

Decision Notice



Decision 153/2012 Mr Steven Vass of the Sunday Herald and the Scottish Ministers

TIF evaluation and scoring

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www.itspublicknowledge.info

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Summary

Steven Vass, a journalist with the Sunday Herald, asked the Scottish Ministers (the Ministers) for the scoring and reasoning they and the Scottish Futures Trust had applied to the 16 Tax Incremental Financing proposals received from local authorities. The Ministers dealt with the request under the Freedom of Information (Scotland) Act 2002, but refused to disclose the information to Mr Vass.

During the investigation, the Commissioner came to the view that the Ministers should have dealt with the request under the Environmental Information (Scotland) Regulations 2004 (EIRs). The Ministers agreed, but argued that, since the information constituted material in the course of completion and internal communications, they did not have to disclose the information.

The Commissioner did not accept that the withheld information was material in the course of completion. She did accept that it related to internal communications, but found that the public interest favoured its disclosure. The Commissioner also found that the Ministers failed to provide advice and assistance to Mr Vass and had failed to respond to his requirement for review within the required timescale. She required the Ministers to disclose the withheld information to Mr Vass.

Relevant statutory provisions

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) (definitions (c) and (e) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 9(1) (Duty to provide advice and assistance); 10(1), (2), 4(d) and (e) (Exceptions from duty to make environmental information available on request); 16(4) (Review by Scottish public authority)

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. Tax Incremental Financing (TIF) is a method of enabling local authorities to fund regeneration projects by borrowing money against the predicted increase in locally-collected business taxes from the new development. Two projects (Leith Waterfront project and Ravenscraig Phase two scheme) were taken forward as a first phase of pilot projects. In June 2011, the Scottish Futures Trust (SFT) wrote to all local authorities in Scotland that did not have a TIF pilot project, inviting them to submit outline proposals in order to identify a second phase of pilot projects. 16 proposals were subsequently received from 15 local authorities. The proposals were evaluated by a panel of representatives of the SFT and the Scottish Government (the evaluation panel). Following the agreement of scoring by the panel, recommendations were made to the Scottish Ministers, who announced on 1 November 2011 which of the proposals would be taken forward¹.
2. On 4 November 2011, Mr Vass emailed the Ministers requesting the scores for economic suitability and the reasoning that the SFT allotted to each of the 16 TIF applications for the second phase of TIF pilots. Mr Vass indicated that he was unclear as to what information was held by the Ministers, and requested that someone contact him to discuss his request.
3. The Ministers responded on 5 December 2011 (having not contacted Mr Vass to discuss his request before doing so). The Ministers provided some background information on the evaluation of the proposals and on the role of the evaluation panel in the overall decision making about which proposals were taken forward. However, they refused to supply the information they understood to have been requested on the basis that it was exempt from disclosure under sections 29(1)(a) and 30(b)(i) of FOISA. These exemptions apply where the information relates to the formulation or development of government policy (section 29(1)(a)) and where disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)).
4. On 6 December 2011, Mr Vass emailed the Ministers requesting a review of their decision. He indicated he did not consider that the exemptions applied and commented that the public has a strong interest in understanding whether the Government had taken decisions about the TIF pilots contrary to SFT findings. Mr Vass also commented that he had expected someone to contact him to discuss his request to clarify the nature of information held and to establish exactly what he wished to access. He stated that he considered that the Ministers had breached their duty to provide advice and assistance.
5. The Ministers notified Mr Vass of the outcome of their review on 6 February 2012. The Ministers upheld their decision without amendment. In response to Mr Vass' comment that someone should have contacted him to discuss his request, the Ministers apologised that this had not occurred, but indicated that the wording and subject of his request was considered clear by the person who had responded.

¹ <http://www.scotland.gov.uk/News/Releases/2011/11/01143027>

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6. On 6 February 2012, Mr Vass emailed the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
7. In his application, Mr Vass expressed dissatisfaction with the Ministers' decision to withhold the information requested. He also noted that the Ministers had failed to respond to his request for review within the required timescale and reiterated his view that the Ministers should have contacted him to discuss his request to assist him in understanding what information was available.
8. The application was validated by establishing that Mr Vass 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.

Investigation

9. On 15 February 2012, the Ministers were notified in writing that an application had been received from Mr Vass and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking them to respond to specific questions.
11. The Ministers were advised that the Commissioner was likely to find that the information under consideration was environmental information and were asked to provide submissions on whether the Ministers considered that the information was excepted from disclosure under the EIRs.
12. The Ministers were also asked to provide details of the searches they had undertaken to determine that all information falling within the scope of the request had been identified; why they had not contacted Mr Vass to discuss his request as he had asked; and why they had failed to respond to Mr Vass' requirement for review within the required timescales.
13. The Ministers responded to the investigating officer's request. They accepted that the withheld information was environmental information and indicated that they would now consider it to be exempt from disclosure under section 39(2) of FOISA. They also confirmed that they considered the exceptions in regulations 10(4)(d) ("material in course of completion") and 10(4)(e) of the EIRs ("internal communications") applied to the withheld information, and explained their reasoning regarding these exceptions and the associated public interest test.



14. The Ministers also explained the searches they had undertaken when identifying the information requested by Mr Vass. They indicated that they had not contacted Mr Vass to discuss his request because they considered it was clear and required no discussion. In addition, they explained that they had not provided a response to his request for review within the required timescale because of staff absences over the festive period.
15. The investigating officer also contacted Mr Vass during the investigation, seeking his submissions on the matters to be considered in the case. Mr Vass' submissions, along with those of the Ministers, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Vass and the Ministers and is satisfied that no matter of relevance has been overlooked.
17. The information being withheld in this instance comprises two tables setting out the evaluation panel's agreed comments on, and scoring of, the TIF proposals following the meeting at which these were agreed. The Ministers have withheld this information under regulations 10(4)(d) and 10(4)(e) of the EIRs. Prior to considering these exceptions, the Commissioner considered whether the withheld information is environmental information.

Section 39(2) of FOISA – environmental information

18. The Commissioner's views on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*². It need not be repeated in full here.
19. In this case, the Ministers submitted, in the course of the investigation, that they were entitled to withhold the requested information under section 39(2) of FOISA, concurring with the Commissioner's view that it was environmental information as defined in regulation 2(1) of the EIRs.
20. In his submissions, Mr Vass disputed both that the information was environmental information and that his request should be considered in terms of the EIRs by the Commissioner at a late stage in the process. He commented that, if the information under consideration in this case was environmental information, it would suggest that virtually any information that relates to physical space (such as traffic or agricultural statistics) was environmental information. He accepted that information (as with information about the TIFs) was related to the environment, but only in a loose sense.

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

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21. Mr Vass expressed the view that most people would think of the environment as relating to environmental protection. He added that, if had he been asking for an environmental impact assessment in relation to a particular TIF, which would indicate how it might affect air quality or protected species, then he would have no complaint. In this case, however, he maintained that he was seeking economic assessments in relation to infrastructure.
22. The Commissioner has noted all of Mr Vass' comments, and she recognises that his view on the extent of what constitutes environmental information may well be shared widely. However, the definition of environmental information within the EIRs is wide-ranging and includes a range of information that goes beyond information directly about environmental conditions, impacts and protection.
23. As set out in *Decision 218/2007*, if a request is for environmental information, it must be considered under the EIRs, not FOISA. The Commissioner acknowledges that it may be frustrating if a request that has previously considered under FOISA is identified at a late stage as one seeking environmental information. However, it would not be appropriate to ignore the obligations under the EIRs in cases where a public authority has failed to consider them. To do so would compound the public authority's error, and fail to encourage good practice with respect to the handling of requests for environmental information.
24. In this case, the Commissioner finds the withheld information is environmental information in terms of part (e) of the definition in regulation 2(1) of the EIRs. Part (e) refers to cost benefit and other economic analyses and assumptions which are used within the framework of measures defined in part (c). Part (c) refers to measures, including administrative measures, such as policies, plans, programmes, environmental agreements and activities, affecting or likely to affect the state of the elements of the environment or factors affecting these. The relevant parts of the definition are set out in the Appendix to this decision.
25. The Commissioner considers the scoring and evaluation of the TIF proposals to be an economic analysis. That analysis relates to proposals for infrastructure projects, which would involve a range of measures (including e.g. planning applications and decisions, activities such as building works and agreements with contractors) which in time would be likely to affect the state of the land and built environment (elements of the environment) and will involve factors such as energy, noise and waste.
26. As the Commissioner is satisfied that the withheld information is environmental information, she is satisfied that Mr Vass' application should have been considered under the EIRs.
27. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined 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. As the Commissioner is satisfied that the requested information is environmental and can be considered under the EIRs, she is satisfied that the Ministers were entitled to apply the exemption in section 39(2) of FOISA to the requested information.



28. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also finds that 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 disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
29. However, while she is pleased to note that the Ministers accepted the information was environmental in the course of the investigation, the Commissioner must also note that the Ministers initially failed to recognise that the request was for environmental information. By failing to do so, the Ministers failed to comply with regulation 5(1) and (2)(b) of the EIRs.

Information under consideration

30. The information under consideration is that identified by the Ministers as falling within the scope of Mr Vass' information request. It constitutes two tables setting out the final comments and scoring agreed by the evaluation panel (comprising two representatives of each of the SFT and the Scottish Government) in relation to each of the 16 local authority TIF proposals.
31. In his application, Mr Vass stated that he was uncertain what information the Ministers held regarding the TIF evaluation process, so he expected someone to contact him to discuss his request and was disappointed that no-one had done so. He was therefore uncertain if the Ministers' response had been all encompassing.
32. During the investigation, the investigating officer took steps to establish whether the information provided to the Commissioner by the Ministers constituted all that was held by them regarding the scoring and evaluation of each proposal, given that individual notes and scores had not been provided.
33. The Ministers explained that, following receipt of the TIF proposals, the panel members had individually prepared scores and comments, before attending a moderation meeting at which the final comments and scores were agreed. After the moderation meeting, all individual notes and scores were destroyed as the withheld information was seen as the master copy of the evaluation. The evaluation and scoring matrix was then used to advise the Ministers on the reasoning and scoring of the applications, and the Ministers responded to this advice before a formal announcement was made.
34. In addition, the investigating officer also identified types of information that could possibly fall within scope of Mr Vass' request, if held, and enquired whether the Ministers had identified all relevant information. The Ministers provided a detailed response to the investigating officer's questions, and no further information which fell within the terms of Mr Vass' request was identified.



35. Having considered the Ministers' explanation of the process, the Commissioner has concluded that the evaluation of the TIF proposals fell into two broad phases:
- evaluation and scoring of the TIF submissions by the panel, the outcome of which was a recommendation to the ultimate decision makers (the Ministers), and
 - the actual decision-making taking into account the recommendation and any other information considered relevant by the decision makers.
36. In considering Mr Vass' request, it is evident to the Commissioner that at the time of his request he was uncertain what information was held about the decision making process concerning the TIF proposals. The wording of his request suggested it should be read as relating to the first step in the process (the evaluation stage), and did not include information relating to the second step (the Ministerial decision making). It only became clear from Mr Vass' comments during the investigation that he was interested in both stages of the process, but was not clear on what information would be held. Since the Ministers did not offer any assistance to or speak with Mr Vass to clarify his request, they did not identify this at the time and so the terms of his request were not widened to incorporate other information that may be of interest to Mr Vass. The terms of his request remained restricted to information relating to the first phase of the process set out in paragraph 35 above.
37. Having considered the submissions provided by the Ministers, the Commissioner is satisfied that the only information held which falls within the scope of Mr Vass' information request is the scoring and evaluation information that has been identified and withheld by the Ministers. However, having reached this conclusion, she agrees with Mr Vass that the Ministers have failed to comply with their duty to provide advice and assistance to him in the course of their handling of his request.
38. Regulation 9(1) of the EIRs provides that a Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants. The duty to provide advice and assistance can arise at any point, including at the stage where an applicant is contemplating making a request, or seeking guidance on how best to formulate their request.
39. In his initial request, Mr Vass advised the Ministers that he was unclear as to what form the TIF scoring and reasoning took and that he wanted someone to contact him to discuss his request. The terms of his request made clear that he wished to have assistance in formulating a request based on an understanding of the types of information that were held. It is clear from his later communications with the Commissioner, that had he been given fuller details of the process leading to the decision on which TIF proposals to take forward, he may have modified his request to seek a wider range of information, or made an additional request.
40. Instead, the Ministers indicated that they considered the request to be clear, and issued a response based on its initial formulation.

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41. In response to the questions raised by the investigating officer, the Ministers reiterated that the request was considered clear, and this was a limited pilot project, on which there was not a vast amount of information. However, they conceded that it would have been helpful for someone to contact Mr Vass to explain the limitations of the information available.
42. The Commissioner is concerned that by declining to engage with Mr Vass about his request, the Ministers limited his opportunity to make a wider or additional request informed by knowledge of the process followed and the types of information generated as part of that process.
43. Given that Mr Vass so clearly asked the Ministers for their assistance in this case, and they declined to provide it, the Commissioner has concluded that they failed to comply with the duty to provide advice and assistance under regulation 9(1) of the EIRs.
44. The Commissioner does not require any particular steps to be taken in response to this failure in this particular case but encourages the Ministers to respond to similar requests for assistance in future (from Mr Vass or from any other applicant) by engaging in discussion prior to responding, to ensure that they understand the matters of concern to the applicant, who is in turn able to make an informed request.

Regulation 10(4)(d)

45. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
46. As with all of 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)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
47. Regulation 13(d) provides that where a Scottish public authority refuses to make information available on the basis of the exception in regulation 10(4)(d), the authority shall state the time by which it considers that the information will be finished or completed.
48. The Ministers advised the Commissioner that the TIFs are a pilot project and that the process is on-going and will only be complete when all the TIF pilot places have been allocated, on the basis of full business cases. They explained that four local authorities were invited to develop full TIF business cases following the assessment process undertaken in 2011, but that the Ministers may choose to extend the pilot scheme or reject the business cases, or local authorities may themselves choose to withdraw. Consequently, the Ministers considered that the pilot phase is still in the course of completion, and will only be complete when all the TIF pilot business cases have been agreed.



49. In this case and others which consider the application of regulation 10(4)(d) of the EIRs, the Commissioner has considered the relevant paragraphs of *The Aarhus Convention: an Implementation Guide*³ for guidance on the application of exception in regulation 10(4)(d).
50. This guide (at page 58) suggests that the term "materials in the course of completion" refers to individual documents that are actively being worked on by the public authority, or will have more work done on them within a reasonable time-frame. Once these documents are no longer in the "course of completion", the guide takes the view that they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.
51. The Commissioner considers that the information that has been withheld in this case is not in any sense incomplete. It sets out the outcome of an evaluation process that was completed prior to Mr Vass' request being submitted. That evaluation related to the proposals submitted, which were also completed proposals, rather than the business cases that might have been developed at a later date.
52. Mr Vass sought only the reasoning and scoring; he did not seek the full business cases or the Ministers' future plans for the applications. The Commissioner considers that the phase of the TIF pilot project in which proposals were put forward and evaluated, and a subset selected for further development, is complete.
53. While the TIF projects themselves remain ongoing, the Commissioner does not consider the information withheld in this case to relate to the development of those projects beyond the decision to select them for further consideration. The withheld information is a finished piece of work in itself and is complete. As a result, she cannot accept that the withheld information either constitutes or relates to unfinished documents, incomplete data or material in the course of completion.
54. Therefore, the Commissioner concludes that the withheld information does not fall within exception contained in regulation 10(4)(d). As she is satisfied that the exception does not apply, the Commissioner is not required to consider the associated public interest test.

Regulation 10(4)(e)

55. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication.
56. The regulation does not expand upon what is meant by internal communications, but the Commissioner has considered the guidance contained in *The Aarhus Convention: An Implementation Guide* which states:

³<http://www.unece.org/env/pp/acig.pdf>



"The public authority may refuse to disclose... materials 'concerning internal communications,' but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by "customary practice" and this may differ according to the administrative law of an implementing Party. For example, for some Parties "customary practice" may apply only to those materials covered by evidence of established norms of administrative practice."

57. The question of whether communications exchanged between two separate organisations (in this case the Scottish Government and the SFT) can be considered internal communications for the purposes of regulation 10(4)(e) needs to be considered on a case-by-case basis. Relevant considerations will include the nature and context of the particular relationship and the nature of the communication itself.
58. The Ministers submitted that the withheld information was the product of a private deliberative process carried out jointly by officials from the Scottish Government and SFT staff. This collaboration involved input from both parties and involved the exchange of views amongst those concerned. The Ministers commented that they had established the SFT to provide them with the type of input required in this evaluation, and it was a joint exercise. Consequently, they maintained that the withheld information could be considered to constitute internal communications for the purposes of the exception.
59. Having considered the withheld information, the Ministers' submissions, and the nature of the SFT's relationship with the Scottish Government (SFT is a company wholly owned by the Scottish Government) in the context of the evaluation of the TIF proposals, the Commissioner accepts that the information under consideration in this case constitutes an internal communication for the purposes of the EIRs. Accordingly, she finds that that the exception in regulation 10(4)(e) applies to this information.

Consideration of the public interest

60. Having found that the Ministers correctly applied the exception contained within regulation 10(4)(e), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test specifies that a 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.
61. The Ministers acknowledged that there is undoubtedly a public interest in the openness and transparency of projects to inject economic growth or stimuli. However, they submitted that it would not be in the public interest to disclose information which was clearly used for the purpose of internal communications and of providing advice to Ministers. The Ministers considered that the process followed in the selection of the TIF pilot projects was open and transparent from the information that has been published on the SFT website.

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62. The Ministers commented that it was never the intention to place the considerations of the evaluation panel into the public domain. Moreover, they maintained that recommendations of the panel were only one factor in the Ministers' decision making process. They explained that when making a decision, the Ministers had taken a broad view of the individual applications, bearing in mind issues such as geographic spread.
63. The Ministers submitted that, if the Scottish Government and the SFT officials were deterred from communicating with each other because of fear of their discussions being made public, this would have serious consequences for public policy-making. They also argued that disclosure could deter local authorities from participating in such schemes in the future and may inhibit the ability of unsuccessful authorities to seek alternative forms of financing (if, for example, negative comments had been attributed to their projects, or they were ranked low down the list).
64. On balance, the Ministers submitted that while there is clearly a public interest in the outcome of the ministerial decision making process, the release of the information produced by the evaluation panel in isolation would be inappropriate and misleading. Consequently, they considered the public interest in maintaining the exception outweighed the public interest in disclosing the withheld information.
65. In his submissions, Mr Vass argued that economic interests and ensuring that public money is spent well are both highly relevant to the public interest; principles that he considered even more important during this time of austerity. Mr Vass commented that this case is about whether the Government chose to ignore advice on which proposals were the most economically sound and, therefore, the most likely to avoid costing the taxpayer money further down the line. In view of the importance of the public's right to know that the diminishing public spending pot is being deployed wisely, there can, according to Mr Vass, be few competing reasons that are more important to the public interest.
66. Mr Vass also commented on the Ministers' submission that the information was only one factor in the decision-making process and it would mislead the public to publish it. He considered that this was not as important as ensuring that public money is being spent well. Mr Vass considered that the public has the right to know what information formed the basis of the Ministers' decision to select the TIF proposals which were put forward to the next phase.
67. The Commissioner has considered all of the submissions from Mr Vass and the Ministers when considering the public interest balance. She recognises that there is considerable public interest in knowing the basis on which decisions relating to significant public expenditure and major developments are made.
68. While she recognises that the evaluation and scoring undertaken was only one factor influencing the Ministers' decision about which TIF proposals were to be taken further, she considers that the evaluation nonetheless provides significant information about the analysis of those bids that was provided to inform that decision.



69. The Commissioner considers that the Ministers have explained the role of that evaluation and scoring in the decision making process very clearly. They have made clear that the scoring and evaluation submitted by the panel was only one factor influencing the final decision about which projects to develop further, and that that the Ministers considered the bids in relation to wider considerations that were not addressed by the evaluation panel.
70. In this context, the Commissioner does not consider disclosure of the withheld information would be misleading. It represents recommendations based on specified evaluation criteria which, alongside other factors and considerations, informed the Ministers when reaching their decision. There would be no barrier to the Ministers making further background or contextual information publicly available alongside the withheld information, if they considered it would ensure it was properly understood.
71. When considering the Ministers' submission that disclosure would be likely to inhibit future discussions, the Commissioner has reviewed the nature of the information. She notes that this sets out the consensus view of a panel of officials, and so the views expressed are those of a group, rather than of any individual. The information therefore gives no indication of the nature of panel's discussions, other than their outcome.
72. While the Commissioner recognises that these officials may not have expected this information to become publicly available, she can see nothing in the content that (based on the submissions before her) persuades her that its disclosure would be likely to limit their willingness to participate fully and openly in future processes of a similar nature.
73. The Commissioner does not consider that the Ministers have demonstrated that disclosure of information of the nature under consideration in this case would make public authorities less likely to bid for similar opportunities in future. She recognises that disclosure of critical comments about the proposals made might contribute to negative perceptions of those proposals. However, the fact that some proposals were unsuccessful in their bid to be selected by Ministers could already have prompted negative perceptions by indicating that they were evaluated less favourably than those selected. The Commissioner does not consider that disclosure of the information is likely to add significantly to those negative perceptions
74. In the circumstances, the Commissioner considers it unlikely that disclosure of the information under consideration would make local authorities less open to making bids to secure future funding opportunities of a similar nature.
75. In addition, the Commissioner notes that TIF is a new and specific type of funding. She does not consider that the scoring and comments of the evaluation panel concerning proposals for this type of funding would be likely to influence, to any significant degree, persons evaluating proposals for funding under similar schemes in the future.
76. For these reasons, the Commissioner considers there is limited weight to the public interest considerations identified by the Ministers in this case.



77. On the other side of the public interest balance, the Commissioner considers that, given the cost and impact of the infrastructure projects to which the TIF proposals relate, the weight of the public interest in knowing what information and analysis was available to the Ministers to inform their decision is substantial. While she recognises that the withheld information does not represent all such information, or explain in full the basis upon which the Ministers' reached their decision, she does not consider the limitations of the information to weigh significantly against the public interest in disclosure.
78. On balance, the Commissioner is satisfied that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e). She therefore concludes that the Ministers were not entitled to withhold the information requested by Mr Vass.

Timescales

79. In his application to the Commissioner, Mr Vass expressed dissatisfaction with the time taken by the Ministers in responding to his requirement for review.
80. Regulation 16(4) of the EIRs gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review.
81. The Ministers did not provide a response to Mr Vass' requirement for review of 6 December 2011 until 6 February 2012.
82. In their submissions, the Ministers advised that they had issued a delayed review response due to staff absences over the festive period.
83. The Commissioner notes the Ministers' reasons for the issue of the delayed response, but is required to find that they failed to respond to Mr Vass' requirement for review within the 20 working days allowed under regulation 16(4) of the EIRs.



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Vass.

The Commissioner finds that, by failing to identify and respond to Mr Vass' information request as one seeking environmental information as defined by regulation 2(1) of the EIRs, the Ministers breached regulations 5(1) and (2)(b) of the EIRs.

She also finds that the Ministers failed to provide Mr Vass with reasonable advice and assistance, as required by regulation 9(1) of the EIRs and failed to respond to Mr Vass' requirement for review within the timescale required by regulation 16(4) of the EIRs.

Finally, the Commissioner finds that the Ministers were not entitled to withhold the requested information under regulation 10(4)(d) or (e) of the EIRs. By failing to provide Mr Vass with the requested information, the Ministers failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Ministers to provide Mr Vass with the withheld information, by 22 October 2012.

Appeal

Should either Mr Vass or the Scottish Ministers 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.

Rosemary Agnew
Scottish Information Commissioner
07 September 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

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...

(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.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...



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
 - (e) the request involves making available internal communications.

16 Review by Scottish public authority

- ...
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- ...