



Scottish Information  
Commissioner  
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# Decision Notice 102/2023

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## **Burntisland Fabrications Ltd: communications between the Finance Committee and the Scottish Government**

**Applicant: The Applicant**

**Authority: Scottish Parliament**

**Case Ref: 202100630**

### **Summary**

The Applicant asked the Authority for communications between the Finance Committee and the Scottish Ministers on the subject of Burntisland Fabrications Ltd from January 2017. The Authority disclosed some information, but withheld other information. The Commissioner investigated and found that the Authority had largely complied with FOISA in withholding the information falling within the Applicant's request.

### **Relevant statutory provisions**

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

### **Background**

1. In 2020, Burntisland Fabrications Limited (BiFab), which was part-owned by the Scottish Ministers, went into administration.
2. On 18 March 2021, the Applicant made a request for information to the Authority. They asked for communications between its Finance and Constitution Committee ("the Finance

Committee”) and the Scottish Ministers on the subject of BiFab from 1 January 2017 onwards.

3. The Authority responded on 19 April 2021. It identified 12 letters falling within the scope of the request. Seven of these letters had already been published and links to or copies of these letters were provided. The remaining correspondence was provided, with information redacted under the exemptions in section 30(b)(ii) (Prejudice to effective conduct of public affairs) and section 33(1)(b) (Commercial interests and the economy):
  - Burntisland Fabrications Ltd Strategic Review: Intervention by the Ministers dated 14 January 2019 (document 1)
  - Letter dated 17 April 2018 from the Cabinet Secretary for Economy, Jobs and Fair Work to the Convener of the Finance Committee (document 2)
  - Letter dated 6 November 2019 from the Cabinet Secretary for Economy, Jobs and Fair Work to the Convener of the Finance Committee (document 3)
  - Letter dated 14 November 2019 from the Cabinet Secretary for Economy, Jobs and Fair Work to the Convener of the Finance and Constitution Committee, attaching paper to the Finance Committee dated 15 November 2019 (document 4)
  - Letter dated 28 September 2020 from the Cabinet Secretary for Economy, Fair Work and Culture to the Convener of the Finance Committee (document 5)
4. On 20 April 2021, the Applicant wrote to the Authority requesting a review of its decision. They were dissatisfied with the response because:
  - some of the information which had been redacted was already in the public domain;
  - they did not agree that the exemptions applied (and explained why); and
  - they considered the public interest test had not been properly carried out – and that the public interest favoured disclosure of the information.
5. The Applicant told the Authority that they did not want any personal data, except for the names of senior parties (such as senior government officials). All other personal data could be redacted.
6. The Authority notified the Applicant of the outcome of its review on 19 May 2021. The Authority confirmed its original decision, but gave additional reasoning as to why it considered the exemptions applied.
7. Later that day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the Authority’s review because they believed that the exemptions cited by the Authority did not apply and/or the public interest favoured disclosure of the information.

## **Investigation**

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

9. The Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions.
11. The Authority provided submissions. It told the Commissioner that, after it had been notified of the application, it had asked the Scottish Ministers to review the redacted documents and consider whether, in their view, the information was as commercially sensitive as at the time of the request. The Scottish Ministers had advised that further information could be disclosed from document 1. The Authority subsequently disclosed this information to the Applicant.
12. A meeting took place between the Authority and the Commissioner on 4 July 2022. The Authority no longer wished to rely on the exemptions in sections 30(b)(ii) and 33(1)(b) of FOISA, but was instead withholding information under sections 30(c) and 33(2)(a).
13. On 18 July 2022, the Authority disclosed more information from documents 2 and 3 to the Applicant.
14. The Applicant commented (20 July 2022) that all the Authority had done was to release information that was in the public domain at the time they made the request. The Applicant expressed concern that the Authority appeared to be acting as a proxy or agent for the Scottish Ministers.
15. In the absence of an explanation from the Authority as to why information in documents 1, 2 and 3 was exempt from disclosure when it originally responded to the request, but was no longer exempt from disclosure and able to be disclosed during the investigation, the Commissioner finds that the Authority failed to comply fully with Part 1 of FOISA by withholding this information.

## **Commissioner's analysis and findings**

16. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

### **Section 30(c) of FOISA**

17. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
18. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
19. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual

harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

#### *The Authority's submissions about the exemption*

20. The Authority submitted that section 30(c) of FOISA applied to all the withheld information.
21. The Authority explained that the Public Finance and Accountability (Scotland) Act 2000 ("the 2000 Act") sets out the budgetary processes informing the annual Budget (Scotland) Acts. All public expenditure, including that by the Scottish Ministers for any financial year, must be authorised by the Budget Act for that year. Ultimately, the 2000 Act provides that all public expenditure must be accounted for and approved by the Authority.
22. To ensure proper scrutiny of expenditure, or financial liabilities undertaken, by the Scottish Government, and to allow a smoother budget process, agreement was reached on how that should be done. The Session 5 Budget Process Agreement between the Scottish Government and the Finance Committee was formally approved by a motion of the Authority on 8 May 2018. It sets out the terms of the agreement between the Authority (its Finance Committee in particular) and the Scottish Government on the administrative arrangements for the annual budget scrutiny process and other related budgetary matters, including contingent liabilities. The Session 5 Agreement arose from the findings of the Budget Process Review Group, established by the Finance Committee and the Scottish Government, to carry out a fundamental review of the Authority's budget process, including the process for considering Contingent Liabilities.
23. The information held by the Authority that is within the scope of this request is information shared with the Finance Committee for the purposes of considering a contingent liability, where the Minister specifically requested that the contingent liability be considered in private.
24. The Parliament's process for dealing with contingent liabilities has its origins in the Consultative Steering Group's (CSG's) [Report](#) of 1998<sup>1</sup>, on which the Authority's rules and procedures were based. Paragraph 1.35 of the Report states:

#### ***Contingent liabilities***

*The Westminster Parliament has established conventions to limit the ability of Ministers to enter, without informing Parliament, into agreements with outside bodies that might result in future expenditure. FIAG [The Finance Issues Advisory Group] concludes that the Scottish Parliament should make similar arrangements and recommends that the Executive must obtain authority from the Scottish Parliament before entering into any agreement that might result in subsequent spending in excess of £1 million.*

25. The FIAG reported to the CSG in 2008 on "proposals for the rules, procedures, standing orders and legislation which the Scottish Parliament might be invited to adopt for handling financial issues".
26. The section on contingent liabilities contained in the FIAG's report is:

*FIAG report: Contingent liabilities*

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[https://archive2021.parliament.scot/PublicInformationdocuments/Report\\_of\\_the\\_Consultative\\_Steering\\_Group.pdf](https://archive2021.parliament.scot/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf)

*7.1 A guarantee or indemnity given by a Minister of the Crown is a legally enforceable undertaking. And, a letter or general statement of comfort, while not necessarily giving rise to a legal obligation, may nevertheless impose a moral obligation on the Government.*

*7.2 At Westminster agreements have been reached between the Government and the Public Accounts Committee which has established conventions which ensure, as far as possible, that Parliament is not asked to authorise the provision of funds to meet liabilities of which it has not had reasonable notice and for which no justification has previously been provided.*

*7.3 Where a non-statutory liability could exceed £100,000, Parliament should be notified in accordance with the procedure agreed with the PAC. After obtaining Treasury approval, a Department which proposes to give a guarantee or indemnity must lay before the House of Commons a minute describing the amount and duration of the guarantee or indemnity and the body or bodies involved, and any other relevant information. Members of Parliament have the opportunity to raise questions and an undertaking cannot proceed until these have been answered.*

*7.4 FIAG has considered whether an equivalent procedure is required for Scotland in the recognition that the procedures described above relate to the procedures against the background of cash accounting systems. The Group recognise that resource accounting would mean, in future, that provision would have to be made in the accounts for liabilities likely to mature. Nevertheless, FIAG recommends there should be some constraint on the Executive's ability to enter into such liabilities, and the Scottish Parliament may wish to consider a limit above which prior approval must be sought. It also recommends that this limit should be set considerably higher than the Westminster precedent - £1m might be reasonable.*

27. The first [Budgeting Process Agreement on the Budgeting Process](#) between the Scottish Government and the Finance Committee<sup>2</sup>, published on 27 June 2000, puts in place the recommendations of the FIAG (and CSG) on contingent liabilities. The Parliament noted the written agreement and agreed its terms on 28 June 2000.
28. Each session, the Finance Committee and Scottish Government endorse the Written Agreement for that session. The Written Agreements have evolved over time. The Budget Process Review Group, in its 2017 report, recommended that the section in the Written Agreement on contingent liabilities be updated to provide more flexibility to the Committee in terms of scrutiny and on the thresholds and these arrangements still stand today.
29. The Written Agreement contains provisions (a) for information from a Minister to be received and considered in confidence if the Committee is satisfied with the reasons given as to why that is necessary, and (b) that neither party will disclose information that has been identified as confidential without the agreement of the other party. Both conditions were agreed to and ratified by the Authority, and establish a legitimate expectation that that is how these matters will be dealt with.
30. The Authority advised the Commissioner that the Scottish Public Finance Manual (produced under the 2000 Act) provides for the accounting of contingent liabilities in the Scottish Government's annual accounts and acknowledges the status of the Written Agreement as follows:

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<sup>2</sup> <https://archive.scottish.parliament.uk/business/committees/historic/finance/reports-00/fi-bpa-01.htm>

*Only contingent liabilities above the threshold of £1m, which have to be reported and authorised by the Scottish Parliament in accordance with the written agreement between the Finance Committee and the Scottish Government, are included in the consolidated annual accounts.*

31. The Authority told the Commissioner that, on receipt of the information request, it contacted the Scottish Government for their position on the potential release of the information in the letters in line with good practice set out in [Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information \(Scotland\) Regulations 2004](#)<sup>3</sup>, and in line with the Written Agreement. At the time the letters were submitted, the Committee had agreed to the Scottish Government's request that the contents should be treated as confidential and should be considered in private session. The Scottish Government confirmed that it still considered the content of the letters to be confidential.
32. The Authority argued that it was "imperative to the effective conduct of public affairs that the Scottish Government can share such communications in confidence with the Finance Committee when required in terms of the Written Agreement".
33. The Authority stated that its role is to hold the Scottish Government to account through scrutiny of its policies in the committees. In its view, it is imperative that both the Finance Committee (a group of elected representatives carrying out scrutiny on behalf of the public) and the Scottish Government adhere to the terms of the Written Agreement, including the Finance Committee's commitment not to make information publicly available where a request not to do so has previously been agreed to.
34. Although this scrutiny may take place in private session, it does so only if the Finance Committee is satisfied with the Scottish Government's explanations as to why that discussion should take place in private, and that decision and the explanations that inform it, as well as the subsequent discussions in private, are key parts of the work of the Finance Committee in holding the Scottish Government to account. The Authority suggested that, should the Parliament not adhere to the terms of the Written Agreement despite the Finance Committee having previously agreed to do so, this would risk significant damage being done to the relationship and trust between the two, resulting in a real risk that the Scottish Government may be less willing to share such information in a timely and fulsome manner with the Finance Committee in the future. This, the Authority claimed, "will greatly diminish effective parliamentary scrutiny of the work of the Scottish Government".
35. The Authority commented that the Finance Committee has a significant role in scrutinising the Scottish Government's annual budget, including revenue raising and expenditure, as the Scottish Government is accountable to the Finance Committee in relation to those matters. Furthermore, the Committee's report informs the Parliament's scrutiny of the Scottish Government's annual budget.
36. The information at issue was marked as being commercially confidential by the Scottish Government as it related to the commercial trading activity of BiFab and its investor company and, therefore, to their commercial interests. The information also related to the Scottish Government's position as a guarantor and lender on commercial terms, which related to the Scottish Government's commercial interests. This information was only held by the Authority as a result of a Scottish Government request to consider a contingent liability.

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<sup>3</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

37. In support of its use of the exemption under section 30(c), the Authority noted the decision of the Commissioner in relation to applications that relate to the use of this exemption. [Decision 130/2017](#)<sup>4</sup> refers to the fact that the Commissioner accepts that public authorities need to concentrate on the potential impact that disclosure may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information.
38. In the Authority's view, should it not adhere to the terms of the Agreement, despite the Finance Committee having previously agreed to do so, there is a real risk of significant damage being done to the relationship between the two, resulting in the risk that the Government may be less willing to share such information in a timely manner with the Finance Committee in the future which is necessary for effective parliamentary scrutiny. It also may increase the risk that it is now seen to be more acceptable for one of the parties to the agreement (which mainly relates to the process for annual budget scrutiny) to override other aspects of it.

#### *The Applicant's view*

39. The Applicant argued that section 30(c) did not apply in the circumstances. They commented that, while the Scottish Ministers may wish to communicate information to the Scottish Parliament by labelling it as confidential, "this in itself does not make the information free from disclosure". If applicable, specific exemptions should be applied to redact only specific information. Furthermore, the Applicant did not believe the Written Agreement had any legal significance and so should not and could not be used to "undermine FOISA".
40. The Applicant commented that the issue related to the Scottish Government seeking approval of an *ad hoc* project (with a private company) from the Finance Committee. This, the Applicant said, "has no connection whatsoever with the Scottish Government's annual budget process relating to the funding of schools, hospitals and roads etc" and the Applicant was at a loss as to why information was being withheld under section 30(c) of FOISA. The Applicant suggested that "scrutiny of projects should be carried out in the public domain as part of an open, transparent democracy".

#### *The Commissioner's conclusions on section 30(c).*

41. The information which is the subject of this investigation was provided to the Finance Committee in terms of the Written Agreement, which sets out an understanding between the MSPs who sit on the Committee and the Scottish Government on the administrative arrangements for the annual budget process and other related budgetary matters, including in relation to contingent liabilities.
42. The Commissioner accepts that, were the Authority to disclose the information, contrary to the terms of the Written Agreement, and despite the Finance Committee having previously agreed not to disclose it, would risk significant damage being done to the relationship between the Authority and the Scottish Government, resulting in a real risk that the Scottish Government may be less willing to share such information in a timely and fulsome manner with the Finance Committee in the future.
43. While the Written Agreement may not have a statutory legal basis, it is the basis on which the information was provided to the Authority by the Scottish Government, and as such is more akin to a convention. As noted elsewhere, the Scottish Parliament is not the only

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<sup>4</sup> <https://www.itspublicknowledge.info/decision-1302017>

parliament which has similar agreements in order to ensure that the work of the executive can be scrutinised effectively by elected representatives.

44. The Commissioner acknowledges that, if the information were to be disclosed contrary to the Written Agreement, this would diminish effective parliamentary scrutiny of the Scottish Government.
45. In the circumstances, the Commissioner is satisfied that disclosure would have the effects claimed by the Authority; if the information were disclosed, contrary to the Written Agreement, disclosure would negatively impact the Scottish Government's trust in the Finance Committee and subsequent willingness to provide information. This would clearly diminish effective parliamentary scrutiny of the budgetary process and would, or would be likely to, prejudice the effective conduct of public affairs. He is therefore satisfied that the exemption in section 30(c) applies to the information.

#### ***The public interest test - section 30(c)***

46. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
47. The public interest is not defined in FOISA, but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

#### ***The Applicant's submissions about the public interest***

48. In their requirement for review, the Applicant argued that (contrary to section 2(1)(b) the Authority had not demonstrated that it had considered the public interest in disclosing the information. The Applicant commented that there was significant public interest in the transparency and accountability of the use of public funds, "estimated at over £53 million, which are at risk following the financial collapse of Burntisland Fabrications Limited (in administration)". The Applicant suggested that "the real motivating factor for some of the redactions is not 'commercial sensitivity' but the prevention of public scrutiny of government activity".
49. The Applicant's requirement for review also suggested a public interest in learning from the circumstances of this case in order to prevent reoccurrence, "such as examining the course of action taken by Scottish Ministers, when intervening in a private company which collapsed into administration a short time later."
50. The Applicant also argued that there is a public interest in ensuring the Finance Committee was provided with complete and accurate information by the Scottish Government prior to approving the contingent liability. Disclosure would show whether the documents provided to the Finance Committee were accurate at the time of presentation "and presented without intention to mislead or other bias" and, in particular, that the Finance Committee was presented with a clear and full understanding of project risks.
51. The Applicant also argued that there was a public interest in ensuring the Finance Committee provided effective independent scrutiny prior to approving the contingent liability. Disclosure will reveal the extent of the Finance Committee's scrutiny of the agreement and



its suitability (or otherwise) for evaluating high-value, long-term, highly-complex financial arrangements.

52. Similarly, there was a public interest in broad public scrutiny to increase the quality of the scrutiny over that achievable by a small number of politicians and disclosing the information would allow a much larger and, in their view, more skilled population to scrutinise the agreement, thus increasing public engagement, improving transparency and improving accountability.

#### *The Authority's submissions about the public interest*

53. The Authority agreed that openness and transparency around the expenditure of public funds is in the public interest. In its view, the Written Agreement respects that principle. However, it argued that there are occasions where disclosure could impact adversely on the public interest, and this included the arrangements for contingent liabilities. It was, the Authority said, *very much in the interests of the public that the parties to [the written Agreement] can collaborate, deal openly with each other and strictly observe the terms of the Agreement.*
54. The Authority argued that it is imperative that both the Finance Committee and the Scottish Government adhere to the terms of the Written Agreement, including the process for considering contingent liabilities and the Finance Committee's commitment not to make information publicly available where it has agreed to a Government request to keep that information private. Should the Authority not adhere to the terms of the Agreement, despite the Finance Committee having previously agreed to do so, there is a real risk of significant damage being done to the relationship between the two, resulting in the risk that the Government may be less willing to share such information in a timely manner with the Finance Committee in the future; such sharing of information is necessary for effective parliamentary scrutiny. Disclosure may also increase the risk that it is now seen to be more acceptable for one of the parties to the Written Agreement (which mainly relates to the process for annual budget scrutiny) to override other aspects of it.

#### *The Commissioner's view on the public interest - section 30(c)*

55. The Commissioner accepts there is a general public interest in ensuring that information is accessible.
56. The Commissioner acknowledges that the Finance Committee has a significant role in scrutinising the Scottish Government's annual budget, including revenue raising and expenditure, as the Scottish Government is accountable to the Committee in relation to those matters. There is a significant public interest in such scrutiny, particularly as the Finance Committee's report informs the Parliament's scrutiny of the Scottish Government's annual budget.
57. It must also be acknowledged that there is a significant public interest in the transparency and accountability of the use of public funds. As the Applicant has argued, there is a public interest in the scrutiny of the Authority's conduct through its Finance Committee both in general and in respect of this particular information.
58. The Commissioner acknowledges that some weight must also be assigned to the public interest in the success of the Scottish Government's investing of public money on commercial terms.
59. In all the circumstances, having weighed the public interest arguments in favour of disclosure against those in favour of maintaining the exemption, the Commissioner concludes, on

balance, that the public interest in maintaining the exemption outweighs the public interest in disclosing the remaining withheld information. The Commissioner therefore finds that the Authority was entitled to withhold the information under section 30(c) of FOISA

60. Given that the Commissioner has accepted that the remaining redacted information was correctly withheld by the Authority in terms of section 30(c), the Commissioner will not go on to consider whether the information would also be exempt under section 33(2)(b) of FOISA.

## **Decision**

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by withholding information in terms of section 30(c) FOISA the authority complied with Part 1 of FOISA.

However, the Authority failed to comply with Part 1 of FOISA by withholding other information. Given that the Authority disclosed that information during the Commissioner's investigation, the Commissioner does not require the Authority to take any action in respect of this failure in response to the Applicant's application.

## **Appeal**

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**13 October 2023**

## Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
  - ...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
  - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).