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 consisted of five parts in relation to “Term Contracts for Environmental Maintenance 2008: EMS2 (southern area), EME1 (eastern area), EMW2 (western area)”.
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 informed the Appellant that it had previously disclosed the information requested in part four and five of the request, but provided an additional copy. The Tribunal agrees that these are not therefore 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 the reasoning of the Commissioner in this regard.
8. The Commissioner decided that in respect of the information already disclosed in parts three, four and five of the request, that the requested information has been disclosed and that it goes beyond his role to aid complainants in understanding information disclosed to them. The Tribunal accepts this reasoning. Furthermore, in the absence of evidence to suggest that other information has been withheld the Tribunal cannot say the Commissioner was wrong to find that information had been disclosed.
9. In withholding parts one and two of the requested information, DRD relied on section 43(2) of the FOIA, which provides 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). 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. Again the Tribunal accepts the reasoning of the Commissioner in this regard.

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.
11. 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.
12. 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.
13. 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 figures 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 in the circumstances of this appeal.
14. 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 and endorse the reasoning of the Commissioner in the circumstances of this appeal.

The Notice of Appeal:

15. The Appellant appealed by way of a notice of appeal dated 26th 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 8th June 2010 and reply dated 21st June 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 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 Commissioner did not issue a determination on parts 3-5 of the Appellant's request.

Reasons & Analysis

16. As set out above, the Tribunal is satisfied that regulation 12(5)(e) is engaged and that it is necessary to determine the balance of the public interest test. The appellant argues that the public interest test favours the disclosure inter-alia because of *“concern of private interest that there may be in withholding this information, which when revealed, may cause embarrassment, detail corruptive practice or in deed highlight continued incompetence by the individuals and groups involved, and emphasise even further the need for fundamental change.”* On the evidence before this Tribunal, there are no

grounds for establishing any of these concerns. A vague reference to corruption is insufficient, in our view to amount to a persuasive argument supporting the public interest being in favour of disclosure

17. The Tribunal finds that the Commissioner has given adequate details in each case for his decision and in our view is right in coming to the conclusion he has in relation to the public interest test as regards the information in parts one and two of the request as set out in para 14 above. In the absence of any weightier counter arguments in favour of disclosure the balance of the public interest test favours non-disclosure.

Conclusion

18. In light of the foregoing, the Tribunal dismisses this appeal.
19. 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.