



Decision Notice 164/2024

GFG Alliance Guarantee and Reimbursement Agreement: Scottish Government accounting provisions 19/20 and 20/21 (Lochaber Smelter)

Applicant: The Applicant

Authority: Scottish Ministers

Case Ref: 202200261

Summary

The Applicant asked the Authority for information showing the calculations of the Authority's provisions for the Lochaber Smelter Guarantee with the GFG Alliance for the years 2019/2020 and 2020/2021. The Authority identified one document and disclosed some information but withheld the remainder.

The Commissioner investigated and found that the Authority had largely complied with FOISA in that, it had identified all of the information falling in the scope of the request, and most of the information had been correctly withheld on the basis that it would, or would be likely to prejudice substantially the effective conduct of public affairs, but he required the Authority to disclose some further information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to the 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 17 December 2021, the Applicant made a request for information to the Authority. They asked for a copy of the working papers showing the calculations of the Scottish

Government's provisions for the Lochaber Smelter Guarantee Agreement with the GFG Alliance. The two years they wanted to look at were 2019/2020 when the provision totalled £37m and 2020/2021 when the provision totalled £161m.

2. The Authority responded on 1 February 2022. It provided some of the information but withheld the remainder under the exemptions in sections 30(b)(i) and 33(1)(b) of FOISA.
3. On 1 February 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because:
 - the response appeared to be incomplete (in that it did not include both years);
 - they did not consider the exemptions claimed to apply;
 - they did not consider the public interest test had been properly carried out;
 - they considered the public interest favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 1 March 2022. The Authority disclosed some further information contained in the document falling within the scope of the Applicant's request. It continued to rely on the exemption in section 33(1)(b) to withhold some of the remaining information, and additionally relied on the exemption in section 30(b)(ii) for the rest of the information it was withholding. The Authority also confirmed that only one document fell within the scope of the request and contained the information on both financial years requested, as a consequence, the Authority stated that the response was not incomplete.
5. On 2 March 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review because they considered the response was incomplete, the exemptions claimed did not apply, and that the public interest favoured disclosure.

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. On 27 April 2022, 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.
8. 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 steps taken to identify the information falling within the scope of the request, as well as the reasons why it considered the exemptions in sections 30(b)(ii) and 33(1)(b) to apply.
9. When providing its submissions to the Commissioner, the Authority changed its position, no longer relying on sections 30(b)(ii) or 33(1)(b) to withhold the information, but on section 30(c) of FOISA instead. It provided submissions in support of its reliance on section 30(c).
10. The Applicant provided their comments to the Commissioner on both the Authority's initial and revised position.

Commissioner's analysis and findings

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

Background: Lochaber Smelter Guarantee

12. In its submissions to the Commissioner, 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, and at the time accounted for over 300 direct, indirect and induced jobs.
- When Rio Tinto decided to review its Lochaber operation 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, the Authority indicated its willingness to support any purchaser who would retain the smelter and associated hydro-power scheme. The Authority's offer included the potential to guarantee the power purchase obligations of the aluminium smelter and was made known 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 (Smelter Co)) 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. A power purchase agreement (PPA) between SmelterCo and HydroCo fixes the smelter's electricity prices for 25 years with the aim of locking in low long-term predictable renewable energy costs for the smelter and to provide revenue certainty to the power station.
- The commercial guarantee arrangement (the Guarantee) was entered into in December 2016 by the Authority, SmelterCo and HydroCo, and guarantees over a term of 25 years 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.

13. The information request in this case involves information related to the Lochaber Smelter Guarantee.

The Applicant's perspective

14. Following the issue of [Decision 062/23](https://www.itspublicknowledge.info/decision-0622023)¹ and [Decision 063/23](https://www.itspublicknowledge.info/decision-0632023)² on 20 June 2023 (which also related to the Lochaber Smelter Guarantee and Reimbursement Agreement), the Applicant wrote to the Commissioner (on 26 June 2023) to advise him that they strongly disagreed with the outcome.
15. The Applicant explained that the Commissioner appeared to have accepted information provided to him by the Authority at face value and without adequate challenge. In their view, the Guarantee did nothing for the preservation of jobs at the smelter, but guaranteed the income for the hydro-plant only, which had very few direct jobs. In their view, “the story of saving jobs was concocted to divert attention away from the real purpose (a financial enabler to allow the GFG Alliance to purchase the company)”.
16. The Applicant also contested in more detail the accuracy of the background information provided by the Authority in paragraphs 16 and 13 of those Decisions respectively. The Applicant provided what they described as an “alternative background”, as set out below:
- The primary purpose of the Guarantee was to enable GFG to purchase Alcan Aluminium UK Ltd (Alcan) by issuing debt. The Guarantee did not *directly* support existing jobs. As part of the agreement, Greensill Capital securitised the guarantee together with forecasted revenue streams from the smelter to the supporting hydro-electric facility in order to provide loan-financing to GFG. In the event that the guarantee was called in, it provided protection to Greensill (now in administration), not companies within GFG.
 - While the Authority may claim that the Guarantee was offered on an even-handed basis to all prospective bidders, it strongly favoured bidders using supply-chain finance as the mechanism of acquisition (such as GFG). The offer provided much less advantage, for example, to cash bidders and so the “even-handed” offer merely created an illusion of fairness. The net effect of the guarantee offer to all bidders was to significantly elevate the attractiveness of the debt-financed GFG bid. (The Authority had an already-established relationship with GFG through its purchase of the Dalzell and Clydebridge steelworks.)
 - Alcan was not a distressed company at the time of acquisition by GFG and was trading profitably. GFG purchased the company for £330 million. This was not the value of a distressed company. The funding enabled by the Guarantee was not “last resort funding” in relation to the Lochaber complex.
 - A stated objective of the Authority was to prevent the fragmentation of the Lochaber smelter complex. However, immediately after the acquisition, GFG removed the Lochaber smelter, Kinlochleven hydro-plant and estate land holdings from the existing legal entity (Alcan), transferring them to new and separate legal entities under different structures ultimately controlled from different off-shore jurisdictions.
 - The Authority had represented that, in return for entering into the Guarantee, it received a “commercial fee”. There was no independent evidence to support the

¹ <https://www.itspublicknowledge.info/decision-0622023>

² <https://www.itspublicknowledge.info/decision-0632023>

assertion that the fee was at a commercial level. If the arrangement was of a commercial level, GFG could have obtained the Guarantee from the private sector where there are much lower transparency expectations.

- High levels of secrecy over high-value government contracts were a red flag of potential fraud. Fraudsters were extremely unlikely to consent to disclosure of any information in any circumstance. GFG is under investigation by the Serious Fraud Office for suspected fraud, fraudulent trading and money-laundering including its financing arrangements with Greensill. The Serious Fraud Office has no jurisdiction in Scotland where there is no equivalent agency.

Information falling within the scope of the request

17. 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.
18. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
19. 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.
20. The Commissioner 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.
21. The Authority is withholding information contained within one document entitled "Analysis of the IFRS 9 Expected Credit Loss for an Issued Financial Guarantee Contract".
22. The Applicant was not satisfied that all of the information they had requested had been provided, as only one document was identified, when they had requested information relating to two financial years, 2019/2020 and 2020/2021.
23. During the investigating the Commissioner asked the Authority to explain why the information in the one document that had been withheld from the Applicant covered both of the financial years contained in his request.
24. The Authority submitted that this was all of the information it held falling within the scope of the Applicant's request.
25. It stated that the report was considered to be the 'working paper' used to set the provision for the guarantee. The Authority explained that, with agreement from Audit Scotland, this one report could be relied upon as the basis on which the provisions for both 2019/2020 and 2020/2021 were calculated and, therefore, covered both of the financial years requested.
26. The Authority further explained that the report contained a number of scenarios, and resulting figures, and that in the different years, different scenarios (related to the risk profile) were used to determine the resultant provision. It therefore considered that the 'working

paper' and calculations for both years were in the report, as it presents the different scenarios on which the provision was then based.

The Commissioner's view

27. Having considered the content of the withheld information, together with the explanation provided by the Authority, the Commissioner is satisfied that the Authority did identify all relevant, recorded information falling within scope of the Applicant's request.
28. The Commissioner therefore finds that the Authority complied with section 1(1) of FOISA.

Section 30(c) - prejudice to effective conduct of public affairs

29. 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.
30. 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 a public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by the disclosure of the information, and how that harm would be expected to follow from disclosure.
31. 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 of likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly foreseeable) future, not simply that the harm is a remote or hypothetical possibility.
32. The Authority relied upon section 30(c) to withhold certain information within the document falling within the scope of the Applicant's request.

The Authority's submissions on section 30(c)

33. The Authority, in its submissions, considered that it was essential that it was able to have a productive relationship with companies like GFG who run businesses of local and national importance to Scotland. It highlighted that the smelter is a significant employer, and that the Authority had a significant interest in the business through the Guarantee.
34. The Authority believed that disclosing the requested information would substantially prejudice the effective conduct of public affairs in the following ways:

Point (a) - By weakening the Authority's ability to negotiate guarantee terms

35. The Authority submitted 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 if the resulting guarantee was more likely to be called up). Disclosure of the requested information would, the Authority argued, enable future lenders to form views about the Authority's likely appetite for risk, together with the basis on which it takes decisions on these matters. This, along with the process of benchmarking one guarantee against another would be likely to be used as part of future lenders negotiating strategy which would ultimately be detrimental to the Authority's interests.

Point (b) - By making distressed businesses less likely to engage with Authority support

36. The Authority submitted that businesses are extremely hesitant to consider financial intervention sponsored by it, or its Agencies, because of the considerable risk that the fact of such an intervention would become public knowledge. This is because 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. 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.
37. As these companies had not consented to disclosure, the Authority considered that release of the information would likely undermine trust in it, leading to businesses being reluctant to engage with it on such matters in the future, to the detriment of the Scottish economy and employment. For these reasons, the Authority believed disclosure would substantially prejudice its ability to take similar action to secure the future of employers and jobs.
38. 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.

The Applicant's submissions on section 30(c)

39. The Applicant did not consider that the exemption in section 30(c) of FOISA had been engaged, as they did not consider that disclosure of the withheld information would result in the significant probability of substantial prejudice.
40. The Applicant's view was that the Authority should instead have followed the guidance in section 8 (The disclosure of information relating to contracts) of [The Scottish Ministers Code of Practice on the discharge of functions by Scottish Public Authorities under the Freedom of Information \(Scotland\) Act 2002](#)³.
41. With regard to the Authority's point (a), the Applicant did not believe that a substantiated link had been made, by the Authority, between the specific information, disclosure and harm.
42. The Applicant stated their view that the Lochaber Smelter Guarantee and Reimbursement Agreement is a novel, highly unusual agreement with a financing firm, which was not authorised and regulated by the Financial Conduct Authority, and which had subsequently collapsed into administration. The Applicant considered that the unique nature of this agreement meant that disclosure would not compromise negotiations in future guarantees.

³ [Code of Practice under section 60 of FOISA \(www.gov.scot\)](#)

43. With regard to the Authority's point (b), the Applicant submitted that there was no requirement for the Authority to obtain the consent of the participating companies prior to disclosing information.
44. The Applicant's view was that the participating companies engaged in the Guarantee and Reimbursement Agreement knowing that the Authority was a public authority for the purposes of FOISA. Therefore, information could be disclosed solely at the discretion of the Authority, and they argued that the agreement should contain a clause to that effect.

The Commissioner's view on section 30(c)

45. 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.
46. The Commissioner has considered the submissions from both parties. He has also taken into account the content of the withheld information.
47. The withheld information predates the change in financial circumstances of the companies involved in the Lochaber Smelter Guarantee, however the request, response and review outcome were made after this change in circumstance.
48. 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 the Decision Notice.
49. The Commissioner notes that the main focus of the withheld information is an independent assessment of Expected Credit Loss (ECL) to the financial liability (the Guarantee), taking account of a range of factors including Liberty Steel's own financial data and forecasts. The Commissioner recognises that at the time of the Authority's response to the Applicant's requirement for review this information was just over 2 years old.
50. The Commissioner has considered the nature and content of the withheld information which utilises bespoke datasets of private commercial information, together with the submissions of the Authority and the Applicant.
51. He recognises that the information redacted from this report under section 30(c) of FOISA was sensitive, as it considered the financial position and risk based scenarios relating to a commercial business.
52. The Commissioner also acknowledges that the involvement of the Authority in this type of arrangement, by its nature, then requires accountability for the involvement of public finances. He recognises though that this needs to be balanced against the harm from disclosure. In this case the Authority's arguments in relation to the financial circumstances of the business(es) at the time of the request and review, as well as the importance of trust in sharing information have been taken into account.
53. The Commissioner finds that disclosure of the majority of the withheld information would, or would be likely to, have a detrimental impact on the Authority, GFG 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.

54. Consequently, the Commissioner is satisfied that the Authority was entitled to apply the exemption in section 30(c) of FOISA to the majority of the withheld information.
55. However, there is some information for which the Commissioner is not satisfied that the exemption in section 30(c) is engaged.
56. The information concerned is very limited, involving a few words or phrases on four pages of the document. The information the Commissioner highlighted on two of the pages involved terminology used and disclosed elsewhere within the same document. As a consequence, the Commissioner is unable to accept that disclosure of this term would lead to the harm envisaged by the Authority.
57. For certain of the withheld information on the other two pages, only two words were involved in each instance. The Commissioner did not consider the phrases in question to be in any way sensitive, nor that their disclosure would result in the level of harm anticipated by the Authority or required by the exemption.
58. Consequently, the Commissioner finds that the Authority incorrectly withheld some information under section 30(c) of FOISA. As he does not accept that section 30(c) applies to that information, he is not required to consider the application of the public interest in section 2(1)(b) of FOISA for that particular information.
59. The Commissioner will provide an appendix to the Authority indicating what information he considers not to be exempt under section 30(c) of FOISA, and which should therefore be disclosed to the Applicant.

Public interest test – section 30(c)

60. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA.
61. As the Commissioner has found that the exemption in section 30(c) was correctly applied to some of the withheld information, he is now 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)

62. The Authority recognised that there was public interest in the release of the information as part of an open, transparent and accountable government and to inform public debate. It also recognised the public interest in the aluminium smelter complex, and how the government works with companies such as GFG when public funds are involved.
63. However, given the importance of the smelter to Scotland, the Authority commented that the arguments in favour of disclosure were outweighed by the public interest in protecting the trust of GFG in their relationship with the Authority.
64. The Authority argued that it was of vital importance to Scotland, and the people of Scotland that it can intervene to protect jobs and the wider economy. It submitted that when this involves a guarantee, as in this case, the public interest lies in protecting some sensitive information in the service of allowing future interventions.

The Authority explained that the aim of the intervention was to protect jobs, and it was clearly in the public interest to withhold information that would jeopardise such actions in the future. It noted that approximately 200 people were employed within the smelter business operating in Lochaber. The public interest, the Authority submitted, lies in protecting their interest,

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 about the public interest

65. The Applicant submitted a number of arguments in support of their position that the public interest favoured disclosure of the information. In their view, there was a public interest:
- (i) In ensuring the guarantee agreement and the Authority's actions complied with all laws and regulations, including EU state aid law. Their view was that a commercial company faced with these same circumstances, would not have entered into this agreement as it would represent too high a financial risk, and that as such, the project may not comply with EU state aid laws;
 - (ii) In ensuring the Scottish Parliament's Finance and Constitution Committee was provided with complete and accurate information by the Authority, and that it provided effective independent scrutiny prior to approving the £586m contingent liability;
 - (iii) In disclosure as this would allow a larger and more skilled population to scrutinise the agreement increasing public engagement, and improving transparency and accountability;
 - (iv) Disclosure would provide increased public confidence that the arrangement is free (or otherwise) from fraud and/or money-laundering, because the Guarantee was not based on sound data, and because one of the key parties to the agreement (Greensill Capital (UK) Limited) was now in administration;
 - (v) Disclosure would reveal if the arrangements were at arm's length and undertaken without favours and whether the GFG Alliance's financial contributions were proportionate, and that it provided value for money at all stages (from approval to delivery);
 - (vi) in disclosure, in order to evaluate relative spending priorities and to be able to independently monitor and measure approved project outcomes;
 - (vii) in disclosure, because of the financial size (£586m), the unusual term (25 years), the nature and the complexity of the agreement;
 - (viii) in understanding the Authority's exposure to the GRA;
 - (ix) in understanding the security and guarantees the Authority has obtained from GFG member companies for entering into the agreement and, specifically, whether they were adequate;

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

66. The Commissioner has taken account of all of the relevant submissions from both parties, together with the withheld information in this case that he has found to be exempt under section 30(c). He is required to balance the public interest in disclosure of the information requested against the public interest in maintaining the exemption. In the context of FOISA, the public interest should be considered as "something which is of serious concern and benefit to the public".

67. As noted above, the Commissioner has already accepted that disclosure of the information which has engaged the exemption contained in section 30(c) of FOISA, would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
68. 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 details of the calculations of the Authority's provisions for the Guarantee.
69. However, he recognises that this must be carefully balanced against any impact that disclosure of such detailed information (whether it be financial, commercial or otherwise) 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.
70. The Commissioner acknowledges 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.
71. 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.
72. On balance, therefore, the Commissioner is of the view that the public interest in withholding the remaining information outweighs the public interest in disclosing it.
73. The Commissioner therefore finds that the Authority was entitled to withhold the information he has found to be exempt under 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 (FOISA) in responding to the information request made by the Applicant.

While the Commissioner agrees that the majority of the information withheld by the Authority was exempt from disclosure, and that the Authority had identified all of the information falling within the scope of the request, he also finds that the Authority failed to comply with Part 1 of FOISA (and, in particular, section 1(1)), by withholding some information under the exemption in section 30(c).

The Commissioner therefore requires the Authority to disclose the information detailed in the attached Appendix, by **30 September 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

14 August 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.”
- (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 section (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.

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).