



Decision Notice 063/2023

Lochaber Smelter: Fees paid by GFG Alliance under the Guarantee and Reimbursement Agreement

Authority: Scottish Ministers
Case Ref: 202200877

Summary

The Applicant asked the Authority for a list of fee payments, split by financial year, paid by GFG Alliance companies under the Lochaber Smelter Guarantee and Reimbursement Agreement. The Authority withheld the information.

Following an investigation, the Commissioner found that the Authority had correctly withheld the fee payments, on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 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 8 May 2022, the Applicant made a request for information to the Authority relating to the Lochaber smelter. They asked for a list of fee payments, split by financial year, received by the Authority from the GFG Alliance relating to the Lochaber Smelter Guarantee and Reimbursement Agreement (GRA).

2. The Authority responded on 12 July 2022. It refused the request under section 33(1)(b) of FOISA on the basis that the precise amount and timing of each fee payment was subject to commercial confidentiality, disclosure of which could cause substantial prejudice to the Authority or to the company involved. The Authority confirmed it received a commercial fee in respect of the Lochaber Guarantee and that all such payments were up-to-date. The Authority believed the public interest in transparency, accountability and informing public debate was outweighed by that in protecting the commercial interests of companies which enter into contracts with the Authority, to ensure it obtained best value for public money.
3. On 12 July 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because it was not sufficiently clear, from the explanation given, why the information had been withheld. They did not believe the exemption applied and, in their view, the public interest strongly favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 9 August 2022, fully upholding its original decision, on the basis that disclosure would negatively impact the business and potentially damage negotiations, day-to-day operations and other activity. It explained that the company was currently engaging in business activity that would be adversely affected should the Authority reveal details of its financial obligations associated with the Guarantee. The Authority considered that, given the importance of the business to those employed and the economy of the West Highlands and beyond, the public interest lay in withholding the information. While it recognised the public interest in transparency and accountability for expenditure of public money, the Authority believed it was not in the public interest to disclose information that would prejudice this and deprive the taxpayer of best value for money.
5. On 9 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority's review because they believed the exemption claimed did not apply and 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 28 September 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 subsequently 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 Authority's justification for withholding the information requested under the exemption in section 33(1)(b) of FOISA.
9. On 16 December 2022, the Authority informed the Commissioner that it now wished to withdraw its reliance on section 33(1)(b) for the information originally considered to be

commercially sensitive and now, instead, wished to apply section 30(c) to that same information. It provided submissions in support of its reliance on section 30(c).

10. The Authority also notified the Applicant of its change of position on 16 December 2022.
11. On 2 January 2023, the Applicant provided submissions to the Commissioner on the Authority's decision to now rely on section 30(c) of FOISA.

Commissioner's analysis and findings

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

Background: Lochaber Smelter Guarantee

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

- The nominal value of the Authority's contingent liability on day one of the Guarantee was £586 million (i.e. the total amount of payments guaranteed by the Authority across the 25-year agreement), and is the largest industrial guarantee ever agreed by the Authority.
- In return for the Guarantee, the Authority receives a commercial guarantee fee (the Fee) from GFG.
- In March 2021, GFG's major providers of working capital and investment finance (Greensill Capital (UK) Limited and Greensill Capital Management Company (UK) Limited (together "Greensill")) entered administration.

Authority's interests

14. In addition to the background information above, the Authority explained that, as a result of its legal obligations arising from the Guarantee, it had a significant and specific financial and economic interest in the operation of the smelter to which the information related. In addition, it had an overarching general interest in the original objectives of the proposal, namely the retention of jobs and the support of the metals industry in Scotland.
15. The Authority acknowledged that the Commissioner had previously indicated in [Decision 144/2021](#)¹ that he did not consider the Authority to be a commercial actor in respect of Scotland's energy sector, but that it may have other economic interests in relation to the smelter.
16. The Authority considered that its commercial, economic and financial interests in respect of the Guarantee were manifest and quantifiable, and information within the material remained current. It also submitted that there was considerable uncertainty with respect to any future scenario involving the smelter, the loss of which could materially impact upon the local regional economy. It noted that, during the 18 months since the Greensill collapse, GFG and its primary shareholder, Sanjeev Gupta, had sought to defend and engage in legal action across multiple jurisdictions in order to preserve operations.

Section 30(c) – Prejudice to effective conduct of public affairs – “otherwise” prejudice

17. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
18. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
19. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

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

20. During the investigation, the Authority confirmed that it was now relying on this exemption to withhold some information, namely that which it had withheld, at review stage, under section 33(1)(b) of FOISA.

The Authority's submissions on section 30(c)

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

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

23. 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 were such a guarantee more likely to be called up). Disclosure would enable future lenders to form views about the Authority's likely appetite for risk and on how it takes decisions on these matters, and would allow them to use this as part of their negotiation strategy. The Authority believed the process of benchmarking one guarantee against another would ultimately be detrimental to its interests.

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

24. In the Authority's view, businesses must have confidence that it will act in the way of a responsible entity, including protecting any and all information that may be shared in support of future guarantees, negotiations or support.
25. The Authority submitted that the information requested was private and confidential, it had not been published by the Authority, and was managed according to auditor's guidelines. The Authority believed it was difficult to identify a situation where a commercial entity (e.g. a bank or business) would reveal to a (non-commercial or non-statutory) third party, details of the fees relating to a commercial and legal agreement to which the third party was not privy. The Authority considered it ought to continue to act in a manner that recognises the value of the commercial information supplied to it, and any deviation from that would attract significant challenge and criticism, likely erode trust in its working relationship with GFG and significantly prejudice the Authority in respect of future business engagement.
26. The Authority submitted that businesses may be hesitant to consider financial intervention sponsored by it, or its Agencies, due to the risk of this becoming public knowledge, as this would alert customers and suppliers to the fact that the business was utilising last resort funding to continue to trade. This, in turn, would adversely affect the business as its customers and suppliers would be less willing to deal with it due to fear of wasted costs (e.g. where the business was unable to pay for materials ordered), leading to further difficulties in trading. 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.

27. 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.
28. The Authority argued that it must be able to assure businesses that sensitive information about their financial position and future plans will not be released as a result of their involvement with the Authority. In the Authority's view, maintenance of trust was important to allow it to engage with businesses in the best interests of Scotland, with the ultimate aim of preserving employment and growing the economy. It believed that disclosure of the information would jeopardise its ability to work in partnership with commercial actors such as GFG in future.

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

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

The Applicant's submissions on section 30(c)

31. The Applicant disagreed that the exemption in section 30(c) was engaged. In their view, disclosure of the withheld information would not result in the significant probability of substantial prejudice.
32. In respect of point (a) above, the Applicant submitted that the Authority had not substantiated the link between the specific information, disclosure and harm. They argued that the Lochaber Smelter GRA was a novel, highly unusual agreement with a financing firm (Greensill Capital (UK) Ltd) which was not authorised and regulated by the Financial Conduct Authority, and which had subsequently collapsed into administration. In their view, the unique nature of this agreement would not compromise negotiations in future guarantees.
33. In respect of point (b) above, the Applicant did not believe there was any requirement for the Authority to obtain the consent of the participating companies prior to disclosing information. In their view, the participating companies will have engaged into the GRA knowing that the Authority was a public authority for the purposes of FOISA, and so information could be disclosed solely at the discretion of the Authority. They argued that the agreement should contain a clause to that effect.

The Commissioner's views on section 30(c)

34. The Commissioner has considered the submissions from both parties. He has also taken into account the age of the information as at the date when the Authority issued its review outcome. He notes that the information requested, namely a list of fee payments split by financial year, is relatively recent in relation to the date of the Authority's review.
35. The Commissioner must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome. Given the sensitivity of the information and the circumstances surrounding it, the Commissioner is limited in the reasoning he can set out in this Decision Notice.
36. By the date of the Authority's review, the financial viability of the companies involved in the Lochaber Smelter Guarantee had changed considerably. However, what remained constant was the existence of the Authority's financial obligation in the event that the Guarantee was called-in.
37. The Commissioner has considered the withheld information in this case, which comprises a list of fee payments made by GFG under the Guarantee (as at the date of the Applicant's request), split by financial year. He is of the view that many of the arguments now put forward by the Authority for withholding this information under section 30(c) of FOISA were pertinent when the Authority issued its review outcome in August 2022 (i.e. when it withheld that same information under section 33(1)(b)).
38. While the Commissioner is not obliged to consider the information with regard to current circumstances, he is of the view, given the changing circumstances regarding GFG's financial situation in relation to the Guarantee, that the sensitivity of this information - even continuing into the present - is something which he cannot ignore. He recognises, however, that the level of sensitivity will not always be the same, say in a number of years' time.
39. Having considered all the arguments put to him, the Commissioner recognises that the information detailing the fee payments is sensitive, and speaks to how much GFG is obliged to pay each financial year in return for the Guarantee. In the Commissioner's view, disclosure of a list of the fee payments made to date would have a detrimental impact on the ability of the Authority, GFG and the other commercial companies involved in the Lochaber Smelter Guarantee, to continue in this arrangement in a competitive environment. He believes that this, in turn, would impede the Authority's ability to engage with businesses, in future similar arrangements, in the best interests of Scotland and its economy.
40. The Commissioner is satisfied that, if the list of fee payments made to date was disclosed, this would, or would be likely to, prejudice substantially the effective conduct of public affairs. He therefore finds that the Authority was entitled to rely on the exemption in section 30(c) of FOISA to withhold this information.

Public interest test – section 30(c)

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

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

42. The Authority recognised the public interest in disclosure, 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 in how the Authority works with companies such as GFG when public funds are involved.
43. However, given the importance of the smelter to Scotland, the Authority believed this was outweighed by the public interest in protecting GFG's trust in its relationship with the Authority. The Authority argued that it was of vital importance to Scotland and its people that it was able to intervene to protect jobs and the wider economy. When this involved a guarantee, such as this one, the Authority believed the public interest lay in protecting certain sensitive information to allow future interventions. It submitted that, ultimately, the aim of this intervention was to protect jobs, and there was no public interest in disclosing information that would jeopardise such future action. The Authority believed the public interest lay in protecting the interests of those employed within the Lochaber smelter business (circa 200 people), given its importance not only to those employees, but also to the wider economy of the local area.
44. The Authority also believed that the public interest in maintaining the private space necessary for it to make effective decisions also outweighed that in the release of the information.

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

45. In their application to the Commissioner, the Applicant confirmed that, in their view, the public interest favoured disclosure of the information.

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

46. The Commissioner has taken account of all of the relevant submissions from both parties, together with the withheld information in this case (i.e. the list of fee payments made to date, split by financial year). 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". As stated previously, due to the sensitivity of the information and the circumstances surrounding it, the Commissioner is limited in the reasoning he can set out in this Decision Notice.
47. As rehearsed above, the Commissioner has already accepted that disclosure of the list of fee payments made to date would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
48. Taking into account the significant size of the Lochaber Smelter Guarantee and those potentially affected by the circumstances surrounding it, particularly were it to be called in, the Commissioner accepts that there is clear and substantial public interest in understanding the finer details of the Guarantee and any underpinning or associated information. 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.

49. The Commissioner considers there is a significant and substantial public interest in maintaining the exemption in relation to information which could adversely impact the ability of the parties involved to continue, as planned, with the Guarantee. He recognises that, were circumstances to arise requiring the Guarantee to be called in, this would clearly impact the parties involved (including the Authority), the economy of the local area (and the wider Scottish economy) and the jobs of those individuals employed at the smelter and associated businesses, both directly and indirectly.
50. In the Commissioner's view, there is also a substantial public interest in maintaining the exemption in relation to sensitive information which could adversely impact GFG's current (and changing) financial situation and lead to the Guarantee being called in. He 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.
51. The Commissioner notes that, in its initial response, the Authority confirmed that all fee payments were up to date. In the Commissioner's view, this goes some way to satisfying the public interest in transparency and accountability for public funds.
52. On balance, therefore, the Commissioner is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
53. The Commissioner therefore finds that the Authority was entitled to withhold the information requested (i.e. the list of fee payments made to date, split by financial year) under the exemption in section 30(c) of FOISA.

Decision

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

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Daren Fitzhenry
Scottish Information Commissioner

21 June 2023

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

33 Commercial interests and the economy

- (1) Information is exempt information if-
 - ...
 - (b) 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).

...

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).

...