

Decision Notice



Decision 014/2012 Ivanhoe Cambridge and the Scottish Futures Trust

Tax Increment Finance Business Case: Buchanan Quarter development

Reference No: 201101971

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On behalf of Ivanhoe Cambridge, the Scottish Futures Trust (the SFT) was asked for information about the business case for a proposed tax increment finance (TIF) initiative (to fund the Buchanan Quarter development in Glasgow). The SFT withheld the information under regulation 10(4)(d) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), which relates to incomplete or unfinished material, and upheld this decision after review. An application for a decision from the Scottish Information Commissioner was then made on behalf of Ivanhoe Cambridge.

Following an investigation, the Commissioner found that the SFT had wrongly withheld the information under regulation 10(4)(d) of the EIRs. While accepting that the exception applied, he concluded that the public interest in making the information available outweighed the public interest in maintaining the exception. The Commissioner required the SFT to provide Ivanhoe Cambridge with the withheld information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "environmental information"); 5(1) and 2(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(d) (Exceptions from duty to make environmental information available).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. The SFT is a company limited by shares, wholly owned by the Scottish Ministers. As such, it is a publicly owned company as defined by section 6(1)(a) of FOISA and therefore a Scottish public authority as defined by section 3(1)(b) of FOISA.



2. On 24 June 2011, a request was made to the SFT on behalf of Ivanhoe Cambridge for information which Glasgow City Council had submitted in support of a tax increment finance pilot scheme (the TIF scheme) for the Buchanan Quarter, this information comprising the business case for the TIF scheme and a supporting research report prepared by GVA Grimley. (As the Commissioner is satisfied that the GVA Grimley report should be considered as an integral part of the business case, the withheld information in its entirety is referred to as “the business case” in this decision notice.)
3. On 1 August 2011, the SFT wrote to advise Ivanhoe Cambridge that it had decided to withhold the requested information, which it considered to be environmental information and excepted from disclosure under regulation 10(4)(d) of the EIRs. It explained that the business case might change significantly as the result of ongoing work streams, and took the view that the public interest in withholding the information before work on the business case was completed was greater than the public interest in making it available.
4. On 2 August 2011, a request for a review of the SFT’s response was sent on behalf of Ivanhoe Cambridge, challenging the view that the information was incomplete and giving reasons why disclosure would be in the public interest.
5. On 30 August 2011, the SFT wrote to Ivanhoe Cambridge to advise that the decision to withhold the information under regulation 10(4)(d) had been upheld after review. The SFT provided more explanation of its decision (the SFT’s reasons are considered later in this decision notice).
6. On 21 October 2011, a letter was sent to the Commissioner on behalf of Ivanhoe Cambridge, expressing dissatisfaction with the outcome of the SFT’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Subject to certain specified modifications, regulation 17 of the EIRs applies the provisions of Part 4 of FOISA for the purposes of enforcing the EIRs, as they apply to the enforcement of FOISA.
7. The application was validated by establishing that Ivanhoe Cambridge had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. On 1 November 2011, the investigating officer contacted the SFT, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.



9. The SFT was directed to a previous decision from the Commissioner (*Decision 216/2011 Ivanhoe Cambridge and Glasgow City Council*¹) in which he found that a distinction could be made between information in a draft of the business case which was obviously incomplete at the time of the request, and information in the “finalised” draft sent to the SFT for consideration. In particular, the SFT was invited to consider the Commissioner’s comments in that case on the public interest for and against disclosure of information in the draft business case.
10. The SFT was also asked to say more about the way in which it had met the requirement to interpret the exceptions in the EIRs in a restrictive way and to apply a presumption in favour of disclosure. It was also invited to explain further why it considered the requested information to be “unfinished” and “incomplete”.
11. The SFT replied on 24 November 2011. It provided information about its role in TIF projects and addressed the points raised in the investigating officer’s letter of 1 November 2011. It also confirmed that it wished to rely on section 39(2) of FOISA in withholding the information. The SFT’s comments and arguments are considered in more detail, together with those put forward by Ivanhoe Cambridge, in the next part of this decision notice.

Commissioner’s analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information, with the submissions made to him by both Ivanhoe Cambridge and the SFT, and is satisfied that no matter of relevance has been overlooked.
13. In this decision notice, the Commissioner must determine whether the SFT complied with the EIRs in withholding the information in the business plan at the time it carried out its review in respect of Ivanhoe Cambridge’s request. Since then (and since Ivanhoe Cambridge submitted its application for a decision from the Commissioner), Glasgow City Council has published a finalised version of the business plan, as approved by the SFT. The Commissioner is aware of this, but has not taken it into account in reaching his decision on whether the SFT complied with the EIRs in responding to the request from Ivanhoe Cambridge.

Section 39(2) of FOISA – environmental information

14. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*² and need not repeat it in full here. In the course of the current investigation the SFT submitted that it was entitled to withhold the requested information under section 39(2) of FOISA, concurring with the Commissioner’s view (as expressed in *Decision 216/2011*) that the information was environmental information as defined in regulation 2(1) of the EIRs.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201100564.asp>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



15. The exemption in section 39(2) of FOISA provides, in effect, that information which is defined as environmental information by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing such information to be considered solely in terms of the EIRs. In this case, having examined the withheld information, the Commissioner was satisfied that the requested information falls within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraphs (c) and (e) of that definition. Having reached that conclusion, he finds that the SFT was entitled to apply the exemption in section 39(2) of FOISA to the requested information.
16. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The SFT considered that the public interest in upholding the exemption in section 39(2) of FOISA outweighed the public interest in disclosing the information under FOISA, because the EIRs represent a freestanding regime for access to environmental information and it is in the public interest that request for environmental information are dealt with consistently under that regime.
17. Having considered all the circumstances of this case, the Commissioner accepts that because there is a separate statutory right of access to environmental information available to the applicant in this case, the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in dealing with the request under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(4)(d) of the EIRs

18. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available when requested to do so, where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)).
19. Regulation 10(4)(d) is subject to the public interest test in regulation 10(1)(b), which provides that a request for environmental information may only be refused if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

Was the information “unfinished” and/or “incomplete”?

20. In its application to the Commissioner (21 October 2011), Ivanhoe Cambridge argued that when Glasgow City Council submitted the business case to the SFT in February 2011, the Council regarded the document as “finalised”, whatever the SFT’s view might be. The Council had previously withheld an “incomplete” version of the business case (the draft existing in December 2010) but had described the version submitted to the SFT as “a clear and robust case”.



21. The SFT took the view that the version of the business case it received from the Council in February 2011 was still in the course of completion, and did not represent a finalised version of the business case; it has drawn attention to the later, “finalised” version which has since been published by the Council. In its initial response to Ivanhoe Cambridge (1 August 2011), the SFT advised that the version of the business case covered by the request was “out of date and not representative of the current status of the Scheme”. The SFT indicated that several work streams were then ongoing, with its intention being to consolidate these into a new or updated business case. Consequently, the business case might change significantly.
22. In its review response to Ivanhoe Cambridge (30 August 2011), the SFT confirmed its view that the business case, as submitted by Glasgow City Council, was “a work in progress”. The SFT pointed out that the Buchanan Quarter project was referred to as a pilot project, and considered that this description indicated the iterative approach which the SFT had taken to the project: a process of dialogue and debate about the proposed business case. The SFT referred to its Draft Guidance on TIF Projects to clarify the approach it had taken. It argued that the process clearly envisaged the submission of a “final” business case to the SFT which would then be considered by the Scottish Ministers, and that until that point the business case document should be treated as unfinished or incomplete. The SFT confirmed that, at the date of its writing, no final business case had been submitted by the Council.
23. In its submission to the Commissioner, the SFT provided more information about the processes it followed on receipt of the business case from Glasgow City Council. It explained that the process was one of validation, to ensure that appropriate planning had been carried out and that risks were appropriately and actively managed. The validation process questioned the assumptions made by the local authority, and attempted to weed out any inconsistencies, ensuring that when the business case was put before Scottish Ministers with the SFT’s recommendation to proceed, it would be at a sufficiently advanced level. The SFT described the validation process as requiring “an independent, sceptical and challenging mindset”.
24. The SFT explained that while the local authority may have concluded its initial work on the business case, that did not (in its view) render it “more or less complete”. A significant element of the validation work (checking consistency and how the case “hangs together”) could not be undertaken until SFT had received the document. The validation process required “exchange and amendment of important areas of a document”. The SFT believed that although the version of the business case requested by Ivanhoe Cambridge on 24 June 2011 was more developed than the version previously withheld by Glasgow City Council, it was still a draft that was subject to a number of work streams.



25. The SFT provided a marked-up copy of the business case showing the differences between the requested and published versions. It indicated that some of the changes had been significant, and went to the heart of the business case: certain elements had been excluded or included; the financial analysis was different; and the economic outputs were different. The SFT commented that some of the fundamental areas underpinning the business case had changed since the version requested by Ivanhoe Cambridge, and previously missing or incomplete information of a substantial nature had been provided. In other words, the SFT viewed the requested version of the business case as a “stepping stone” along the way to the published version, rather than being “more or less complete”.
26. The Commissioner has considered carefully whether or not the information in the business case received by the SFT in February 2011 was material still in the course of completion, an unfinished document, or incomplete data.
27. The process of preparing a business case for a TIF project is a lengthy one, involving several different stages. Initially, a draft business case is prepared by the local authority, working (with the SFT’s support and assistance) to guidelines produced by the SFT. The business case is then submitted to the SFT to undergo the validation process described above. Once complete, the next step is for the SFT to submit the business case to the Scottish Ministers with a recommendation (this step had yet not taken place in relation to the Buchanan Quarter TIF project at the point when the SFT made its submission to the Commissioner).
28. The Commissioner takes the view that in an iterative process such as the one used to develop and validate a TIF project business case, there will be points at which it is possible to say that a particular stage in the development of the document is complete, and a new stage about to begin. For example, although the “finalised” draft of the business case has now been published by Glasgow City Council, the Commissioner notes that the same version of the business case continues to be described as a “working draft” in the SFT’s submission to the Commissioner, and that the SFT expects a “final business case” to be submitted to the Scottish Ministers.
29. The Commissioner believes that the version of the business case requested by Ivanhoe Cambridge on 24 June 2011 had reached a particular stage of completion. The Council had finished the initial development of the business case and was content to submit the draft to the SFT for the next stage in the process, describing it as “a clear and robust case”. Although the business case was likely to be amended and developed further during the validation process carried out by the SFT, the request from Ivanhoe Cambridge was for the version supplied to the SFT by the Council, as it stood after the Council had finished working on it and before the SFT’s validation work had begun.



30. Even so, the Commissioner has concluded that in the circumstances of this case (given the nature of the TIF project development process as it existed at the time, and indeed as it exists at present) the request covered information which was in the course of completion and in an unfinished document. He notes that the request was made to the SFT, not Glasgow City Council. From the Council's perspective, the business plan had reached a particular stage of completion, and it might be argued that while the version in which it existed was preliminary to a later development, it was not unfinished. However, from the SFT's perspective, the document received from the Council clearly had the status of a draft, presented in order for further amendment to take place after checking consistency, validating key assumptions, and carrying out various types of analysis and modelling. From the SFT's perspective, then, the Commissioner accepts that the document was in the course of completion rather than complete.
31. The Commissioner therefore accepts that the information fell within the scope of the exception in regulation 10(4)(d).

The public interest test

32. Having accepted that the exception in regulation 10(4)(d) can apply to the information withheld from Ivanhoe Cambridge and under consideration in this decision, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Public interest arguments from Ivanhoe Cambridge

33. Ivanhoe Cambridge set out a detailed account of its understanding of events occurring during the development of the business case for the Buchanan Quarter TIF project. Ivanhoe Cambridge believed it was important for the Commissioner to take due cognisance of these events, in reaching a decision on whether the information in the business case should have been released.
34. Ivanhoe Cambridge submitted that it was very much in the public interest (and essential in the interests of good public administration) that the SFT should release the February 2011 version of the business case, as this would enable the public to compare the detail of its contents with the finalised version of the business case, now published by the Council and due to be submitted to the Scottish Ministers for approval. This would give the public an opportunity to understand the iterative process that had informed the decision-making process, and would allow key stakeholders, such as Ivanhoe Cambridge, to provide informed comment on both the validity of the economic analysis carried out by GVA Grimley and the conclusions drawn about the robustness of the scheme.



35. TIF funding is a relatively new development in relation to public spending in Scotland. Ivanhoe Cambridge pointed out that the other two TIF pilot projects underway in Scotland both involved regeneration proposals founded in the local development plan, so that the proposals and their impacts had been taken through a fully informed public consultation exercise with independent scrutiny ahead of the plan adoption. Ivanhoe Cambridge considered that the Buchanan Quarter TIF proposal differed in having no bespoke development plan support, and believed it could even be contrary to one of the policies in Glasgow's City Plan 2, which directs that the Council will protect and seek to enhance the vitality and viability of the core City centre retail area as a whole. Ivanhoe Cambridge described the TIF proposal as "essentially a project that has been put together behind closed doors", rather than one informed by a process of consultation on a range of options.
36. Ivanhoe Cambridge commented that the EIRs were derived from the Aarhus Convention, which was concerned not just with access to environmental information, but also with the promotion of informed public participation in the decision-making process, as indicated by the Aarhus Convention Implementation Guide. Ivanhoe Cambridge drew attention to page 38 of the Implementation Guide:
- "[as] the results of economic analysis may have a great impact on whether or not a particular project will go ahead, it is important to be able to examine the thinking that went into it. The quantification of environmental values and the 'internalisation' of environmental costs are among the most difficult questions for economists. It is therefore also important to be able to analyse the assumptions behind economic modelling used in environmental decision-making."
37. Ivanhoe Cambridge referred to the consultation exercise which Glasgow City Council had carried out in May 2010, in relation to the TIF project.³ It stated that despite the inclusion of a reference to "the Buchanan Quarter proposals" in the consultation questionnaire, at the time of the consultation exercise no member of the public (including key interested parties such as Ivanhoe Cambridge) had any detailed knowledge of what the specifics of the proposals actually were. The consultees were not provided with any alternative options to consider, with a view to informing the selection of the best possible outcome. Nor were the consultees informed of what had been learned from the consultation exercise (Ivanhoe Cambridge suggested this would be expected practice).
38. Ivanhoe Cambridge argued that it was in the public interest that decision-makers should be seen to have had the opportunity for third-party comment to inform their final decision, not just advice from consultants paid by developers with an obvious financial interest in the outcome. In support of this view, Ivanhoe Cambridge pointed to several occasions (both before and after its information request was made to the SFT) on which it had presented arguments and comments to Glasgow City Council and the SFT based on the information available about the business case and the proposed development. Ivanhoe Cambridge believed that certain aspects of the business plan had been amended by the Council or the SFT as a result of its comments and questioned whether these issues would have been identified without its input. It asked what other issues might members of the public have been able to identify and seek to address if a draft copy of the business plan had been published for public consultation.

³ Also described in paragraph 36 of [Decision 216/2011 Ivanhoe Cambridge and Glasgow City Council](#).



Public interest arguments from the SFT

39. The SFT stated that in considering the public interest test, it had started from the presumption that it would be in the public interest to publish a version of the business case at the “right stage” of the process. SFT identified two particular factors which it believed to be relevant in relation to the public interest test. These were:
- (i) whether disclosure would allow the public to give informed views which might assist the development of a business case and provide added certainty that a project would find market support; and
 - (ii) that the project would affect a great number of people both within and outwith Glasgow, in terms of potential for employment, disruption during the works period and potential for positive and negative effects on businesses, and that these people should therefore have knowledge of the terms of the project.
40. The SFT believed that it was absolutely vital that public scrutiny should happen at the appropriate stage, and advised that this was why it had sought to ascertain from Glasgow City Council whether it intended to publish the final version of the business case, and had advised Ivanhoe Cambridge that this was the Council’s intention.
41. The SFT noted that consultation about the TIF project was a matter for Glasgow City Council, not the SFT, and advised that it would be inappropriate for it to comment on the consultation carried out by the Council. It took the view that consultation was important, as was the disclosure of the final business case; however (as stated previously), it was vital that consultation and the release of information took place at the appropriate stage. The SFT welcomed the Commissioner’s comments in paragraphs 55 and 56 of *Decision 216/2011*, in which the Commissioner accepted that there might be a strong public interest in enabling third party scrutiny of the business case proposals but expressed the view that this might not be equally strong at all stages in the drafting process.
42. The SFT explained that it did not consider the requested version of the business case to be at an appropriate stage for publication, since several work streams were ongoing and changes to the business case were being made. It argued that to release a version of a business case too early could lead to a significant amount of time being spent in dealing with concerns, queries and questions that would not have arisen had a more complete draft been released. It argued that while the inevitable delay caused by such interventions might suit the private interests of competitors or opponents to the business case, it would not be in the public interest.
43. The SFT noted the Commissioner’s comments in paragraph 50 of *Decision 216/2011*, in which he stated that he had been able to compare two different versions of the business case and believed it would be misleading to draw conclusions based on the earlier version which contained incomplete information and which was then subject to further revision. The SFT believed the same reasoning should apply in the current case, given the differences between the requested version of the business case and the finalised version (the version which has since been published by Glasgow City Council).



44. The SFT also commented that (at the time of its writing) it had not yet given the Scottish Ministers a recommendation on the business case and there was still time to comment on the published version. Additionally, in its view, the business case had reached a stage where the public interest in publishing outweighed any interest in withholding it on the grounds that it was a working draft. However, the SFT made clear its view that there was no public interest or merit in issuing a draft that was now clearly out of date (i.e. the version of the business case requested by Ivanhoe Cambridge).

The Commissioner's view on the public interest test

45. The Commissioner has carefully considered all the arguments put forward by Ivanhoe Cambridge and by the SFT, in relation to the public interest in disclosing or withholding the requested information.
46. The Commissioner's decision on whether the SFT complied with the EIRs must be based on circumstances as they existed at the time the SFT dealt with the request for review from Ivanhoe Cambridge. This is particularly relevant in relation to the availability of information in the public domain at that time. In a case like this, where more information has subsequently been published, the Commissioner must try to look back in time and consider the arguments for and against disclosure in the public interest as they applied to the circumstances existing at the time of the review. Some of the public interest arguments put forward by Ivanhoe Cambridge (such as the public interest in allowing a comparison of the published version of the business case with the version provided to the SFT in February 2011) must therefore be excluded from consideration, as publication of the business case had not taken place at that time.
47. In considering the public interest test in relation to the withheld information, the Commissioner accepts that there is generally a public interest in making information available to the public, particularly where this promotes transparency and accountability in relation to decision-making, but he acknowledges that this must be balanced against any consequences of disclosure which would be contrary to the public interest.
48. Regulation 10(4)(d) does not contain a "harm test", but simply requires information to be incomplete or unfinished in order for the exception to be engaged. Any arguments relating to the harmful or detrimental consequences of disclosure will therefore be considered in relation to the public interest test required by regulation 10(1)(b) of the EIRs. In reaching a conclusion on whether the balance of public interest lay in disclosing or withholding the information from the draft business case, the Commissioner has sought to establish whether, or to what extent, disclosure of this information would have brought about the positive consequences suggested by Ivanhoe Cambridge, or the negative consequences suggested by the SFT.
49. The Commissioner considered carefully the SFT's argument that while it would ultimately be in the public interest for the information in the business case to be published at an appropriate time, that time had not yet come and it was therefore not in the public interest for the information requested to be disclosed at the time of the review.



50. The Commissioner accepts that some of the information found in the version of the business case requested by Ivanhoe Cambridge was likely to be amended and altered during the SFT's process of validation. This being so, he accepts that disclosure of the version provided by Glasgow City Council to the SFT could have led other parties, such as Ivanhoe Cambridge, to draw conclusions which might not be borne out by the final version of the business case, and to raise concerns and objections which might turn out to be irrelevant once the document was finalised. The Commissioner accepts that if such concerns and objections had been raised at this stage, it is likely that resources within the SFT would have had to be diverted in order to address these, and that the process of validation might have been delayed as a result.
51. However, the Commissioner does not accept that such a scenario would necessarily be against the public interest.
52. As noted previously, the SFT has explained that in its validation process TIF applications are scrutinised with "an independent, sceptical and challenging mindset". During the process, assumptions made by the local authority are questioned, and an attempt is made to weed out any inconsistencies. This outcome is clearly in the public interest, particularly because the business case relates to plans for large-scale public spending. The question remains whether it is necessarily in the public interest to restrict this process to the SFT and Council officials, or whether it might be in the public interest to allow other parties to offer their own sceptical and challenging observations.
53. Ivanhoe Cambridge has pointed out that one of the fundamental principles (or "pillars") underlying the Aarhus Convention is public participation in decision-making. The Implementation Guide states:
- "The Convention recognizes that people have the right to take part in basic decisions affecting their lives. It also recognizes that the quality of these decisions can be improved through the active involvement of the public concerned."⁴
- (The Implementation Guide makes it clear that in this respect, the term 'the public' can represent not only the general public but also sectoral groups or interested parties.)
54. In *Decision 216/2011*, the Commissioner accepted that situations might occur in which the public interest lay in protecting a drafting process by preserving a private space within which draft proposals such as the business plan could be compiled and completed as efficiently as possible. He acknowledged that, effectively, this might mean that opportunities for public comment and participation should be limited or restricted at certain stages in the drafting process, to allow the proposals to be finalised and presented for consideration with a minimum of delay. In *Decision 216/2011*, after reviewing the information in the version of the business case covered by the request and comparing it with the version provided to the SFT, the Commissioner concluded that the public interest lay in withholding the information in order to protect the drafting process by providing a space in which the proposals in the business case could be reviewed and completed for submission to the SFT.

⁴ Aarhus Convention Implementation Guide, p.89



55. In this case, however, the circumstances are different. The information requested by Ivanhoe Cambridge had reached a more advanced state of completion. The initial drafting process (undertaken by the Council with assistance from the SFT) had been completed, and the resulting draft business case had been submitted to the SFT for further scrutiny and assessment. In the Commissioner's view, the argument that disclosure of the information would be inappropriate at this stage is much weaker than when previously applied to information in the draft business case being worked up by the Council. The main provisions and calculations of the business case were now in place, and had been presented for scrutiny by the SFT. While the process of validating the business case was likely to be more straightforward if scrutiny was confined to the SFT, it could be argued that a wider critical scrutiny could well be in the public interest at this stage, to ensure that any perceived weaknesses or flaws in the business plan were identified and addressed before the draft was finalised.
56. Ivanhoe Cambridge's view of the TIF project will, of course, be coloured by its own business concerns, making it likely to be critical of the project; however, it could be argued that, had the SFT disclosed the information requested, any comments then received from an informed (and clearly interested, if potentially antagonistic) party would be all the more valuable when scrutinising the business case. The fact that the draft business case was not finalised and contained information likely to change during the SFT's validation process was something which could have been made clear, had the information been disclosed at the time of the request.
57. The Commissioner takes the view that there would have been a strong public interest in enabling third party comments through the disclosure of the information presented to the SFT, as this would have allowed wider scrutiny of the assumptions underpinning plans for substantial public spending and significant changes to the built environment in the Buchanan Quarter. The Commissioner believes his view to be in line with the principles established by the Aarhus Convention, from which the EIRs derive (see paragraph 53 above).
58. The Commissioner also considers that there was a strong public interest in disclosing information from the draft business case which would improve understanding of the iterative process through which the decision on the TIF project was made. While Glasgow City Council and the SFT had already made available a considerable amount of information about the Buchanan Quarter TIF project and TIF projects in general, the Commissioner accepts that disclosure of the draft business case would have enabled a more detailed understanding of the case submitted for SFT scrutiny, and the nature of the arguments supporting the TIF application. The fact that the business case relates to plans for significant city centre development and public works, involving substantial public funding, increases the public interest in transparency around the decision-making process.
59. Having weighed up the public interest against disclosure, which mainly lies in avoiding disruption to the SFT's scrutiny of the business case process, against the public interest in disclosure (as outlined in the previous paragraphs), the Commissioner has found that the public interest in disclosure outweighed the public interest in maintaining the exception in regulation 10(4)(d) of the EIRs. Therefore, the exception has not been upheld, and the information should now be disclosed.



DECISION

The Commissioner finds that the Scottish Futures Trust (the SFT) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made on behalf of Ivanhoe Cambridge.

The Commissioner finds that the SFT was not entitled to withhold the information under the exception in regulation 10(4)(d), and consequently that it failed to comply with regulation 5(1) in refusing to disclose this information.

The Commissioner requires the SFT to provide Ivanhoe Cambridge with the withheld information by 13 March 2012.

Appeal

Should either Ivanhoe Cambridge or the Scottish Futures Trust wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
26 January 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- ...
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1) -

...

(b) is subject to regulations 6 to 12.

...



10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...