



Scottish Information  
Commissioner  
[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

# Decision Notice 218/2024

---

## Lochaber Smelter Guarantee and Reimbursement Agreement

**Authority: Scottish Ministers**

**Case Ref: 202200672**

### Summary

The Applicant asked the Authority for unredacted versions of the Ministerial sign off and submissions regarding the Lochaber Smelter Guarantee. The Authority continued to withhold the information it had redacted on the grounds that its disclosure would prejudice the effective conduct of public affairs, breach confidentiality or prejudice substantially the commercial interests of named parties.

The Commissioner investigated and found that the Authority had wrongly withheld some information under the exemptions claimed, and he required the Authority to disclose this information.

### 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(b)(i) and (c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. On 15 February 2022, the Applicant made a request for information to the Authority. He asked for;

- (i) The information disclosed in this FOI: <https://www.gov.scot/publications/foi-202100256434/><sup>1</sup> ref FOI/202100256434, in unredacted format.
  - (ii) Confirmation whether this FOI has been referred for internal review, and if also applicable, to the Scottish Information Commissioner.
2. The Authority responded on 15 March 2022. In response to request (ii), it confirmed that a review had been carried out, but an application had not yet been made to the Scottish Information Commissioner. In response to request (i), it explained that it was withholding information under sections 30(b)(ii), 33(1)(b), 36(1) and 38(1)(b) of FOISA.
3. On 22 March 2022, 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 accept that the exemptions were applied correctly and he argued that the public interest favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 19 April 2022. It upheld its reliance on section 30(b)(ii), 33(1)(b), 36(1) and 38(1)(b) of FOISA, and commented that some information was also being withheld under section 30(c) of FOISA. The Authority also confirmed, in response to request (ii), that an Application had since been made to the Scottish Information Commissioner.
5. On 10 June 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not accept that the exemptions applied, and even if they did apply, he considered that the public interests 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 4 July 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 about the exemptions it was relying on to withhold information from the Applicant.

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

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

---

<sup>1</sup> <https://www.gov.scot/publications/foi-202100256434/>

### ***Scope of the investigation***

10. The Authority identified four documents that fell within the scope of the request. It is withholding information in documents 1 and 2 under section 30(b)(i), 30(c), 33(1)(b), 36(1) and 38(1)(b) of FOISA. The Authority is also withholding some information in documents 3 and 4 under section 38(1)(b) of FOISA.
11. During the investigation, the Applicant submitted that he was not challenging the redactions made under section 38(1)(b) of FOISA.
12. As a result, the Commissioner will not consider the information withheld under section 38(1)(b) in this decision notice.

### ***Section 30(b)(i) – Prejudice to effective conduct of public affairs***

13. The Authority is withholding information on pages 2, 4, 5, 8 and 12 to 15 of document 1, and pages 15 to 18 and 27 to 29 of document 2, under section 30(b)(i) of FOISA.
14. Section 30(b)(i) provides that that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. In applying the exemption in section 30(b)(i), the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

### ***The Authority's submissions***

16. The Authority noted that it was no longer relying on the exemption contained in section 30(b)(ii) of FOISA, but instead was withholding information in documents 1 and 2 under 30(b)(i). The Authority argued that all of the advice is contained within submissions from officials to Scottish Government Ministers in relation to the awarding of the Lochaber Guarantee and Reimbursement Agreement in 2016, and subsequent considerations when the Lochaber Guarantee and Reimbursement Agreement was amended in 2020.
17. The Authority submitted that, in most of these cases, it is Scottish Government officials who would be substantially inhibited from providing similar free and frank advice or views in future, although it acknowledged that some of the advice was provided to the Scottish Government by its commercial advisers.
18. The Authority argued that, in all cases where the section 30(b)(i) exemption has been applied, the officials or others providing the comments were not expecting those comments to be released into the public domain and would be very likely either not to have made the comments provided in the advice, or to have changed or excluded substantial aspects of it if they had known that those same comments would be made publicly available. It argued that this becomes even more important when discussions with external parties are still ongoing and officials want to maintain a well-functioning working relationship with companies and external advisers.
19. The Authority submitted that disclosing officials' views of negotiations, particularly where these are critical of third parties would substantially prejudice future working relationships, making it harder for the Scottish Government to secure the best negotiated position.

### *The Commissioner's view about the exemption*

20. The Commissioner has considered all of the submissions made by the Authority and the Applicant, along with the withheld information under consideration.
21. The Commissioner notes that document 1 was created in June 2020 while document 2 was authored in November 2016. Having viewed the information, he is inclined to uphold the exemption in all of the redactions in document 1, given its currency and the higher level of sensitivity around the information. The Commissioner is satisfied that disclosure would, or would be likely to prejudice substantially the free and frank provision of advice. The Commissioner notes that the comments in the document are very frank and were clearly not set out with the aim of public dissemination. The information contains comments and data which is clearly sensitive and which would not have been recorded in the way it has, if the author of the advice considered that publication was a possibility.
22. The Commissioner notes that the sensitivity in the comments will wane with the passage of time, and at some point in the future, when the matters discussed in the documents have been fully resolved, disclosure would be unlikely to cause the harm claimed. At this juncture, however, the Commissioner is satisfied that disclosure would, or would be likely to, lead to analysts and advisors being more circumspect when they give advice to Ministers, for fear it may be disclosed inappropriately. If this occurred, the Commissioner considers that it would be to the detriment of the decision-making processes of the Scottish Government.
23. The Commissioner accepts that there was a need for Ministers and officials to have a private space to discuss, in detail, the issues surrounding the Lochaber smelter and guarantee in order that a full informed decision could be taken. Part of this process involved the free and frank provision of advice. The Commissioner considers that disclosure of this advice (at the time of the request or review) would, for the reasons given by the Authority, substantially inhibit those involved from giving their advice freely.
24. In document 2, which was published in 2016, the Commissioner has found that some of the information withheld under section 30(b)(i) of FOISA can be disclosed. He has found that, given the time that has passed, the likelihood that disclosure would inhibit officials from giving free and frank advice to Ministers in the future, is less likely. He still considers that some of the redactions are proportionate, and he upholds the exemption to some of the information on pages 15, 27, 28 and 29. Where the Commissioner has disclosed the information, it is because he considers that sensitivity of the information has decreased to the extent that its disclosure would not now cause the harm claimed.
25. As the Commissioner has not upheld the application of section 30(b)(i) to some redactions on pages 15, 27, 28 and 19 of document 2, he requires the Authority to disclose this information to the Applicant.
26. Where the Commissioner has found the exemption in section 30(b)(i) of FOISA to apply, he must go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

### ***Public interest test - section 30(b)(i)***

27. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

### *The Authority's submissions*

28. The Authority acknowledged that there was some public interest in releasing this information given the level of interest in Lochaber, including Scottish Government support provided to GFG and the fact that release would promote openness and, in some cases, might help inform public debate about the provision of the Lochaber Guarantee.
29. However, it argued that there was a stronger public interest in avoiding officials being significantly inhibited from providing free and frank advice and views throughout the development of proposals. The Authority submitted that if an official does not feel comfortable expressing their views, key points or issues could be missed in similar situations in future. This would be contrary to the public interest in ensuring that effective and sound decisions are taken.
30. The Authority argued that there was a strong public interest in protecting its ability to negotiate with third parties to secure the best value for money by maintaining effective working relationships. It submitted that disclosing views expressed by officials, particularly where these are critical of the negotiations, would substantially prejudice its ability to develop and maintain good relationships with third parties, which would not be in the public interest.
31. The Authority argued that the public interest in release is outweighed by the strong public interest in allowing officials, advisers to the Scottish Government and Ministers, a private space to have free and frank exchanges to help Ministers to reach a final decision based on sound and comprehensive advice.

### *The Applicant's comments on the public interest*

32. The Applicant argued that the key question around the Lochaber Smelter is whether the deal struck by the Scottish Ministers with GFG Alliance was sound decision-making from a taxpayer value-for-money point of view. Given that context, he submitted that the public interest in discovering whether that is the case was obvious. The Applicant noted that this was a multi-million-pound financial commitment, more so if you took into account any potential future commitment to keep the Smelter open and pay wages for staff and attempt to return it to full financial health. The Applicant argued that 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 played out since.

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

33. The Commissioner has considered carefully all of the public interest arguments he has received.
34. The Commissioner acknowledges that there is a public interest in transparency in relation to the actions and decision-making processes of the Scottish Government, and he accepts that disclosure of the free and frank advice contained in the withheld information would shed some light on these actions and processes. The Commissioner has also taken into account the huge sums of public money involved, and the need for accountability in relation to the use of such funds.
35. However, as noted above, the Commissioner accepts that Ministers and officials must have a private space in which to consider and debate the free and frank provision of advice in order to reach an informed conclusion. The decision on whether it is in the public interest to disclose the information must be assessed in relation to the specific circumstances of the case on each occasion, and at the time of the review (at the latest).

36. In this case, on balance, the Commissioner accepts that the public interest in maintaining the exemption outweighs the public interest in disclosure. He also accepts that the prospect of disclosing the information at the time of the Applicant's request (or review) was likely to have negatively impacted the relationship between the Authority and relevant third parties. Given the complexity of the agreement and the sums of public funds involved, the Commissioner considers that if relations between the parties soured, it may have put some of those public funds at risk. Therefore, he takes the view that disclosure at that time would not be in the public interest. In reaching this conclusion, the Commissioner has taken into account the information that was disclosed in response to the request, as well as the sensitivity of the information that is being withheld.
37. In all of the circumstances of the case, therefore, the Commissioner finds that, for the information withheld under section 30(b)(i), the public interest in maintaining the exemption outweighed that in making the information available, at the time the Authority responded. He therefore concludes that the Authority was entitled to withhold this information under section 30(b)(i) of FOISA.

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

38. The Authority is withholding information on pages 1-9 and 12-16 of document 1, and pages 1-12, 14, 16, 18, 20, 23-28, 34-35 and 38 of document 2, under section 30(c) of FOISA.
39. 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.
40. 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.
41. 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***

42. The Authority explained that the information being withheld under section 30(c) of FOISA, is contained within submissions from officials to Scottish Government Ministers setting out advice in relation to the awarding of the Lochaber Guarantee and Reimbursement Agreement in 2016 and subsequent considerations when the Lochaber Guarantee and Reimbursement Agreement was amended in 2020. It argued that it was essential that the Scottish Government can continue to have a productive relationship with companies like GFG, who run businesses of national and local importance to Scotland. The Authority noted that the smelter is a significant employer in the local area, and the Scottish Government has significant interest in the business through the Guarantee.

43. The Authority contended that disclosure of the requested information would substantially prejudice the conduct of public affairs by weakening the Scottish Ministers' ability to negotiate guarantee terms, making distressed businesses less likely to engage with Scottish Government support, and removing the private space for consideration that is required by government to make decisions in relation to a significant contract with implications for jobs and the economy.
44. The Authority argued that if the requested information was disclosed, future lenders would be in a position to form views about the likely appetite for risk on the part of the Ministers, and on what basis decisions on these matters are taken. It submitted that this process of benchmarking one guarantee against another would ultimately be detrimental to the Ministers' interests – whereas if the information were not in the public domain, then lenders would not be able to use it as part of their negotiation strategy.
45. The Authority noted that it has been made aware by colleagues in the enterprise agencies that businesses are extremely hesitant to consider financial intervention sponsored by the Scottish Ministers and their agencies because of the considerable risk that the fact of such an intervention will become public knowledge. The Authority submitted that disclosing the requested information would exacerbate the issue by underscoring not only the fact but the underlying basis on which decisions are made about sensitive business operations and situations; this is not a risk that arises where a business secures support from a third party which is not a Scottish public authority.
46. The Authority contended that the Scottish Government 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 Scottish Government. The maintenance of trust is important to allow the Scottish Government to engage with businesses in the best interests of Scotland, with the ultimate aim of preserving employment and growing the economy.
47. The Authority argued that it was also important for officials to be able to set out in detail the financial considerations, securities package, risks and issues identified throughout the negotiation process when seeking approval for financial support, to ensure that fully informed decisions can be taken so that value for public money can be achieved. It emphasised that officials and Ministers need to be able to consider financial and economic options freely before reaching a settled public view.
48. The Authority submitted that disclosure of the withheld information in this case would provide confidential information about the Scottish Government's negotiating position, particularly given the level of detail in which this is set out in document 1. If this occurred, the Authority argued that it would substantially impact on its ability to engage effectively in any future renegotiation of the Guarantee and Reimbursement Agreement (GRA) or similar financial support agreements.
49. The Authority also argued that disclosing the information would allow third parties to ascertain the Scottish Ministers' negotiation position. In the event of similar or related events occurring (and in particular where Scottish Ministers may be dealing with an enforcement event arising) they will require to be in an unfettered position to negotiate terms which represent best value for taxpayers' funds. The Authority submitted that if the redacted information were to be disclosed, Scottish Ministers could be at a disadvantage in such negotiations.

50. The Authority maintained that it was essential for officials to be able to communicate, often in confidence, with external stakeholders such as GFG on a range of issues, including on issues of an operational or financial nature. It argued that if the full content of these negotiations were to be disclosed, particularly without GFG's consent, it would be likely to undermine GFG's trust in the Scottish Government and would substantially inhibit communications on this type of issue in the future. The Authority argued that disclosure would mean that GFG would be reluctant to fully participate in negotiations or provide their views fully and frankly either in writing or at meetings if they believe that their views are likely to be made public, particularly while these discussions relate to sensitive or controversial issues such as the Lochaber Guarantee and Reimbursement Agreement.
51. The Authority argued that it was necessary for it to be able to engage in discussions on the future development of a whole range of matters in relation to the GRA to ensure that any financial support or other issues are supported as robustly as possible. It submitted that such discussions were also necessary in ensuring that sufficient research has been undertaken, sought, communicated and developed, and that it is satisfied that it is engaging in work that is in the interests of best value for the people of Scotland before consideration of whether financial funding should be provided and when, including exploring options for renegotiation or enforcement where conditions of the guarantee have not been met.
52. The Authority explained that it was also withholding the sources of its legal advice under section 30(c) of FOISA. It argued that it would be likely to substantially prejudice the effective conduct of public affairs to reveal who the Scottish Government seeks its legal advice from on any particular topic (both in terms of the organisation and the specific individuals) and who those lawyers consult in preparing their advice. The Authority submitted that revealing who the Scottish Government seeks its legal advice from on a particular matter, would be likely to lead to conclusions being drawn from the fact that any particular lawyer or group of lawyers has, or has not, been asked to provide advice, which in turn would be likely to impair the Government's ability to take forward its work on issues relating to the GRA.
53. The Authority argued that the release of details of who's advice was sought would also significantly harm the conduct of public affairs by breaching the Law Officer Convention as it would reveal whether or not advice on this topic had been sought from the Law Officers. It submitted that revealing whether or not Law Officers had been asked to advise on this matter would encourage people to draw conclusions regarding the importance placed by government on the subject of the GRA and also whether or not there were uncertainties regarding the Scottish Government's position. The Authority argued that disclosure of this information would significantly harm the effective conduct of public affairs by placing undue pressure on Ministers and officials in future to consider these factors before deciding to consult Counsel and/or the Law Officers.
54. The Authority contended that all of these factors would be likely to significantly harm the effective conduct of government business by putting officials and/or Ministers off requesting legal advice as and when they need it, for fear of information about the source of the advice being divulged and subjected to public and media speculation.

*The Commissioner's views on the exemption*

55. 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.



Having considered the nature and content of the withheld information, together with the Authority's submissions, the Commissioner accepts that disclosure of some of the withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs.

56. He finds that disclosure of this information would have a detrimental impact on the Authority's ability to negotiate with commercial partners regarding the GRA, and this in turn would impede the Authority's ability to carry out its functions in relation to preserving employment and growing the Scottish economy. If this occurred, the Commissioner is satisfied that it would, or would be likely to, prejudice substantially the effective conduct of public affairs and that the Authority was entitled to apply the exemption in section 30(c) of FOISA to this information.
57. The Commissioner also finds that some of the information has been wrongly withheld under this exemption. In particular, he finds that there is information contained on pages 1-3, 9, 13, 15-16 and 22 of document 1, and pages 1-2, 4-7, 9, 14, 17-20, 23, 27-29, 34-35 and 38 of document 2 which has been wrongly withheld under section 30(c) of FOISA.
58. In these instances, the Commissioner finds that the Authority has incorrectly applied this exemption to comments or figures that are not that sensitive, and to references to external consultants or advisors. Some of the figures that have been redacted relate to Scottish Government internal policies or procedures and their disclosure would not cause the harm claimed. In these cases, the Commissioner has found that the exemption does not apply.
59. The Commissioner has also considered the Authority's arguments on withholding the source of its legal advice. The Commissioner notes that the Law Officers Convention is reflected in the Scottish Ministerial Code, and that it prevents the Scottish Government from revealing whether Law Officers have or have not provided legal advice on any matter. The Commissioner has considered this issue in previous decisions, most recently in [Decision 121/2019](#)<sup>2</sup>, and in each case he has accepted the importance of the Law Officer Convention and the risks posed by its breach. The Commissioner is inclined to take a similar approach in this case, and find that the exemption contained in section 30(c) of FOISA is engaged, with respect to this information.
60. However, the Commissioner notes that the Authority has also sought to withhold the names of private law firms that have advised the Scottish Government, arguing that to disclose whether one legal firm was approached for advice, and not another, would lead to conclusions being drawn, and this would hinder its ability to progress its work with the GRA. The Commissioner does not accept these arguments, and he cannot see (and the Authority has failed to explain) why disclosure of a law firm's name would cause the harm claimed. In light of this, he requires the Authority to disclose the names of the private legal firm(s) withheld under section 30(c) of FOISA.
61. Where the Commissioner has not upheld the application of section 30(c) of FOISA, he is not required to consider the public interest test in section 2(1)(b) of FOISA.
62. The Commissioner will now go on to consider the public interest test in relation to the information that he has found to be correctly withheld under section 30(c) of FOISA.

---

<sup>2</sup> <https://www.itspublicknowledge.info/decision-1212019>

### **Public interest test**

63. As noted above the exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA.

#### *The Authority's submissions*

64. The Authority recognised that there was some public interest in releasing this information given the level of interest in Lochaber, including Scottish Government support provided to GFG, and the fact that release would promote openness and, in some cases, might help inform public debate about the provision of the Lochaber Guarantee.
65. However, it argued that there was a strong public interest in protecting the Scottish Government's position to negotiate terms which represent best value for taxpayers' funds, particularly when supporting commercial entities who are critical to the Scottish economy. The Authority argued that it was in the public interest to protect employment in the area and safeguard the economic contribution made locally and nationally by Scotland's last remaining aluminium smelter. The Authority submitted that it was of vital importance to Scotland, and the people of Scotland, that the Scottish Government can intervene to protect jobs and the wider economy. It argued that when this involves a novel transaction, such as this one, the public interest lay in protecting some sensitive information in the service of allowing future interventions. The Authority explained that the aim of the transaction was to protect jobs, and that it was clearly in the public interest to withhold information that would jeopardise similar actions in the future.
66. The Authority argued that there was also a public interest in maintaining trust and good working relationships with companies such as GFG, whose activities have a significant positive impact on the Scottish economy. It submitted that it was not in the public interest to deter such companies from sharing sensitive information with the Scottish Government in future. It argued that the Scottish Government needs to be well informed about key issues facing such companies, and to have good working relationships with them, in order to deliver many of its economic, cultural and tourism-related objectives effectively.
67. With regard to the source of its legal advice, the Authority again recognised there was a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, it contended that there was a greater public interest in enabling the Scottish Government to determine how and from whom it receives legal advice, without facing external pressure or concerns that particular conclusions may be drawn from the fact that any particular lawyer or group of lawyers has or has not been asked to provide legal advice on a particular matter. The Authority submitted that it would be damaging to the public interest for it to be possible to use information about the identity and status of an individual legal adviser to suggest that this was relevant to the advice that the Scottish Government received.
68. The Authority also reiterated its view that releasing information about the source of legal advice would be a breach of the long-standing Law Officer Convention (reflected in the Scottish Ministerial Code) which prevents the Scottish Government from revealing whether Law Officers either have or have not been asked to provide legal advice on any matter. It noted that the Ministerial Code states at paragraph 2.38, that Ministers must not divulge who provided the advice whether it is from the Law Officers or anyone else.

The Authority contended that there was no public interest in breaching that Convention by divulging which lawyers were asked to provide advice on any issue as the public interest considerations in maintaining the Law Officer convention require to be given considerable weight.

69. The Authority also argued that it was not necessary for anyone to know who gave the advice to be able to question Ministers or hold them to account for the legality of their conduct. Furthermore, it argued that to disclose, other than in exceptional cases, the source of the legal advice within Scottish Government risks unduly politicising the role of the Law Officers and could lead to them being held responsible for essentially political decisions. If this occurred, the Authority submitted that it would risk seriously undermining the processes by which the government obtains legal advice. In addition, the Authority also argued that disclosure would undermine the public interest in good governance and the maintenance of the rule of law within government which the convention, against disclosure of the fact and content of Law Officer advice, is designed to protect.
70. The Authority submitted that while it acknowledges some general public interest reasons in disclosing who advice was sought from, it considered that the strong public interest in allowing the Scottish Government to decide when and from whom it seeks advice as appropriate, and also the very strong public interest in upholding the Law Officer Convention outweighs any public interest in release of this information.

#### *The Applicant's comments*

71. The Applicant submitted that he did not believe that the effective conduct of public affairs was likely to be prejudiced substantially by disclosure in this case. He argued that the Authority has provided him with no evidence of this, and he considered its decision (mid investigation) to apply the exemption in section 30(c) to information that was previously withheld under section 33(1)(b) of FOISA, to be another roadblock in the release of the information, rather than a legitimate reason for blocking disclosure. He argued that if there had been a likely risk of substantial prejudice to the effective conduct of public affairs, the Authority would have applied the exemption in its initial response and review.
72. The Applicant noted that much of the arguments in this exemption will be based around the hypothetical impact of disclosure versus the public interest in transparency and accountability. He argued that the public interest arguments for disclosure, particularly in the case of the deal in question, are far stronger than the Authority's arguments for maintaining the exemption.
73. The Applicant argued that there was no way for the public to establish whether the deal at Lochaber was in the public interest unless the details of the deal and associated correspondence was made public. As it stands, due to the lack of transparency on the issue, the Applicant contended that there was no accountability. He argued that MSPs stand up in the Scottish Parliament without being armed with the information required to hold the Scottish Government to account. He submitted that Ministers hide behind commercial sensitivity as a justification for not providing full information, and all the while the public is unable to make an informed decision as to whether the deal itself and the reasons behind it justified the extent of taxpayer financial commitment. The Applicant asserted that the public interest in this case was overwhelmingly in favour of disclosure.

*Commissioner's consideration of the public interest test – 30(c)*

74. The Commissioner notes that there are two types of information being withheld under section 30(c) of FOISA; information that reveals the source of the Authority's legal advice, and information about the details of the financial agreement and the parties involved in that agreement.
75. In relation to the former, the Commissioner is satisfied that the public interest lies in protecting the source of the Authority's legal advice. He has taken account of the strong public interest arguments put forward by the Applicant, but he is not persuaded that disclosure of the name(s) of those providing the Authority with legal advice would necessarily address those public interest concerns. He acknowledges that disclosure of those names would reveal whether or not Law Officers have advised the Scottish Government, and this may increase transparency around the source of the legal advice that underpinned the Scottish Government's actions.
76. However, he considers that the public interest lies in maintaining the Law Officers Convention, which is reflected in the Scottish Ministerial Code, and which prevents the Scottish Government from revealing whether Law Officers have or have not provided legal advice on any matter. He shares the Authority's concerns that disclosure of the source of its legal advice may associate those legal advisors with political decisions, and if this occurred, it would be to the detriment of the perceived impartiality of the Law Officers. The Commissioner finds that the Authority has correctly withheld the source of its legal advice under section 30(c) of FOISA.
77. The other information that has been withheld is the information about the mechanism of the agreement, including facts and figures about the parties involved and the specific conditions of the agreement itself. As noted above, the Commissioner has already concluded that disclosure of this information would have a detrimental impact on the Authority's ability to negotiate with commercial partners regarding the GRA. He has accepted that if this occurred, it would impede the Authority's ability to carry out its functions in relation to preserving employment and growing the Scottish economy. Having weighed up the public interest arguments for and against disclosure, he is satisfied that disclosure of this information would cause the harm claimed, and if this occurred it would not be in the public interest.
78. The Commissioner finds that the public interest lies in the Scottish Ministers maintaining good working relations with commercial parties in order to negotiate deals and contracts that benefit the Scottish economy. He cannot find any counter argument that is so powerful that it would merit disadvantaging the Scottish Ministers in their negotiations with third parties, to the extent that jobs may be lost and businesses may refuse to engage with the Ministers for fear that the specific details of their negotiations and agreements would be made public. As noted above, the Commissioner acknowledges the significant public funds involved in the GRA, but he finds the public interest lies in protecting these funds and he considers that disclosure may put them at risk. The Commissioner considers that as time passes, the public interest arguments for disclosure may grow stronger and he may, in the future, conclude that it is in the public interest for the information to be disclosed. However, at this juncture he is satisfied that the public interest is best served by maintaining the exemption.
79. The Commissioner is therefore satisfied that the Authority has correctly withheld this information under section 30(c) of FOISA.

### **Section 33(1)(b) – Commercial interests and the economy**

80. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
81. The Authority is withholding information on pages 30-34 of document 2 under section 33(1)(b) of FOISA.
82. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
- (i) whose commercial interests would (or would be likely to) be harmed by disclosure
  - (ii) the nature of those commercial interests, and
  - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
83. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
84. The Authority explained why section 33(1)(b) applied to the withheld information and it named the entities whose commercial interests would or would be likely to be affected by its disclosure. The Commissioner cannot provide details of these submissions due to their sensitive nature, but he has fully considered them and is satisfied that the exemption has been correctly applied to information redacted from pages 30 to 33 of document 2. However, he does not consider that the exemption is engaged in relation to the information redacted from page 34 of document 2. The Commissioner notes that this information comprises the names of bodies involved in carrying out due diligence and he cannot see how disclosure of their names would cause the harm claimed.
85. The Commissioner requires the Authority to provide the Applicant with the information withheld under section 33(1)(b) on page 34 of document 2.

### **Public interest test – 33(1)(b)**

#### *The Applicant's comments*

86. The Applicant submitted that the public interest lay in disclosure of the information, especially since the private company involved (GFG Alliance) is under suspicion for fraud and money laundering. He argued that GFG's history in recent years demonstrates that the decision to go into business with the company is questionable. The Applicant acknowledged that it might have been the correct decision, but it is impossible to judge this without all of the facts. The Applicant argued that the public interest is paramount and the public interest is clearly in favour of disclosure. He further argued that without disclosure, there was a vacuum of accountability around this deal and this provides the Authority with a free ride to control the narrative and ensure scrutiny does not get too difficult to handle.
87. The Applicant commented that it was clear that the Authority was not willing to have a reasonable public interest discussion on this issue, which further undermined its claim of being transparent and bolsters the need for an intervention from the Commissioner.

### *The Authority's submissions*

88. The Authority recognised that there was a public interest in disclosure of the withheld information as part of open, transparent and accountable government. It also acknowledged that there was a public interest in relation to community land ownership and more generally in relation to the continuing operation of the Lochaber smelter.
89. However, it contended that there was a greater public interest in upholding its application of section 33(1)(b) of FOISA, with regards to the East Lochaber and Laggan Community Trust's (ELLCT) interest in land assets.
90. The Authority argued that disclosure would undermine the ELLCT's negotiating position for the land assets, which would not be in the public interest. The Authority also argued that there was a greater public interest in protecting the commercial interest of GFG, as disclosure could lead to pressure to progress a sale at a below reasonable market value which, in turn, would worsen GFG's financial position, which would also not be in the public interest.
91. The Authority maintained that the public interest in this case would support the withholding of the withheld information under s33(1)(b).

### *Commissioner's consideration of the public interest test – 33(1)(b)*

92. The Commissioner has considered the submissions from both parties, together with the withheld information. He recognises that there is general public interest in disclosing information held by Scottish public authorities, particularly when it relates to financial arrangements that involve significant public funds. He acknowledges that disclosure in this case would aid the public's understanding of the finances of the ELLCT, but he considers this to be peripheral to the guarantee agreement, and not entirely relevant to the public interest arguments put forward by the Applicant.
93. The Commissioner considers that disclosure of the information would give third parties an unfair insight into the ELLCT's financial position. He does not accept that there is any public interest in placing a particular organisation at a commercial disadvantage, particularly in this case, where the ELLCT aims to own and maximise land assets for the long-term sustainable development of the community. In addition, the Commissioner considers the public interest in disclosure is met, to some extent, by the information already disclosed in document 2.
94. On balance, the Commissioner concludes that the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure in respect of the remaining withheld information. Accordingly, he finds that the Authority was entitled to withhold this information under section 33(1)(b) of FOISA.

### **Section 36(1) - confidentiality of communications**

95. The Authority is withholding information in pages 1, 2, 8-10, 12, 15, and 17-24 of document 1, and pages 4-6, 12, 13, and 26-28 of document 2, under section 36(1) of FOISA.
96. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.

97. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
- (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
  - (ii) The legal adviser must be acting in their professional capacity; and
  - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
98. The Commissioner has considered the content of the information and the circumstances in which it was created, and is satisfied that the information very largely meets the conditions for legal advice privilege to apply. All the conditions stated above apply: the information involves communications with a legal adviser (a solicitor), who is acting in their professional capacity, and the communications occur in the context of the legal adviser's professional relationship with their client. He cannot, however, accept that the names of those providing that advice – in isolation – can be said to fulfil these conditions: where he has not accepted this information as exempt under any of the exemptions considered above, he must require its disclosure.
99. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintain the exemption.

### ***Public interest test – 36(1)***

#### *The Applicant's comments*

100. The Applicant reiterated his views that disclosure was in the public interest. He referred to the substantial sums of public money involved in the deal, and the fact that the deal involved a company which was now being investigated for fraud. He contended that the public's right to know outweighed the Authority's reasons for withholding the information.

#### *The Authority's submissions*

101. The Authority recognised that there was a public interest in disclosure of the withheld information as part of open, transparent and accountable government. It also acknowledged that there was a public interest in relation to the subject of the involvement of the Scottish Government in the Lochaber smelter.
102. However, the Authority submitted that there was a very strong public interest in maintaining the exemption relating to legal professional privilege in order to ensure confidentiality of communications. It argued that it remains important in all cases that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that that advice may be disclosed and, as a result, potentially taken out of context.
103. Where matters are the subject of public scrutiny, such as the Lochaber smelter, the Authority argued that an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective. The Authority submitted that there was a strong public interest in protecting the confidentiality of this information in order to ensure that the Scottish Government was able to discuss and take policy decisions in full possession of thorough and candid legal advice.

Maintaining such confidentiality ensures that the Scottish Government can take decisions in a fully-informed legal context, having received legal advice in confidence as any other client would.

104. The Authority argued that the public interest in maintaining the exemption outweighs that of disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients.

*Commissioner's consideration of the public interest test – 36(1)*

105. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest on maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of [Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien \[2009\] EWHC 164 \(QB\)](#)<sup>3</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
106. The Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
- the privileged material discloses wrongdoing by/within an authority
  - the material discloses a misrepresentation to the public of advice received
  - the material discloses an apparently irresponsible and wilful disregard of advice
  - the passage of time is so great that disclosure cannot cause harm.
107. Having examined the withheld information, while the Commissioner accepts that the contents of the advice would be of interest to the Applicant and to the general public, he does not consider that any of the above categories would apply.
108. The Commissioner accepts that there is a public interest in the subject matter of the advice, i.e. the Lochaber smelter guarantee. The Commissioner also accepts that there is a public interest in disclosure of the legal advice, in terms of accountability and transparency, with regard to the significant amount of public funds that are involved. However, having reviewed the information along with the arguments put forward by the Authority and the Applicant, he is not convinced that in this instance the public interest in disclosure outweighs that in maintaining the exemption.
109. The Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour maintaining the exemption. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the

---

<sup>3</sup> [https://www.bailii.org/cgi-bin/format.cgi?doc=ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))



Authority, its ability to come to fully-formed decisions would be restricted, which would not be in the public interest.

110. Given this, the Commissioner does not find the public interest in disclosure of this information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
111. The Commissioner is therefore satisfied that the Authority correctly withheld this information under section 36(1) 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 Applicants.

The Commissioner finds that by withholding information under sections 30(b)(i), 30(c), 33(1)(b) and 36(1) of FOISA, the Authority complied with Part 1.

However, by incorrectly withholding some information under section 30(b)(i) and 30(c) of FOISA, the Authority failed to comply with Part 1.

The Commissioner therefore requires the Authority to provide the Applicant with the information it has wrongly withheld, by **18 November 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**

**2 October 2024**