



Decision Notice 116/2023

Lochaber Smelter: COVID-19 Delay Agreement letter

Authority: Scottish Ministers

Case Ref: 202200010

Summary

The Applicant asked the Authority for the full contents of a letter which had been previously published by the Authority with redactions, concerning a COVID-19 Delay Agreement relating to the Lochaber smelter. The Authority disclosed some information and withheld the remainder.

Following an investigation, the Commissioner found that the Authority had correctly withheld some of the information in the letter, on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs. For the remainder, the Commissioner found that this information had been wrongly withheld and required the Authority to disclose it to the Applicant.

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 27 October 2021, the Applicant made the following request for information to the Authority relating to the Lochaber smelter:

Lochaber Smelter (GFG COVID-19 Delay Agreement, 12 Nov 2020)

I am seeking full disclosure of the attached document on the basis that any claimed FOISA exemptions do not apply and that the public interest favours disclosure.

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/07/gup-ta-family-group-documentation-2016-to-2020/documents/commercial-documentation-relating-to-the-lochaber-aluminium-smelter-2016-to-2020/gfg-covid-19-delay-agreement-12-november-2020/gfg-covid-19-delay-agreement-12-november-2020/govscot%3Adocument/GFG%2BCOVID-19%2Bdelay%2B2020.pdf>

2. The Authority responded on 24 November 2021. It partially disclosed some of the information requested, and withheld the remainder under the exemption in section 33(1)(b) of FOISA, on the basis that disclosure would, or would be likely to, prejudice substantially the commercial interests of the parties to the Guarantee and Reimbursement Agreement (GRA). The Authority believed the public interest in transparency and accountability for public funds was outweighed by that in GFG Alliance (GFG) being able to operate effectively in a commercial context to ensure the continued profitability and viability of the business, given its position as a major source of employment in the West Highlands.
3. On 24 November 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because, in their view, it lacked any form of precision in terms of the nature and extent of any prejudice (and in identifying any parties that may be prejudiced), the exemption claimed did not apply, the public interest test had not been properly carried out (and favoured disclosure), and the response did not take account of [Decision 144/2021](#)¹ by the Scottish Information Commissioner.
4. The Authority notified the Applicant of the outcome of its review on 23 December 2021, fully upholding its original decision to withhold the remaining information under section 33(1)(b) of FOISA. It stated that disclosure would likely weaken the negotiating position of the business while providing commercially sensitive information to competitors, and would also likely have an impact on the long term profitability and attractiveness of the business to future investors. The Authority confirmed that its initial decision and disclosure had taken into account Decision 144/2021.
5. The Authority recognised the public interest in transparency and accountability for the expenditure of public money. It believed, however, that this was outweighed by that in protecting the commercial interests of companies which enter into contracts with the Authority to ensure that it obtained the best value for public money, and in GFG Alliance being able to negotiate effectively in commercial contexts to ensure the continued profitability and viability of the business, given its position as a major source of employment in the West Highlands.
6. On 27 December 2021, 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 the exemption claimed did not apply (in their view, the existence of prejudice had been significantly overstated) and the public interest favoured disclosure.

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

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 31 January 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.
9. The Applicant provided submissions to the Commissioner on 20 July 2022, setting out why they believed disclosure of the information requested was in the public interest.
10. 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 focussed on the Authority's justification for withholding some of the information requested under the exemption in section 33(1)(b) of FOISA.
11. On 9 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).
12. The Authority notified the Applicant of its change of position on 16 December 2022.
13. On 2 January 2023, the Applicant provided further submissions to the Commissioner, on the Authority's decision to now rely on section 30(c) of FOISA.
14. On 21 and 26 June 2023, and subsequently on 31 July 2023, the Applicant provided further comments to the Commissioner.

Commissioner's analysis and findings

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

Background: Lochaber Smelter Guarantee

16. 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 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

17. 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.
18. The Authority acknowledged that the Commissioner had previously indicated in Decision 144/2021 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.
19. 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.

The Applicant's perspective

20. Following the issue of [Decision 062/23](https://www.itspublicknowledge.info/decision-0622023)² and [Decision 063/23](https://www.itspublicknowledge.info/decision-0632023)³ on 20 June 2023 (which also related to the Lochaber Smelter GRA), the Applicant wrote to the Commissioner (on 21 June 2023 and on 31 July 2023) to advise him that they strongly disagreed with the outcome. They stated 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 is concocted to divert attention away from the real purpose (a financial enabler to allow the GFG Alliance to purchase the company)”.
21. The Applicant also wrote to the Commissioner on 26 June 2023, contesting 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.

² <https://www.itspublicknowledge.info/decision-0622023>

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

- 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 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.

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

22. 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.
23. 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.
24. 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. An 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.
25. 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)

26. 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.
27. 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

28. 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

29. 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.
30. 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.
31. The Authority argued that it must be able to assure businesses that sensitive information about their financial position and future plans will not be released as a result of their involvement with the Authority. In the Authority's view, maintenance of trust was important to allow it to engage with businesses in the best interests of Scotland, with the ultimate aim of preserving employment and growing the economy. It believed that disclosure of the information would jeopardise its ability to work in partnership with commercial actors such as GFG in future.

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

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

The Applicant's submissions on section 30(c)

34. The Applicant 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.
35. 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.
36. 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.
37. Following the issue of Decision 062/2023 and Decision 063/2023, the Applicant confirmed to the Commissioner that his position remained that section 30(c) was not engaged and that the public interest favoured disclosure of the information. In particular, he noted:
 - unnecessary secrecy in government contracts was a breeding ground for corruption, wrongdoing and the inefficient allocation of public resources;
 - Alcan was not a distressed company at the time of the acquisition by GFG. The financial distress that has subsequently arisen appeared to be the result of the high level of debt used by GFG (including to fund this acquisition); and
 - GFG appeared to take an aggressive approach to withholding information about their operations in the UK, including systematic non-compliance with laws and regulations.

The Commissioner's views on section 30(c)

38. The Commissioner has considered the submissions from both parties along with the withheld information. The Commissioner would stress that he has not simply accepted the information provided to him by the Authority at face value and without challenge. He has also taken into account the age of the information as at the date when the Authority issued its review outcome (i.e. 23 December 2021). Given the letter in question was dated 12 November 2020, the Commissioner notes that the information requested is relatively recent in relation to the date of the Authority's review.
39. 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.
40. 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.

41. The Commissioner has considered the information in the letter being withheld by the Authority, which relates to ongoing prospects and obligations. He is, however, unable to describe that information in any greater detail without revealing its nature. The Commissioner 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 December 2021 (i.e. when it withheld that same information under section 33(1)(b)).
42. While the Commissioner is not obliged to consider the information with regard to current circumstances, he is of the view that, given the changing circumstances regarding GFG's financial situation in relation to the Guarantee, 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.
43. Having considered all of the arguments put to him, the Commissioner recognises that the majority of the information being withheld is sensitive. In the Commissioner's view, disclosure of this information 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. He also recognises that disclosure of this information could enhance the risk of the Guarantee being called-in.
44. The Commissioner is satisfied that, if the majority of the withheld information in the letter 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.
45. However, for certain other information in the letter, the Commissioner does not take the same view. He does not accept the Authority's arguments, that disclosure of this particular information would lead to the substantial prejudice claimed by the Authority with regard to its ability to conduct its public affairs, or the ability of GFG to continue to operate effectively in a commercial context.
46. The Commissioner therefore finds that disclosure of certain information being withheld by the Authority would not result in the harm claimed. He does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of this particular information.
47. Given that the Commissioner does not accept that the exemption applies to certain information in the letter being withheld under section 30(c), he is not required to consider the public interest test in section 2(1)(b) for that information.
48. As the Authority is not relying on any other exemption to withhold that information, he requires the Authority to disclose it to the Applicant. (The information to be disclosed will be marked up on a copy of the withheld information to be provided to the Authority along with this Decision Notice.)
49. The Commissioner will now go on to consider the public interest test in respect of the remaining information for which he has found that the exemption in section 30(c) is engaged.

Public interest test – section 30(c)

50. 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 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 remaining withheld information is outweighed by the public interest in maintaining the exemption.

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

51. 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.
52. 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 involves 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.
53. 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 submissions on the public interest test – section 30(c)

54. 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:
- in ensuring the Guarantee agreement and the Authority's actions complied with all laws and regulations;
 - 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;
 - in subjecting the financial guarantee to broad public scrutiny to increase the quality of the scrutiny over that achievable by a small number of politicians (lay people);
 - in disclosure, because of suspected fraud and money-laundering between two of the key parties (GFG and Greensill Capital (UK) Limited), 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;
 - in ensuring the agreement was robust and at arm's length, with no mutual reward between the Authority and other parties to the agreement, and that it provided value for money at all stages (from approval to delivery);

- in disclosure, in order to evaluate relative spending priorities and to be able to independently monitor and measure approved project outcomes;
 - in disclosure, because of the financial size (£586m), the unusual term (25 years), the nature and the complexity of the agreement;
 - in understanding the Authority's exposure to the GRA; and
 - 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.
55. Separately, the Applicant made the following arguments (see paragraph 21) which were also relevant to the public interest test:
- the guarantee did not directly support existing jobs;
 - the guarantee provided protection to Greensill and not GFG;
 - the funding enabled by the guarantee was not "last resort funding" in relation to the Lochaber complex;
 - the funding had not prevented the fragmentation of the Lochaber smelter complex;
 - there was no independent evidence to support the Authority's assertion that the fee was at a commercial level; and
 - "secrecy" over high-value government contracts was a "red flag of potential fraud" and GFG was under investigation by the Serious Fraud Office.

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

56. The Commissioner has taken account of all of the relevant submissions from both parties, together with the remaining withheld information in this case (as contained in the COVID-19 Delay Agreement letter). 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.
57. As rehearsed above, the Commissioner has already accepted that disclosure of the remaining withheld information in the letter would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
58. 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.

59. 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.
60. 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 would not be in the public interest.
61. On balance, therefore, the Commissioner is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the remaining information.
62. The Commissioner therefore finds that the Authority was entitled to withhold the remaining information requested under the exemption in section 30(c) of FOISA.

Decision

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

The Commissioner finds that, by the end of his investigation, the Authority partially complied with Part 1 by correctly withholding some information under the exemption in section 30(c) of FOISA.

However, the Commissioner also finds that, by the conclusion of his investigation, the Authority failed to comply with Part 1 by incorrectly withholding some other information under the exemption in section 30(c) and, in doing so, failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to provide the Applicant with the information which the Commissioner has found to have been incorrectly withheld under the exemption in section 30(c) of FOISA by **19 January 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

5 December 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).

...