



Decision Notice 054/2024

Lochaber Smelter: Correspondence with/to/about Deloitte regarding the annual Guarantee fee

Authority: Scottish Ministers
Case Ref: 202101521

Summary

The Applicant asked the Authority for a range of correspondence relating to the Guarantee and Reimbursement Agreement (GRA) between the Authority and GFG Alliance. The Authority disclosed information to the Applicant in redacted form in response to the request and during the investigation. Following an investigation, the Commissioner found that the Authority had correctly withheld the redacted information on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.

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. On 10 September 2021, the Applicant made a request for information to the Authority. The Applicant asked for:
 - (i) “Correspondence, including emails, letters, text messages, WhatsApp messages and internal memos sent or received or included via 'cc'ing' [named employee], then a Senior Project and Policy Officer, to or from Deloitte or employees of Deloitte,

between June 2017 and January 18, 2018, concerning changes, alterations, additions, or discussion around Deloitte's Guarantee Management Meeting Reports in relation to the GRA between [the Authority] and GFG Alliance.”

(ii) “Any internal correspondence on the same topic between or involving [named employee] (i.e. if he was 'cc'ed' in to an email chain) and other [Authority] civil servants, ministers, or special advisers, during the same time frame.”

2. The Authority responded on 11 October 2021. The Authority disclosed three documents in redacted form, withholding information under section 33(1)(b) (commercial interests and the economy) and section 38(1)(b) (personal information) of FOISA.
3. On 25 October 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant considered that section 33(1)(b) of FOISA did not apply to the withheld information and that, in any case, the public interest test favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 22 November 2021, upholding its original decision without modification and providing further explanation why it considered the exemptions applied to the withheld information.
5. On 13 December 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he did not consider that:
 - the information was exempt under section 33(1)(b), referring to a finding of the Commissioner in paragraph 19 of [Decision 144/2021](#)¹ to support his view
 - the public interest test had been applied correctly.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. 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 subsequently allocated to an investigating officer.
8. The investigating officer contacted the Applicant to confirm that the application had been allocated, and outlined the matters that would be investigated. In response, the Applicant confirmed that he did not require the Commissioner to reach a decision on the withholding of personal data under section 38(1)(b) of FOISA.
9. 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. These related to the Authority’s justification for withholding the information requested under the exemption in section 33(1)(b) of FOISA.

¹ <https://www.itspublicknowledge.info/decision-1442021>

10. On 15 December 2022, the Authority informed the Commissioner that it wished to withdraw its reliance on section 33(1)(b) of FOISA to withhold the information requested and instead wished to apply section 30(c) to that same information (for which it provided supporting submissions).
11. The Authority also notified the Applicant of its change of position and the Applicant provided submissions to the Commissioner on the Authority's decision to now rely on section 30(c) of FOISA.

Commissioner's analysis and findings

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

Background: Lochaber Smelter Guarantee

13. The Authority provided detailed background information, the following parts of which may be helpful in explaining the background of the Lochaber Smelter Guarantee:
 - The Lochaber aluminium complex in Fort William is the UK's last remaining aluminium smelter, the operation of which is a key component of Scotland's industrial capability and a major source of employment in the West Highlands.
 - When Rio Tinto decided to review its Lochaber operations in 2016, the smelter faced the prospect of closure, endangering over 300 jobs in total (direct, indirect and induced). The Authority's focus at the time was to avoid the fragmentation of the Lochaber complex, to secure the long-term viability of the smelter and to realise further industrial and employment opportunities on site.
 - In September 2016, as part of the Authority's wider overall objective to preserve jobs, protect the economy and sustain the metals industry in Scotland, it indicated a willingness to support any purchaser who would retain the smelter and associated hydro-power scheme together, and make the necessary commitment to significant investment in the development of the Lochaber assets. The Authority's offer included the potential to guarantee the power purchase obligations of the aluminium smelter and was made known on an even-handed basis to all short-listed bidders via the vendor (Rio Tinto).
 - To deliver its objective for the site, the Authority is standing behind a portion of the power purchase obligations of the aluminium smelter operator (Alvance British Aluminium Limited (SmelterCo)) in the event that it cannot pay for the power it is contracted to take from the hydro-electric power station operator (Simec Lochaber Hydropower 2 Limited (HydroCo)). Both companies are part of the GFG Alliance (GFG) which is a collection of global businesses and investments.
 - The commercial guarantee arrangement (the Guarantee) was entered into in December 2016 by the Authority, SmelterCo and HydroCo, and guarantees over a 25 year term that the Authority will pay for a percentage of the power that SmelterCo is contracted to purchase from HydroCo in the event that SmelterCo is unable to do so.
 - The nominal value of the Authority's contingent liability on day one of the Guarantee was £586 million (i.e. the total amount of payments guaranteed by the Authority across the 25 year agreement), and is the largest industrial guarantee ever agreed by the Authority.

- In return for the Guarantee, the Authority receives a commercial guarantee fee (the Fee) from GFG.
 - In March 2021, GFG's major providers of working capital and investment finance (Greensill Capital (UK) Limited and Greensill Capital Management Company (UK) Limited (together "Greensill")) entered administration.
14. The Authority submitted that should the Lochaber guarantee be called in and if other recovery options prove ineffective, it would have an option to take ownership of the business assets at Lochaber and trade these assets (directly or through lease arrangements) with the intent of satisfying the ongoing payment obligations under the Power Purchase Agreement (PPA) or alternatively seek to dispose of the assets through a managed sales process.
 15. The Authority submitted that information within the material remained current and could negatively impact its ability to operate the assets on effective commercial terms and, potentially, inhibit any sale process to the detriment of the public purse if the information was disclosed prematurely.

The Authority's interests

16. In addition to the background information above, the Authority explained that, as a result of its legal obligations arising from the Guarantee, it had a significant and specific financial and economic interest in the operation of the smelter to which the information related. In addition, it had an overarching general interest in the original objectives of the proposal, namely the retention of jobs and the support of the metals industry in Scotland.
17. The Authority acknowledged that the Commissioner had previously indicated in [Decision 144/2021](#)² that he did not consider the Authority to be a commercial actor in respect of Scotland's energy sector, but that it may have other economic interests in relation to the smelter.
18. The Authority considered that its commercial, economic and financial interests in respect of the Guarantee were manifest and quantifiable, and information within the material remained current. It also submitted that there was considerable uncertainty with respect to any future scenario involving the smelter, the loss of which could materially impact upon the local regional economy. It noted that, during the 18 months since the Greensill collapse, GFG and its primary shareholder, Sanjeev Gupta, had sought to defend and engage in legal action across multiple jurisdictions in order to preserve operations.

Information disclosed during the investigation

19. The Authority identified and provided copies of three documents it considered to fall within scope of the request, comprising emails and documents of one to four pages in length dating between 11 September 2017 and 1 December 2017. These documents had been disclosed to the Applicant in redacted form.
20. On 25 August 2023, the Authority disclosed further information to the Applicant from an email dated 1 December 2017.
21. As the Authority disclosed information to the Applicant subsequent to its review response, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA.

² <https://www.itspubliknowledge.info/decision-1442021>

Section 30(c) – Prejudice to effective conduct of public affairs

22. Section 30(c) of FOISA exempts 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.
23. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing 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.
24. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
25. The Authority relied upon section 30(c) (prejudice substantially, the effective conduct of public affairs) to withhold information in the documents.

The Authority's submissions on section 30(c)

26. The Authority submitted that it was essential for it to have a productive relationship with companies like GFG, which run businesses of national and local importance to Scotland. As the Lochaber smelter is a significant employer in the local area, the Authority had a significant interest in the business through the Guarantee.
27. The Authority provided three key reasons for withholding the information under the exemption in section 30(c) of FOISA, as follows:

Point (a) – Disclosure would weaken the Authority's ability to negotiate guarantee terms

28. The Authority submitted that it was likely that external lenders will be involved in situations where it is providing guarantees to support businesses. It would be in these lenders' interests to negotiate the most generous guarantee terms possible, thereby passing risk to the Authority (which would be to the detriment of the Authority's interests were such a guarantee more likely to be called up). Disclosure would enable future lenders to form views about the Authority's likely appetite for risk and on how it takes decisions on these matters, and would allow them to use this as part of their negotiation strategy. The Authority believed the process of benchmarking one guarantee against another would ultimately be detrimental to its interests.

Point (b) – Disclosure would make distressed businesses less likely to engage with Authority support

29. The Authority submitted that businesses are extremely hesitant to consider financial intervention sponsored by it, or its Agencies, due to the risk of this becoming public knowledge, as this would alert customers and suppliers to the fact that the business was utilising last resort funding to continue to trade. This, in turn, would adversely affect the business as its customers and suppliers would be less willing to deal with it due to fear of wasted costs (e.g. where the business was unable to pay for materials ordered), leading to further difficulties in trading.

30. In the Authority's view, disclosure would exacerbate the issue by underscoring not only that fact, but also the underlying basis on which decisions are made about sensitive business operations and situations, and this risk was not one that arose where a business secured support from a third party which was not a Scottish public authority. The Authority also believed this would heighten concerns about seeking support from the Authority, making such support less effective and thereby prejudicing its own commercial interests.
31. The Authority argued that it must be able to assure businesses that sensitive information about their financial position and future plans will not be released as a result of their involvement with the Authority. In the Authority's view, maintenance of trust was important to allow it to engage with businesses in the best interests of Scotland, with the ultimate aim of preserving employment and growing the economy. It believed that disclosure of the information would jeopardise its ability to work in partnership with commercial actors such as GFG in future.

Point (c) – Disclosure would remove the private space for consideration that is required by the Authority to make decisions in relation to a significant contract with implications for jobs and the economy

32. The Authority submitted that the Guarantee was a live agreement, and it was required to take decisions in relation to the management of the Guarantee. It argued that release of information relating to the Guarantee, including the terms of the Guarantee, would inhibit substantially its ability to make such decisions in the public interest, by removing the private space required for it to do so.
33. The Authority considered that disclosure would also substantially prejudice its relationship with GFG. In its view, disclosing the content of a live agreement to which GFG is party could negatively impact on GFG's financial operations in a number of stated ways. The Authority believed that GFG would likely consider that it had revealed sensitive details which were shared on a confidential basis in respect of the agreement, which would be detrimental to GFG and its ongoing relationship with the Authority.

The Applicant's submissions on section 30(c)

34. The Applicant considered that the risk to the effective conduct of public affairs is neither likely nor risks substantial prejudice. The Authority provided no evidence of this and it is clear to that its move to section 30(c) is an admission that section 33 did not apply and is simply another roadblock in the release of the information, rather than a legitimate reason for blocking disclosure.
35. The Applicant also submitted that much of any potential argument against disclosure will be based around hypothetical impact. If there had been a likely risk of substantial prejudice, the Authority would have applied the exemption in their initial response and review. They did not.

The Commissioner's view on section 30(c)

36. Information can only be exempt under section 30(c) of FOISA if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
37. The Commissioner must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome. Given the sensitivity of the information and the

circumstances surrounding it, the Commissioner is limited in the reasoning he can set out in this Decision Notice.

38. The Commissioner notes that the main focus of the withheld information is financial arrangements and discussions of the commercial companies' information within the documents which were, at the date of the Authority's review response, relatively recent.
39. For example, at the date of the Authority's review response, the financial viability of the companies involved (Greensill and CFG) had changed considerably, but the Authority would still have to pay for 80% of the power that SmelterCo is contracted to purchase from HydroCo in the event that SmelterCo is unable to do so.
40. Having considered the nature and content of the withheld information, together with the submissions of the Authority and the Applicant, the Commissioner finds that disclosure of the withheld information would, or would be likely to, have a detrimental impact on the Authority, CFG and the other commercial companies' ability to continue in a competitive environment, which, in turn, would, or would be likely to, impede the Authority's ability to engage with businesses in the best interests of Scotland.
41. The Commissioner cannot expand on his reasoning here, as to do so would reveal the information being withheld.
42. Consequently, the Commissioner is satisfied that the Authority was entitled to apply the exemption in section 30(c) of FOISA to withheld information.

Public interest test

43. The exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 30(c) was correctly applied to the withheld information, he is now therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing that information is outweighed by the public interest in maintaining the exemption.

The Authority's submissions on the public interest – section 30(c)

44. The Authority acknowledged that there is a public interest in favour of disclosing the withheld information as part of an open, transparent and accountable government to inform the public debate. The Authority also recognised that there is public interest in the aluminium smelter complex and in how it works with companies such as CFG, particularly when public funds are involved.
45. However, the Authority explained that, given the importance of the smelter to Scotland, the public interest favoured withholding the information requested in order to protect the trust of CFG in their relationship with the Authority.
46. The Authority submitted that it was of vital importance that it can intervene to protect jobs and the wider economy, specifically when this involves a guarantee, the public interest lies in protecting some sensitive information in the service of allowing future interventions.
47. Ultimately, the aim of the intervention was to protect jobs, and the Authority considered it was clearly in the public interest to withhold information that would jeopardise future such action. There are currently over 200 people employed within the smelter business operating at Lochaber. The public interest lies in protecting their interests, given the importance not only to the individuals employed at the sites but to the wider economy of the local area.

The Applicant's submissions on the public interest – section 30(c)

48. The Applicant submitted that the key question around the Lochaber smelter is whether the deal struck by the Authority with GFG Alliance was sound decision making from a taxpayer value-for-money point of view.
49. The Applicant explained that, in this context, the public interest in discovering whether that is the case is obvious: this was a multi-million financial commitment and the political and financial risks of such a decision are clear in how the rescue of companies such as Ferguson Marine, Prestwick Airport, Bifab and Dalzell Steelworks have developed.
50. The Applicant submitted that full transparency is therefore overwhelming and, without disclosure of the withheld information, there is no way for the public to establish whether the deal at Lochaber is in the public interest and there is no accountability.
51. The Applicant explained that the history of GFG Alliance further increased the public interest in disclosure of the withheld information. The Applicant noted that GFG's recent history raised question marks about the Authority's decision to go into business with it and, while it may well have been the correct decision, it is impossible to judge this without all of the facts.
52. The Applicant submitted that there is clearly a different type of public interest test to be applied to this (and many other Lochaber cases) where the information requested is not necessarily inherently financial, as fee payments clearly are.
53. The Applicant considered that it is important to underline the importance in the transparency and accountability of the deal in terms of public scrutiny of the Authority's decision to back the smelter and agree the Guarantee.
54. The Applicant noted the Commissioner's conclusion in [Decision 063/2023](#)³ that the public interest in saving jobs and not adversely affecting the financial situation at Lochaber is paramount.
55. However, the Applicant explained that he felt the Commissioner's consideration of the public interest skipped an earlier and much more integral part of the public interest test around the decision itself, rather than the consequences of that decision. The Applicant stated that he considered there is a significant level of public interest in knowing whether the rationale for the Authority to back the Guarantee was justifiable, regardless of any external factors.
56. On this point, the Applicant referred to an [interview with Jeff Kabel \(Chief Transformation Officer\) of GFG Alliance](#)⁴ where he stated that the Authority was advised that the decision to back the Guarantee may have breached state aid rules.
57. The Applicant submitted that the main commercial partner engaged in this discussion is not just willing but is happy to provide information about the deal and the considerations made by the Authority at the time.
58. The Applicant considered that, if this is the position of the main commercial partner in the deal when it comes to discussing decisions made more than five years ago (at the time of the Authority's review response), the Authority should have no reasonable concerns about the information requested impeding its ability to conduct public affairs.

³ <https://www.itspublicknowledge.info/decision-0632023>

⁴ <https://www.scotsman.com/news/politics/inside-the-controversial-lochaber-smelter-as-gfg-alliance-chief-opens-up-on-the-deal-with-the-scottish-government-4069759>

The Commissioner's view on the public interest – section 30(c)

59. The Commissioner has taken account of all of the relevant submissions from both parties, together with the withheld information in this case. He is required to balance the public interest in disclosure of the information requested against the public interest in maintaining the exemption. The public interest, in the context of FOISA, should be considered as “something which is of serious concern and benefit to the public”.
60. As rehearsed above, the Commissioner has already accepted that disclosure of the withheld information would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
61. Given the significant size of the Lochaber Smelter Guarantee and those potentially affected by the circumstances surrounding it, the Commissioner accepts that there is clear and substantial public interest in understanding the finer details of the Guarantee and discussions that the Authority had with CFG and other companies.
62. However, the Commissioner recognises that this must be carefully balanced against any impact that disclosure of the withheld information would have had – at the time when the Authority issued its review outcome – with regard to the Lochaber smelter, the Guarantee itself (underwritten by the Authority) and what the likely circumstances might be were the Guarantee to be called in.
63. The Commissioner considers there is a significant and substantial public interest in maintaining the exemption in relation to information which could adversely impact the ability of the parties involved to continue, as planned, with the Guarantee.
64. The Commissioner recognises that, were circumstances to arise requiring the Guarantee to be called in, this would clearly impact the parties involved (including the Authority), the economy of the local area (and the wider Scottish economy) and the jobs of those individuals employed at the smelter and associated businesses, both directly and indirectly.
65. In the Commissioner's view, there is also a substantial public interest in maintaining the exemption in relation to sensitive information which could adversely impact GFG's current (and changing) financial situation and lead to the Guarantee being called in.
66. The Commissioner recognises that such a situation could lead to a number of unwanted circumstances presenting themselves, for example job losses, the requirement for a new agreement to be drawn up or entered into by the Authority, and a reduction in crucial commercial information being provided by businesses to the Authority which would inhibit the Authority's ability to take fully informed decisions and secure best value for public money. Such circumstances would clearly impact on the Authority's position with regard to its ability to effectively conduct its public affairs, and that would not be in the public interest.
67. On balance, therefore, the Commissioner is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
68. The Commissioner therefore finds that the Authority was entitled to withhold the information requested under the exemption in section 30(c) of FOISA.

Decision

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

The Commissioner finds that, by the end of his investigation, the Authority had disclosed all of the information falling within the scope of the Applicant's request, except that correctly withheld under section 30(c) of FOISA.

However, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by failing to disclose all relevant information until during the investigation (and in doing so, failed to comply with section 1(1)).

Given that the Authority has now disclosed all of the information falling within the scope of the Applicant's request (except that correctly withheld under section 30(c) of FOISA, the Commissioner does not require it to take any action in respect of this failure.

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.

David Hamilton
Scottish Information Commissioner

17 April 2024

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).