

# Decision Notice



Decision 154/2012 Mr Steven Vass of the Sunday Herald and the Scottish Futures Trust

TIF evaluation and scoring

Reference No: 201200270  
Decision Date: 07 September 2012

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

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## Summary

Steven Vass, a journalist with the Sunday Herald, asked the Scottish Futures Trust (SFT) for the scoring and reasoning it had applied to the 16 Tax Incremental Financing (TIF) proposals received from local authorities. The SFT 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 SFT should have dealt with the request under the Environmental Information (Scotland) Regulations 2004 (EIRs). The SFT agreed, but argued that, since the information constitutes internal communications, it did not have to disclose the information.

The Commissioner accepted that the information related to internal communications, but found that the public interest favoured disclosure of the information. She required the SFT to disclose the withheld the scoring and reasoning to Mr Vass.

## Relevant statutory provisions

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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); 10(1), (2), and (4)(e) (Exceptions from duty to make environmental information available on request)

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

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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 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 then evaluated by a panel of representatives of the SFT and the Scottish Government. 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 forward<sup>1</sup>.
2. On 4 November 2011, Mr Vass emailed the SFT 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.
3. The SFT responded on 2 December 2011, having considered Mr Vass' request in terms of FOISA. The SFT provided some background information on the evaluation of the proposals, and the role of the evaluation panel in the overall decision making about which proposals were taken forward. However, it refused to supply the information requested on the basis that it was exempt from disclosure under sections 30(b)(i) and (ii) of FOISA. These exemptions apply where disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
4. On 6 December 2011, Mr Vass emailed the SFT requesting a review of its decision. Mr Vass questioned whether the scoring of the proposals constituted advice as such. He also maintained that there was an overwhelming public interest in releasing the information, commenting that the public has a strong interest in understanding whether the Scottish Government took the decisions about the TIF pilots that went against the SFT's economic findings.
5. The SFT notified Mr Vass of the outcome of its review on 12 January 2012. The SFT highlighted that the role of the SFT and the evaluation panel was to make non-binding recommendations to inform the Scottish Ministers' decision-making. It maintained that it would be misleading and disruptive to ongoing policy development, and so contrary to public interest, to put the panel's scores and related reasoning into the public domain. The SFT accordingly upheld its decision to withhold the requested information.

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



6. On 6 February 2012, Mr Vass emailed the Commissioner, stating that he was dissatisfied with the outcome of the SFT's 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. 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

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8. On 15 February 2012, the SFT was notified in writing that an application had been received from Mr Vass and was asked to provide the Commissioner with the information withheld from him. The SFT responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the SFT, giving it 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 it to respond to specific questions.
10. The SFT was advised that the Commissioner was likely to find that the information under consideration was environmental information and was asked to provide submissions on whether the SFT considered that the information was excepted from disclosure under the EIRs. The SFT was also asked to provide details of the searches it had undertaken to determine that all information falling within scope of the request had been identified.
11. The SFT responded to the investigating officer's request. It accepted that the withheld information was environmental information and indicated that it would now consider it to be exempt from disclosure under section 39(2) of FOISA. The SFT confirmed that it considered the exception in regulation 10(4)(e) of the EIRs ("internal communications") applied to the withheld information, and explained its reasoning regarding that exception and the associated public interest test. It also explained the searches it had undertaken when identifying the information requested by Mr Vass.
12. 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 SFT, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.



## Commissioner's analysis and findings

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13. 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 SFT and is satisfied that no matter of relevance has been overlooked.
14. The information being withheld in this instance is the evaluation and scoring matrix produced following the meeting between the SFT and the Ministers to evaluate the TIF proposals. The SFT has withheld this information under regulation 10(4)(e) of the EIRs. Prior to considering this exception, the Commissioner considered whether the withheld information is environmental information.

### Section 39(2) of FOISA – environmental information

15. 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*<sup>2</sup>. It need not be repeated in full here.
16. In this case, the SFT submitted, in the course of the investigation, that it was 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.
17. 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.
18. 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.
19. 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 just information directly about environmental conditions, impacts and protection.

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



20. 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.
21. In this case, the Commissioner finds the withheld information is environmental information in terms of part (e) of the definition in regulation 2 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.
22. 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.
23. As the Commissioner is satisfied that the withheld information is environmental information, she is satisfied that Mr Vass' should have been considered under the EIRs.
24. 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 SFT was entitled to apply the exemption in section 39(2) of FOISA to the requested information.
25. 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.
26. However, while she is pleased to note that the SFT accepted the information was environmental in the course of the investigation, the Commissioner must also note that the SFT initially failed to recognise that the request was for environmental information. By failing to do so, the SFT failed to comply with regulation 5(1) of the EIRs.





### Information under consideration

27. The information under consideration in this decision 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.
28. During the investigation, the investigating officer took steps to establish whether the information provided to the Commissioner by the SFT constituted all that was held by the SFT regarding the scoring and evaluation of each proposal, given that individual notes and scores had not been provided. The SFT explained that, following receipt of the 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.
29. The SFT was asked to provide details of the searches undertaken to identify information falling within the scope of Mr Vass' request and its record management practices associated with project evaluations of the type under consideration.
30. The SFT explained that it does not have a specific policy in relation to TIF evaluations, but the evaluation team adopted a procedure that was similar to that used in evaluating commercial tenders. Although the SFT noted that the local authorities' submissions were not commercial tenders, the evaluation team felt that there were enough similarities to adopt certain principles for evaluation purposes. The SFT made reference to the government's approach to tender evaluation<sup>3</sup>.
31. Having considered the submissions provided by the SFT, and the government tender evaluation referred to, the Commissioner is satisfied that the SFT does not hold any further information falling within scope of the request.

### Regulation 10(4)(e)

32. 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.
33. The regulation does not expand upon what is meant by internal communications, but Commissioner has considered the guidance contained in *The Aarhus Convention: An Implementation Guide*<sup>4</sup> which states:

*"The public authority may refuse to disclose... materials 'concerning internal communications,' but only when national law or customary practice exempts such materials. The Convention*

<sup>3</sup> <http://www.scotland.gov.uk/Topics/Government/Procurement/buyer-information/spdlowlevel/routetwotoolkit/openandevaluatetender/tenderevaluation>

<sup>4</sup> <http://www.unece.org/env/pp/acig.pdf>



*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."*

34. The question of whether communications exchanged between two separate organisations (in this case the SFT and the Scottish Government) 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.
35. The SFT 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 SFT commented that the Scottish Ministers 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.
36. Having considered the withheld information, the SFT's submissions, and the nature of its 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**

37. Having found that the SFT correctly applied the exception contained within regulation 10(4)(e), the Commissioner is required to apply the public interest test in 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.
38. The SFT considered that, on balance, the public interest in maintaining the exception outweighed that in disclosing the information to Mr Vass. It submitted that the TIF evaluation process was transparent, and that details of that process had been published on its website. The SFT indicated that the scoring and recommendations had been produced for the Scottish Ministers (the Ministers) to inform their decision making, but the recommendations of the panel was only one factor in the Ministers' decision making process.
39. The SFT indicated that the Ministers had taken a broad view of the individual applications, bearing in mind geographic spread, desirability of promoting further private sector investment and the effect on local confidence. It noted that it had no role in providing input beyond the evaluation. While it acknowledged that there is clearly a public interest in the outcome of the ministerial decision making process, it maintained that the release of the information produced by the assessment panel in isolation would be inappropriate and misleading.



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40. 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.
41. Mr Vass also commented on the SFT's view that 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 the information that formed the basis of the Ministers' decision to select which TIF proposals to put forward to the next phase.
42. The Commissioner has considered all submissions from Mr Vass and the SFT 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.
43. While she recognises that the evaluation and scoring undertaken was only one factor influencing the Scottish 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.
44. The Commissioner considers that the SFT has explained the role of that evaluation and scoring in the decision making process very clearly. It has highlighted that the evaluation panel was not tasked with either making a decision or a binding recommendation about which proposals should be developed further. It has also made clear that the Ministers considered the bids in relation to wider considerations that were not addressed by the evaluation panel.
45. 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.
46. Given the cost and impact of the infrastructure projects to which the TIF proposals relate, the Commissioner considers that 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 in this instance.
47. 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).

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## DECISION

The Commissioner finds that the Scottish Futures Trust (SFT) 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 SFT breached regulations 5(1) and (2)(b) of the EIRs.

The Commissioner also finds that the SFT was not entitled to withhold the information on the basis that it was excepted from disclosure under regulation 10(4)(e) of the EIRs. By failing to provide Mr Vass with the requested information, SFT failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the SFT to disclose the withheld information, by 22 October 2012.

## Appeal

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Should either Mr Vass 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**07 September 2012**



## Appendix

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### 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.

...

### 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

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