



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

EA/2012/0170

B E T W E E N:-

MID ULSTER ENTERPRISES (CREGGAN) LTD

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

**DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT
FOR NORTHERN IRELAND**

Second Respondent

BEFORE:

Brian Kennedy QC
Judge

Melanie Howard & Anne Chafer

Paper Hearing on 8th February 2013.

Subject Matter:

Freedom of Information Act 2000, Application of exemptions under:
Section 40(2) [Personal Data]
Section 41(1) [Information provided in confidence]

DECISION

The Tribunal allows the Appeal for the reasons set out below and directs that the First Respondent adopt a substituted decision that conveys the position further to their Response herein in accordance to the findings of this Tribunal. See Paragraph 20 below.

1. The Tribunal reminds itself that the first principles under The Freedom of Information Act 2000 (“the Act”) are that disclosure is required in order to maintain public confidence that there is transparency and accountability in the conduct of the affairs of Public authorities in the execution of their functions. The Legislation however provides exemptions and exceptions where disclosure will not be required. This appeal demonstrates the delicate and often complicated application of exemptions whereby disclosure is or can be restricted.

2. The Tribunal wishes to thank all parties for their most helpful submissions and apologises of the delay in the promulgation of this decision. We adopt in format the helpful submission of the first respondent on the background and outline of the issues. We have considered all the submissions but on balance and for the reasons given prefer the first respondent’s arguments.

Factual Background

3. The Appellant contracted with a third party company to install a wind turbine; the installation of which was part of a project which was partly funded by monies from an EU programme which was administered by the Second named Respondent herein, the Department of Agriculture and Rural Development for Northern Ireland (“DARD”).

4. On 6 July 2010, the Appellant made a request to DARD for the following information:

“Emails sent and received between a public servant (within DARD) and a third party (within Frontier Energy) in relation to the wind turbine at An Creagán between July 2007 and February 2010 using the email address at DARD.

5. DARD argued that it would breach the data protection principles to disclose the requested information. In its internal review, DARD upheld its application of section 40(2) and also cited section 41(1) of the Act.

6. In his decision notice, the first named Respondent (“the Commissioner”) found that section 40(2) of the Act applied to all the requested information (“the withheld information”) and therefore that DARD was correct to withhold it.

7. The Appellant submitted a Notice of Appeal. In his Response, the Commissioner indicated that he was no longer of the view that the entirety of the withheld information could properly be said to fall within the category of third party personal data. As such, the

Commissioner invited the Tribunal to join DARD as Second Respondent in this appeal to enable it to respond to the above and also to set out any arguments it wished to make regarding the possible application of section 41 of the Act to the withheld information.

The Commissioner's Position

8. It is DARD's position that the information in dispute in this matter amounts to the personal data of a third party and that it would be unfair to disclose that information. However, further to the Commissioner's indication of a possible change of position on appeal, DARD also provided arguments in support of section 41(1) in the alternative.

9. The Act and the application of section 41 to the disputed information.

1. Section 41(1) FOIA provides –

“Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

10. The withheld information comprises of “...communication a third party entered into with the Department concerning non-payment by a third party (An Creagan)” .

11. The Commissioner has submitted that the first issue to be considered in a case involving section 41 of the Act is whether or not the requested information was obtained by the public authority from another person or another public authority.

12. In this case, emails from a third party to an employee of DARD can be said to have been obtained by the public authority (DARD) from another person such that the “obtained from” test required by section 41(1)(a) of the Act is satisfied.

13. However, any emails from an employee of DARD cannot be said to have been obtained by DARD from another person or another public authority such that section 41(1) is not engaged in respect of any such emails.

14. The Commissioner has also submitted for the reasons set out in his closed submissions, it cannot be said that section 40(2) of the Act applies to these particular emails. The Tribunal have carefully considered the closed submissions and accept this argument.

15. The Commissioner then made submissions on the issue of whether disclosure would constitute an actionable breach of confidence in respect of the emails from a third party to a person in DARD.

16. The Commissioner adopted the test set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 and will consider:

- a. Whether the requested information has the necessary quality of confidence;
- b. Whether the requested information was imparted in circumstances importing an obligation of confidence; and
- c. Whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

17. The Second Respondent has confirmed its agreement with the above.

18. The Commissioner firstly submits that the requested information does have the necessary quality of confidence as it is not in the public domain (else the Appellant would not be seeking a copy of the same) and its contents are certainly not trivial to the third party concerned. This Tribunal accept this premise and the appellant does not aver.

19. The Commissioner also accepts that the requested information was imparted in circumstances importing an obligation of confidence. As DARD has argued, a third party had entered into communication with the Department concerning the Appellant's non-payment of an invoice. The third party would not expect that such communications would be disclosed to the world at large, which includes the Appellant and the organisation which was the focus of that complaint, in response to an information request. This Tribunal accepts this reasoning and again the appellant does not aver.

20. The Commissioner thirdly submits that the disclosure of the withheld information would have a detrimental effect on a third party either because disclosure would be a loss of the

confider's privacy which is a detriment in itself or because disclosure would have a detrimental effect on the commercial interests of Frontier Energy as he was seeking to pursue legal action against the Appellant for breach of contract. This is supported by evidence in the papers inter-alia an objection form a third party to disclosure. The Tribunal accepts this submission also.

21. Having established that there was a duty of confidence; the Commissioner was then required to and did consider whether disclosure would give rise to an "actionable" breach of confidence. DARD has listed the circumstances in which a breach cannot be said to be actionable. The Commissioner accepts that the third party has not consented to the disclosure of the requested information and that there does not appear to be any legal requirement to disclose the communications.

22. The remaining exclusion requires a consideration of whether DARD would be able to rely on a 'public interest defence' to any claim for breach of confidence. The 'public interest defence' within the duty of confidence assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. It is therefore necessary to weigh up the public interest in disclosure against the wider public interest in preserving the principle of confidentiality, which the Commissioner has done in this case.

23. The Commissioner submits that there is a public interest in the disclosure of information generally for openness and transparency purposes and perhaps more so in the particular circumstances of this case as the Tribunal has recognised at the outset. However, the Commissioner properly recognises that there is a public interest in protecting the principle of confidentiality and in not discouraging individuals from providing public authorities with information in confidence. In addition, the Commissioner accepts there is a public interest in either protecting the privacy of the confider in this case or in avoiding any detriment to the commercial interests of Frontier Energy, with whom the third party is associated.

24. The Commissioner came to the view that the public interests in disclosure of the disputed information do not outweigh the public interests in withholding the same such that DARD could not be said to have a public interest defence to any claim of breach of confidence. As such, any breach of confidence claim is likely to be actionable and therefore section 41 is engaged. On careful consideration of the documents provided in the open and closed bundles, this Tribunal, on balance, accept this interpretation.

25. The Commissioner has also submitted some further closed skeleton arguments; to be seen by the Tribunal and Second Respondent only. This is necessary because these further limited arguments specifically refer to the contents of the disputed information and cannot be addressed in open submissions as to do so would obviously go to defeat the purposes of this appeal.

26. The Commissioner has submitted that section 41 is engaged in respect of those emails which were sent by the third party of Frontier Energy to a public servant within DARD and for the reasons given; this Tribunal accept this as correct. However, it is the Commissioner's submission that neither section 41 nor section 40 applies to any emails from DARD and this Tribunal accept this submission on the grounds and reasons provided in the closed submissions made on behalf of the Commissioner.

27. The Tribunal therefore directs that the Commissioner make the following substituted decision in accordance with their change or "shift in his position" from the Decision Notice of the 10th July 2012 (Ref: FS50415796).

28. **The Substituted Decision:**

"The following Decision Notice is substituted in place of the Commissioner's Decision Notice dated the 10th July 2012.

The Commissioner finds that section 41(1) of the Act is engaged in respect of those emails sent by a third party to the Department of Agriculture and Rural Development for Northern Ireland ("the Department")

However the Commissioner does not accept that section 41(1) is engaged in respect of those emails forwarded from the Department to the third party as such emails cannot be said to have been obtained from another person or another public authority.

The Commissioner also finds that section 40(2) is not engaged in respect of those emails which do not engage section 41.

Steps Required:

The Commissioner requires the Department to disclose only those emails which were sent by the Department to the third party. For the avoidance of any doubt, these emails have been described in the attached confidential annex.

The Department must take the steps referred to above within 35 calendar days of the date of this Substituted Decision Notice.”

Dated this 17th day of May 2013

Brian Kennedy QC

Judge