

# Decision Notice



Decision 035/2011 Mr Steven Vass and tie Limited

Edinburgh tram project contracts and adjudications

Reference No: 201000839

Decision Date: 23 February 2011

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

**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Vass requested from tie Limited (tie) information about contracts and adjudications. tie responded by providing some information, but withheld the majority of the information it held under sections 33 and 36 of FOISA. Following a review, Mr Vass remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which tie acknowledged that it should have dealt with the requests under the EIRs and applied what it considered to be relevant exceptions, the Commissioner found that tie had been entitled to withhold the contracts Mr Vass had requested on the basis that the relevant request was manifestly unreasonable and the remaining information (including the contractual adjudications) was excepted from disclosure on the basis that disclosure would (or would be likely to) cause substantial prejudice to commercial confidentiality. Finding that tie should have provided more to Mr Vass by way of advice and assistance, the Commissioner required tie to provide such advice and assistance with a view to enabling him to narrow down his request.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 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 available environmental information on request); 9(1) (Duty to provide advice and assistance) and 10(1), (2), (4)(b) and (5)(e) (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

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1. On 21 January 2010, Mr Vass wrote to tie requesting the following information relating to the Edinburgh tram project in the following terms [requests numbered according to tie's response of 22 February 2010]:



- Regarding the Russell Road retaining wall, I'm talking about the entire embankment all the way to Baird Drive and beyond if it goes beyond there [with reference to an earlier question as to whether the wall required concrete piling along its entire length [request 1]
- Did the latest adjudication refer only to Russell Road or is it applicable along the entire length of the embankment? [request 2]
- How have things been left with Carillion? What was the total amount that it was paid? [request 3]
- Was it [Carillion] paid a settlement fee when it left the project? [request 4]
- Is there any ongoing negotiation about how much it [Carillion] should be paid? [request 5]
- Why did it [Carillion] leave the project before the utility work was completed? [request 6]
- How much are Clancy Docwra and Farrens being paid for their work? [request 7]
- What is the timetable for the rest of the adjudications? [request 8]
- Which is next and when will it take place? [request 9]
- The four adjudications to date (net of anything commercially sensitive) [request 10]
- The contracts with Farrens, Clancy-Dowcra, Carillion and the BSC consortium (net of anything commercially sensitive) [request 11].

Mr Vass specifically asked that requests 3 - 7, 10 and 11 be dealt with as requests under FOISA.

2. tie responded on 22 February 2010 by:

- Providing answers to requests 1, 2, and 8
- Withholding information under sections 33 and 36 of FOISA in respect of requests 3, 4, 5, 7 and 10
- Providing a press release for request 6
- Withholding information under section 36 of FOISA in respect of request 9
- For request 11, tie referred to the Court of Session decision in the case of *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73<sup>1</sup> and the Commissioner's related guidance<sup>2</sup> to question the validity of the request, on the basis that Mr Vass had asked for documents rather than information. In any event, it considered the requested information to be exempt under sections 33 and 36 of FOISA.

3. On 23 February 2010, Mr Vass wrote to tie requesting a review of its decision. He confirmed that he was content with its responses to requests 1, 2 and 8, but did not believe that he had been given a full response to request 6. In relation to the remaining requests, he challenged tie's application of sections 33 and 36, while making it clear (in relation to request 11) that he was asking for the information in the relevant contracts.

<sup>1</sup> <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>

<sup>2</sup> <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>



4. tie notified Mr Vass of the outcome of its review on 29 March 2010. It upheld the exemptions relied on for requests 3, 4, 7, 9, 10, and 11, while also confirming its reliance on the Commissioner's guidance as to the validity of request 11. tie accepted that it should not have relied on an exemption for request 5 and provided an answer, as it did for request 6.
5. On 20 April 2010 Mr Vass wrote to the Commissioner, stating that he was dissatisfied with the outcome of tie's review and applying to the Commissioner for a decision in respect of requests 3, 4, 7, 10, and 11, in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Vass had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.

## Investigation

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7. On 13 May 2010, tie was notified in writing that an application had been received from Mr Vass and asked to provide the Commissioner with any information withheld from him. tie responded with the information requested (but see paragraph 11 below) and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted tie, 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. In particular, tie was asked to consider whether the requests should have been dealt with under the EIRs, and (with particular reference to the requirements of sections 33 and 36 of FOISA) to justify its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.
9. During the investigation, tie confirmed that it no longer wished to argue that request 11 was invalid. It also confirmed that it considered the requests to be for environmental information and therefore that they should have been dealt with under the EIRs, advising in this connection that it considered the withheld information to be exempt under section 39(2) of FOISA. In withholding this information under the EIRs, it relied on the exceptions in regulations 10(4)(b) and 10(5)(e).
10. During the investigation, tie also stated that it would be willing to allow Mr Vass to inspect the withheld contracts at its premises, in full, under the supervision of a member of its staff. He would have the opportunity to take such notes as he wished, with no restriction on their use. This offer was put to Mr Vass, who declined the offer.



11. During the investigation, it became apparent that the volume of the withheld contracts was substantially greater than the relevant information originally identified by tie and supplied to the Commissioner. To indicate the full extent of the information held, tie supplied the investigating officer with the master index for the INFRACO contract. At tie's invitation, a member of the Commissioner's staff viewed the full information withheld at its premises. It is the Commissioner's understanding that, during the investigation, Mr Vass too was shown the volumes that made up the INFRACO contract, and therefore that he too is aware of the extent of the information that falls within the terms of his request 11.
12. All relevant submissions received from both tie and Mr Vass are considered fully in the Commissioner's analysis and findings below.

### Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all the withheld information and the submissions made to him by Mr Vass and tie and is satisfied that no matter of relevance has been overlooked.
14. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>3</sup> and need not repeat it here.
15. In this case, tie confirmed in the course of the investigation that it considered itself entitled to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below.
16. The requested information relates to the construction of a significant piece of transport infrastructure (the Edinburgh tram project). As with previous decisions involving tie and this project, the Commissioner is of the view that this is information on measures and activities affecting, or likely to affect, the elements of the environment, in particular land and landscape. He therefore considers that the information falls within that part of the definition of environmental information contained in paragraph (c) of regulation 2(1) of the EIRs.
17. While the Commissioner is pleased to note that within the course of the investigation tie accepted that the information was environmental information, he must also note that it did not do so (and act accordingly under the EIRs) when initially dealing with Mr Vass's information request. In failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, the Commissioner finds that tie failed to comply with regulation 5(1) of the EIRs.

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<sup>3</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



18. 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 any such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that tie was entitled to apply the exemption to the withheld information, given his conclusion that it is environmental information.
19. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts 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 is therefore satisfied that tie was entitled to withhold the information under section 39(2) of FOISA and has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

#### **Regulation 10(5)(e) of the EIRs**

20. tie argued that the information in requests 3, 4, 7 and 10 could be withheld under regulation 10(5)(e).
21. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
22. *The Aarhus Convention: an Implementation Guide*<sup>4</sup> (which offers guidance on the interpretation of the Convention, from which the EIRs are derived) notes (at page 60) that the first requirement of this exception is that national law must expressly protect the confidentiality of the withheld information: it must, the Guide states, explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a “legitimate economic interest”: this term is not defined in the Convention, but its meaning is considered further below.
23. The Commissioner has taken this guidance into account when considering this exception. The Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
  - Is the information commercial or industrial in nature?
  - Does a legally binding duty of confidence exist in relation to the information?
  - Is the information publicly available?
  - Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

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



*Is the information commercial or industrial in nature?*

24. Having considered tie's comments and the nature of the information under consideration for requests 3, 4, 7 and 10, the Commissioner is satisfied that the withheld information is commercial or industrial in nature. Requests 3, 4 and 7 all relate to tie's relationships with particular contractors and the associated contractual costs. Request 10 relates to the adjudications that have arisen from the dispute resolution provisions of certain Edinburgh tram project contracts.

*Does a legally binding duty of confidence exist?*

25. tie submitted that the withheld information was the subject of confidentiality clauses in the relevant contracts. For request 10, in particular, tie commented that the contracts with Clancy Dowcra and Farrans imposed similar requirements on the adjudicator, in addition to those imposed on the parties. While acknowledging that the existence of such clauses would not necessarily mean that all information caught by them would automatically be considered confidential, it argued (noting the expectations of the contractors and the fact that the matters in question remained ongoing) that there was in any event an implied duty of confidentiality.
26. In all the circumstances, the Commissioner accepts that a legally binding duty of confidence existed in respect of the information covered by requests 3, 4, 7 and 10 at the time tie dealt with Mr Vass's request for information and requirement for review.

*Is the information publicly available?*

27. The Commissioner is accepts that the information to which requests 3, 4, 7 and 10 relate is not publicly available. Although the general nature of the relevant contracts may be in the public domain, detailed information relating to their performance – or to the conduct of adjudications under them – such as that under consideration here, is not. The Commissioner acknowledges that it will only have been viewed by a limited number of individuals, in accordance with the relevant contractual terms.

*Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?*

28. The term "legitimate economic interest" is not defined within the EIRs. In the Commissioner's view, the interest in question will be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial, and therefore of real and demonstrable significance.
29. In this respect, tie submitted that disclosure of the withheld information would substantially prejudice its commercial interests and those of the Edinburgh tram project more generally. It submitted that its own interests, in delivering the project, were entirely commercial.



30. tie emphasised the ongoing commercial sensitivity of the withheld information. In particular, it highlighted the risks to sensitive ongoing dispute settlement efforts should the information be disclosed, and also the prejudice to its ability to bargain effectively and secure value for money given that certain contracts might require to be retendered. In the circumstances, it took the view that disclosure could place the project in jeopardy.
31. The Commissioner has considered these arguments carefully, noting the timing of Mr Vass's information request and the wider context of tie's relationship at that time with its contractors, including disputes over the nature and extent of the work done under contract. In the circumstances, the Commissioner is satisfied that tie was entitled to argue that disclosure of the withheld information covered by requests 3, 4, 7 and 10 would, or would be likely to, cause substantial harm to a legitimate economic interest, and consequently that it was entitled to apply the exception in regulation 10(5)(e) to that information.

*Consideration of the public interest test*

32. Having upheld the use of the exception in regulation 10(5)(e), the Commissioner must consider the public interest test required by regulation 10(1)(b) of the EIRs. This 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.
33. The Commissioner has considered the public interest in respect of the information held for each of requests 3, 4, 7 and 10. As the arguments advanced in respect of all of the information are broadly the same, the Commissioner will deal with them together.
34. tie cited the following factors in concluding that the balance of the public interest favoured the maintenance of the exception:
  - the public interest in ensuring that each contractual relationship continued, but only where it could ensure that it offered demonstrable value for money
  - the need to maintain progress on the Edinburgh tram project a critical point
  - the need to avoid lengthy and costly litigation at public expense
  - the need to maintain confidentiality in relation to certain disputes, particularly where retendering of contracts remained possible

It emphasised that it remained willing to disclose information of this kind at an appropriate time, when the above considerations did not apply.

35. The Commissioner is aware of the high level of public interest that exists in relation to the tram project, particularly in Edinburgh, but also across Scotland. Where a major infrastructure programme of this type is being carried out, it is inevitable and appropriate that the public will be keen to understand how public monies are being spent and whether value for money can be demonstrated. Clearly, there is a public interest in being able to ascertain whether this is the case, and in informing public debate on these issues.





36. At the same time, the Commissioner also recognises that there is a considerable public interest in tie being able to obtain and deliver the best contracts at the best price, securing performance of the contractual obligations of the project (and to that end maintaining effective working relationships between the parties), with a view to the project being completed and the Edinburgh tram system becoming operational. Having accepted that the withheld information is the subject of a legally binding duty of confidence, the Commissioner must also recognise a strong public interest in the maintenance of confidences.
37. Having carefully weighed up the arguments, therefore, the Commissioner has concluded that in all the circumstances of the case, the public interest in making the information available in this instance is outweighed by the public interest in maintaining the exception. The Commissioner therefore concludes that tie was entitled to withhold the information sought in Mr Vass's requests 3, 4, 7 and 10 under regulation 10(5)(e) of FOISA.

#### **Regulation 10(4)(b) – manifestly unreasonable**

38. During the investigation tie submitted that it was manifestly unreasonable for Mr Vass to insist on obtaining a copy of the information that fell within request 11, i.e. the contracts with Farrens, Clancy-Dowcra, Carillion and the BSC consortium (net of anything commercially sensitive). Consequently, it argued that the information was excepted under regulation 10(4)(b) of the EIRs.
39. During the investigation, tie offered to allow Mr Vass to inspect at its premises the full contracts falling within the terms of request 11 (see paragraph 10 above). Mr Vass declined this offer, and from the terms of his comments on this point the Commissioner can identify no basis for concluding that Mr Vass would have responded any differently had the offer been made earlier (i.e. in the course of dealing with his information request or his request for review). It appears clear to the Commissioner that he expects to be provided with the information rather than simply having the opportunity to inspect it.
40. tie submitted (and a member of the Commissioner's staff has confirmed, as indeed has Mr Vass) that the information in the requested contracts (and in particular their annexes) was extremely voluminous. It advised that were it to provide Mr Vass with the information it would charge a fee in terms of regulation 8 of the EIRs, and also redact information in terms of regulation 10(5)(e). It argued that the time involved in calculating the fee would itself be significant, noting that Mr Vass could, on being presented with the fee, decide that he no longer wished to proceed with the request. Should he wish to do so, tie submitted, the cost of copying or scanning the information (in terms of staff time and the cost of copying, at the rate of 10p per sheet) would exceed £1,000. It also referred to the additional time which would be involved in redacting information, which would require considerable input from its legal advisers. In conclusion, noting its willingness to make the information available for inspection, tie found the burden which compliance would place on its relatively limited resources (it had 89 employees and only one Freedom of Information officer) to be manifestly unreasonable.



41. There is no definition of “manifestly unreasonable” in the EIRs, or in Directive 2003/4/EC from which they are derived. The Commissioner’s opinion is that “manifestly” implies that a request should be obviously or clearly unreasonable and he notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*<sup>5</sup>, which considers the equivalent regulation 10(4)(b) of the Environmental Information Regulations 2004, and states:
- From the ordinary meaning of the words “manifestly unreasonable”, it is clear that the expression means something more than just “unreasonable”. The word “manifestly” imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply “unreasonable”.*
42. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources. In *Decision 024/2010 Mr N and the Scottish Ministers*<sup>6</sup>, the Commissioner stated that he is likely to take into account the same kinds of considerations in deciding whether a request is manifestly unreasonable under the EIRs as he would in reaching a decision as to whether a request is vexatious in terms of section 14(1) of FOISA.
43. The Commissioner's general approach is that a request (which may be the latest in a series of requests) is vexatious where it would impose a significant burden on the public authority and:
- it does not have a serious purpose or value; and/or
  - it is designed to cause disruption or annoyance to the public authority; and/or
  - it has the effect of harassing the public authority; and/or
  - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
44. However, it does not follow that a request is only manifestly unreasonable under the EIRs if it is vexatious under FOISA: the concept is wider. In particular, there may be circumstances where the burden of responding alone justifies deeming a request to be manifestly unreasonable. There is no equivalent in the EIRs to section 12 of FOISA (Excessive cost of compliance) and the Commissioner recognises that there may be cases where the time and expense involved in complying with a request for environmental information mean that any reasonable person would regard them as excessive. That, in essence, appears to be what tie is arguing in this case in relation to request 11.
45. In this case, the Commissioner has considered carefully the arguments advanced by tie in support of this exception. As indicated above (see paragraph 39), he is satisfied that Mr Vass is seeking to be provided with all of the information in the contracts referred to in request 11, rather than simply being given the opportunity to inspect that information. He has therefore considered the application of the regulation 10(4)(b) exception in that context.

<sup>5</sup> [http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/\[2010\]UKFTT\\_EA20100072\\_\(GRC\)\\_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/[2010]UKFTT_EA20100072_(GRC)_20101230.pdf)

<sup>6</sup> <http://www.itspubliknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp>



46. The Commissioner acknowledges that, in common with all other Scottish public authorities, tie is subject to a considerable volume of other demands on its time and resources, in addition to complying with requests for information under FOISA and the EIRs. Compliance with such requests should be considered as an element of the authority's core business, however, and the Commissioner will not accept lightly arguments that such compliance, in any given case, represents an unreasonable diversion from compliance with other core responsibilities. In this case, however, having considered the arguments set out in paragraph 40 above, the Commissioner is persuaded that (even if the question of redaction were to be left out of account) dealing with Mr Vass's request 11 in the form he requires would demand a disproportionate amount of tie's time and divert an disproportionate quantity of its resources away from other core operations. Consequently, the Commissioner accepts that the demands created by compliance with this particular request would, in the view of any reasonable person, be excessive.
47. In the specific circumstances under consideration here, therefore, the Commissioner is satisfied that Mr Vass's request 11 fell within the terms of regulation 10(4)(b) of the EIRs.

*Consideration of the public interest test*

48. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is qualified in that it is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
49. In the Commissioner's view, there is an inherent public interest in disclosure of information to ensure that an authority is transparent about the nature and extent of the information that it holds, to permit adequate public scrutiny of its funding, expenditure and work. This is the case even where the information, and the work involved in making it available, is considerable. In this connection, the Commissioner has noted the specific public interest in the Edinburgh tram project which he has identified at paragraph 35 above.
50. Conversely, however, there is a strong public interest in a Scottish public authority being able to carry out its other core functions without the disruption that would be caused by complying with requests which place excessive demands on its time and resources. In this context, the Commissioner notes the resources available to tie.
51. The Commissioner has weighed the competing arguments in this case. On balance, he has concluded that the burden compliance with the request would place on tie, considering its size and the resources available to it, and the consequent distraction from its other core functions, would outweigh the acknowledged public interest that would be served by that compliance. The Commissioner therefore concludes that tie was correct to withhold the information covered by request 11 under the exception in regulation 10(4)(b) of the EIRs. Having reached that conclusion, he does not find it necessary to consider whether tie would have been entitled to withhold elements of the information under the exception in regulation 10(5)(e).

**Regulation 9 - the duty to provide advice and assistance**



52. 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.
53. tie admitted during the investigation that it could have been more helpful in respect of request 11 in pointing Mr Vass to information about the contracts that was already publicly available on its website. It referred specifically to a summary of one contract and to the section of its Final Business Case concerning the contract's intent. It also acknowledged that it could have queried Mr Vass as to which aspects of the contracts he wished to see, in order to assist in identifying the information requested.
54. In the circumstances, the Commissioner has concluded that tie failed to provide the type of advice and assistance that it was reasonable to expect, given its understanding of the information that was being withheld from Mr Vass. The Commissioner considers tie's failure to advise Mr Vass was a breach of its duty to provide reasonable advice and assistance under regulation 9(1) of the EIRs. Specifically, the Commissioner considers that it would be reasonable to expect tie to provide Mr Vass with further details of the contractual information it holds (for example, the indices provided to the investigating officer in the course of the investigation, insofar as tie does not consider these to be excepted under any relevant provision of the EIRs), together with an indication of the amount of information it considers it could supply without placing unreasonable demands on its resources, with a view to enabling Mr Vass to narrow down his request in a way which would allow it to be complied with (whether in full or subject to exceptions).

## DECISION

The Commissioner finds that tie Limited (tie) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Vass's request for information. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner finds that tie was entitled to withhold the information covered by requests 3, 4, 7 and 10 under section 39(2) of FOISA and regulation 10(5)(e) of the EIRs.

The Commissioner finds that tie was entitled to withhold the information covered by request 11 under section 39(2) of FOISA and regulation 10(4)(b) of the EIRs.

The Commissioner also finds, however, that tie had failed to comply fully with its duty to provide advice and assistance to Mr Vass in terms of regulation 9(1) of the EIRs, and therefore requires tie to provide him with advice and assistance in relation to the withheld contracts, as described in paragraph 54 of this decision. He requires tie to do this by 11 April 2011.



## Appeal

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Should either Mr Vass or tie Limited 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.

**Margaret Keyse**  
**Head of Enforcement**  
**23 February 2011**



## 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

-

- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

### 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

...

- (b) the request for information is manifestly unreasonable;

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest; ...



Decision 035/2011  
Mr Steven Vass  
and tie Limited

