



Decision Notice 047/2023

Correspondence with Deloitte about the GFG Alliance Guarantee and Reimbursement Agreement (Lochaber Smelter)

Applicant: The Applicant

Authority: Scottish Ministers

Case Ref: 202101452

Summary

The Applicant asked the Authority for correspondence between Deloitte and specified grades of staff within the Authority, relating to the Lochaber smelter and hydro plant between specified dates. The Authority informed the Applicant that it did not hold any information falling within the scope of the request. Following an investigation, the Commissioner is satisfied that the Authority did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 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. He asked for correspondence between Deloitte and senior civil servants, Ministers and Special Advisers within the Scottish Government relating to the Guarantee and Reimbursement

Agreement (GRA) between GFG Alliance and the Scottish Government in relation to the Lochaber smelter and hydro plant, sent between 1 March 2017 and 1 January 2018.

2. The Applicant stated that this should include, but not be limited to, emails, letters, correspondence, WhatsApp messages, texts or other digital or physical correspondence from or to Deloitte on the guarantee and its adherence with state aid rules.
3. The Authority responded on 8 October 2021. It provided a formal notice under section 17(1) of FOISA, and explained that it did not hold the information requested.
4. On 25 October 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not believe adequate searches for the information requested had taken place.
5. The Authority notified the Applicant of the outcome of its review on 19 November 2021. It concluded that the original decision should be upheld, and confirmed that appropriate searches had been carried out. The Authority added that, for context, it should be noted that the Scottish Government contract with Deloitte for financial advisory support for the Lochaber project commenced on 17 July 2017.
6. On 24 November 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 still believed insufficient searches had taken place, and that correspondence of this type existed and should be disclosed.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 6 January 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
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 searches carried out by the Authority to establish what information (if any) it held falling within the scope of the Applicant's request.
10. The Authority provided submissions to the Commissioner and these are considered below.

Commissioner's analysis and findings

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

Section 17(1) – Notice that information is not held

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to

withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.

13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
14. The Applicant believed that information falling within the scope of his request was held by the Authority.
15. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the authority.
16. In its submissions to the Commissioner, the Authority described the searches it had carried out, and explained why these searches were relevant. It provided details of the staff members, falling within the categories detailed in the request, who were connected to the project specified, who may have held information falling within the scope of the request, and what was done to locate any such information.
17. The Authority explained that it had conducted searches of its electronic filing system, of the email inboxes of relevant staff, and a WhatsApp/text search. It provided details of the staff connected to the project who fell within the grade of Senior Civil Servant, Special Advisers, Ministers, and the relevant employees of Deloitte.
18. The Authority highlighted that the contract with Deloitte started in July 2017, so there was a portion of time specified in the Applicant's request where there was no correspondence, as Deloitte were not acting for the Scottish Government on the issue at that time.
19. The Authority submitted that civil servants below Deputy Director level would fall outwith the scope of this request, as they are not classified as senior civil servants.
20. The Authority explained that it would be normal practice for members of a policy team who are not senior civil servants to communicate with commercial advisors, such as Deloitte, and then convey information upwards to Senior Civil Service colleagues, Ministers and Special Advisers, rather than for this communication to take place directly.
21. The Commissioner noted that the request was restricted to information between Deloitte and specified grades and roles of staff, namely senior civil servants, Special Advisers and Ministers. The Authority has interpreted senior civil servants to be those falling within the grades of the Senior Civil Service (SCS), which are those at Deputy Director and above. The Commissioner accepts that this was a reasonable interpretation of the request.
22. The Commissioner is also satisfied that the searches carried out by the Authority were reasonable and sufficient to determine whether the requested information was held. Given the restricted nature of the request, the Commissioner is satisfied that the Authority does not

(and did not, at the time of the request) hold the information requested by the Applicant, and so was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of the request.

Decision

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

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.

Margaret Keyse
Head of Enforcement

17 May 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.”
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

...

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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).

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