



Scottish Information
Commissioner
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Decision Notice 001/2024

Ernst & Young – Project Golf – advice note

Applicant:

Authority: Scottish Ministers

Case Ref: 202200011

Summary

The Applicant asked the Authority for an unredacted copy of an advice notice that had been published online. The Authority withheld the redacted information under a number of exemptions in FOISA. The Commissioner investigated and found that the Authority had generally complied with FOISA in responding to the request, but required the Authority to disclose further information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 30(c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 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 a request for information to the Authority for full disclosure of a document (related to the Lochaber smelter) published by the Authority in redacted form¹ on the basis that any claimed exemptions do not apply and that the public interest favours disclosure.

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/07/gupta-family-group-documentation-2016-to-2020/documents/commercial-documentation-relating-to-the-lochaber->

2. The Authority responded on 24 November 2021. The Authority maintained the redactions previously applied to the document, relying on sections 30(b)(ii), 33(1)(b) and 38(1)(b) of FOISA to do so.
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 the prejudice in disclosure of the withheld information had not been identified nor the parties that would be prejudiced by disclosure. The Applicant also considered that the Authority had not taken the Commissioner's finding in [Decision 144/2021](#)² that the Authority does not have commercial interests into account when reaching its decision and that the public interest test favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 23 December 2021. The Authority upheld its original decision without modification, and confirmed that it had taken the Commissioner's finding in [Decision 144/2021](#) into account when reaching its decision.
5. 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 all claims of prejudice had been significantly overstated, meaning the exemptions do not apply, and that the public interest favours disclosure due to the financial size (over £500m), the lengthy term (25 years) and requirement for public scrutiny of this complex project.

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. 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 exemptions in sections 30(b)(ii), 33(1)(b) and 38(1)(b) of FOISA reasons for withholding the information and why the public interest test did not favour disclosure.
9. During the investigation, the Authority informed the Commissioner that it wished to withdraw its reliance on the exemptions in sections 30(b)(ii) and 33(1)(b) of FOISA, and instead wished to rely on sections 30(c) and 36(1) to withhold the information requested (for which it provided supporting submissions).
10. On 10 January 2023, the Authority notified the Applicant of its change of position.

[aluminium-smelter-2016-to-2020/ernest--young-ey-comment-22-november-2016/ernest--young-ey-comment-22-november-2016/govscot%3Adocument/EY%2Bcomment%2B-%2B22%2BNovember%2B2016.pdf](https://www.gov.scot/document/EY%2Bcomment%2B-%2B22%2BNovember%2B2016.pdf)

² <https://www.itspublicknowledge.info/decision-1442021>

11. During the investigation, the Applicant was given the opportunity to provide comments on the Authority's change of position and on why they considered the public interest favoured disclosure of the information that was now being withheld under the exemptions in sections 30(c) and 36(1) of FOISA.
12. The Applicant also confirmed that they were content to exclude the source of legal advice from consideration.
13. During the investigation, the Commissioner asked the Authority for information relating to its decision to withhold information under section 38(1)(b) of FOISA. The Authority confirmed that it no longer wished to rely on that exemption to withhold the information and provided evidence that it subsequently disclosed a copy of the document to the Applicant with the personal data unredacted.

Commissioner's analysis and findings

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

Background: Lochaber Smelter Guarantee

15. The Authority provided detailed background information, the following parts of which may be helpful in explaining the background of the Lochaber Smelter Guarantee:
16. 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.
17. 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.
18. 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).
19. 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.
20. 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.

21. 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.
22. In return for the Guarantee, the Authority receives a commercial guarantee fee (the Fee) from GFG.
23. 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.
24. The Authority submitted that should the Lochaber Guarantee be called in and if other recovery options prove ineffective, it would have an option to take ownership of the business assets at Lochaber and trade these assets (directly or through lease arrangements) with the intent of satisfying the ongoing payment obligations under the Power Purchase Agreement (PPA) or alternatively seek to dispose of the assets through a managed sales process.
25. The Authority submitted that information within the material remained current and could negatively impact its ability to operate the assets on effective commercial terms and, potentially, inhibit any sale process to the detriment of the public purse if the information was disclosed prematurely.

The Applicant's perspective

26. Following the issue of [Decision 062/23](https://www.itspublicknowledge.info/decision-0622023)³ and [Decision 063/23](https://www.itspublicknowledge.info/decision-0632023)⁴ 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.
27. The Applicant explained that the Commissioner appeared to have accepted information provided to him by the Authority at face value and without adequate challenge. In their view, the guarantee did nothing for the preservation of jobs at the smelter, but guaranteed the income for the hydro-plant only, which had very few direct jobs. In their view, "the story of saving jobs is concocted to divert attention away from the real purpose (a financial enabler to allow the GFG Alliance to purchase the company)".
28. 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 were 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

³ <https://www.itspublicknowledge.info/decision-0622023>

⁴ <https://www.itspublicknowledge.info/decision-0632023>

advantage, for example, to cash bidders and so the “even-handed” offer merely created an illusion of fairness. The net effect of the Guarantee offer to all bidders was to significantly elevate the attractiveness of the debt-financed GFG bid. (The Authority had an already-established relationship with GFG through its purchase of the Dalzell and Clydebridge steelworks.)

- Alcan was not a distressed company at the time of acquisition by GFG and was trading profitably. GFG purchased the company for £330 million. This was not the value of a distressed company. The funding enabled by the Guarantee was not “last resort funding” in relation to the Lochaber complex.
- A stated objective of the Authority was to prevent the fragmentation of the Lochaber smelter complex. However, immediately after the acquisition, GFG removed the Lochaber smelter, Kinlochleven hydro-plant and estate land holdings from the existing legal entity (Alcan), transferring them to new and separate legal entities under different structures ultimately controlled from different off-shore jurisdictions.
- The Authority had represented that, in return for entering into the Guarantee, it received a “commercial fee”. There was no independent evidence to support the 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.

The Authority’s interests

29. 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.
30. The Authority acknowledged that the Commissioner had previously indicated in [Decision 144/2021](https://www.itspublicknowledge.info/decision-1442021)⁵ 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.
31. 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.

⁵ <https://www.itspublicknowledge.info/decision-1442021>

Information disclosed during the investigation

32. As set out in paragraph 13, the Authority disclosed to the Applicant the information that it had previously withheld under section 38(1)(b) of FOISA.
33. The Commissioner must therefore find that the Authority failed to comply with section 1(1) of FOISA in responding to the request.

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

34. Section 30(c) of FOISA exempts 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.
35. The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing 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.
36. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
37. During the investigation, the Authority confirmed that it was now relying on this exemption (and the exemption under section 36(1)) to withhold the information previously withheld under sections 30(b)(ii) and 33(1)(b) of FOISA.

The Authority's submissions on section 30(c)

38. The Authority submitted that 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 is a significant employer in the local area, the Authority had a significant interest in the business through the Guarantee.
39. The Authority provided two key reasons for withholding the information under the exemption in section 30(c) of FOISA, as follows:

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

40. The Authority submitted that 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

41. The Authority submitted that businesses are extremely 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.
42. 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.
43. The Authority argued that it must be able to assure businesses that sensitive information about their financial position and future plans will not be released as a result of their involvement with the Authority. In the Authority's view, maintenance of trust was important to allow it to engage with businesses in the best interests of Scotland, with the ultimate aim of preserving employment and growing the economy. It believed that disclosure of the information would jeopardise its ability to work in partnership with commercial actors such as GFG in future.

The Applicant's submissions on section 30(c)

44. For their related applications, the Applicant provided the following submissions on the Authority's application of the exemption in section 30(c) of FOISA.
45. 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.
46. 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 Guarantee and Reimbursement Agreement (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.
47. 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 view on section 30(c)

48. 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.

49. 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.
50. The Commissioner notes that the main focus of the withheld information is financial arrangements and discussions of the commercial companies' information within the documents which were, at the date of the Authority's review response, relatively recent.
51. For example, at the date of the Authority's review response, the financial viability of the companies involved (Greensill and CFG) had changed considerably, but the Authority would still have to pay for 80% of the power that SmelterCo is contracted to purchase from HydroCo in the event that SmelterCo is unable to do so.
52. Having considered the nature and content of the withheld information, together with the submissions of the Authority and the Applicant, the Commissioner finds that disclosure of the majority of the withheld information would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The Commissioner cannot expand on his reasoning here, as to do so would reveal the information being withheld.
53. Consequently, the Commissioner is satisfied that the Authority was entitled to apply the exemption in section 30(c) of FOISA to the majority of the withheld information.
54. However, for some of the withheld information (at the end of page two), the Commissioner considers that this merely expands on the reasoning in the preceding sentence (which was disclosed): the exemption in section 30(c) of FOISA does not therefore apply.
55. Consequently, the Commissioner finds that the Authority incorrectly withheld some information under section 30(c) of FOISA. As he does not accept section 30(c) applies to that information, he is not required to consider the public interest in section 2(1)(b) of FOISA for that information.
56. The Commissioner will provide a marked-up copy of the withheld information to the Authority indicating what information he considers is not exempt under section 30(c) of FOISA and which should therefore be disclosed to the Applicant.

Public interest test

57. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

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

58. 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.
59. 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.
60. 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.

61. The Authority 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.
62. 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.

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

63. 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.
64. Separately, the Applicant made the following arguments (see paragraph 28) 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)

65. The Commissioner has taken account of all of the relevant submissions from both parties, together with the withheld information in this case. He is required to balance the public interest in disclosure of the information requested against the public interest in maintaining the exemption. The public interest, in the context of FOISA, should be considered as "something which is of serious concern and benefit to the public".
66. As rehearsed above, the Commissioner has already accepted that disclosure of the majority of the withheld information would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
67. Given the significant size of the Lochaber Smelter Guarantee and those potentially affected by the circumstances surrounding it, the Commissioner accepts that there is clear and substantial public interest in understanding the finer details of the Guarantee and discussions that the Authority had with GFG and other companies.
68. However, the Commissioner recognises that this must be carefully balanced against any impact that disclosure of the withheld information 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.
69. The Commissioner acknowledges that, were circumstances to arise requiring the Guarantee to be called in, this would clearly impact the parties involved (including the Authority), the economy of the local area (and the wider Scottish economy) and the jobs of those individuals employed at the smelter and associated businesses, both directly and indirectly.
70. The Commissioner recognises that such a situation could lead to a number of unwanted circumstances presenting themselves, for example job losses, the requirement for a new agreement to be drawn up or entered into by the Authority, and a reduction in crucial commercial information being provided by businesses to the Authority which would inhibit the Authority's ability to take fully informed decisions and secure best value for public money. Such circumstances would clearly impact on the Authority's position with regard to its ability to effectively conduct its public affairs, and that would not be in the public interest.
71. On balance, therefore, the Commissioner is of the view that the public interest in withholding the remaining information outweighs the public interest in disclosing it.
72. The Commissioner therefore finds that the Authority was entitled to withhold the information he has found to be exempt under section 30(c) of FOISA.

Section 36(1) – Confidentiality

73. 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. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.

74. 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.
75. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary substantially reflecting the whole.

The Authority's submissions on section 36(1)

76. The Authority explained that the withheld information (consisting of a single paragraph of text in the document) summarises legal advice it had received as part of the presentation and consideration of options for policy actions, leading to the adoption of the Authority's legal position. The Authority state that disclosure would therefore reveal the substance of the legal advice it had received and undermine the consideration of options.
77. The Authority submitted that disclosure of the withheld information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged up for further consideration.
78. The Authority therefore considered that all of the necessary conditions for legal advice privilege to apply are satisfied and stated that the legal advice had only been shared with limited relevant employees within the Authority and with Ernst & Young in order that they could provide further advice.

The Commissioner's view on section 36(1)

79. Having considered the content of the information withheld under section 36(1) of FOISA and the circumstances in which it was created, the Commissioner accepts that it meets the conditions for legal advice privilege to apply.

Public interest test

80. 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.

The Authority's submissions about the public interest – section 36(1)

81. The Authority recognised that there is a strong public interest in its involvement in the Lochaber smelter and it acknowledged that the disclosure of the withheld information would be likely to contribute to openness and transparency in government, which there was also a public interest in.

82. However, the Authority did not consider that those public interest arguments were sufficiently compelling to outweigh the public interest in maintaining the right to legal professional privilege in order to ensure confidentiality of communications.
83. The Authority submitted 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 advice may be disclosed and, potentially, be taken out of context.
84. The Authority explained that, in areas like this, which are the subject of public scrutiny, an expectation that legal advice would be released would inevitably lead to the legal advice being much more circumspect and therefore less effective.
85. The Authority further submitted that there is a strong public interest in protecting the confidentiality of this information in order to ensure that it is able to discuss and take policy decisions in full possession of thorough and candid legal advice, which ensures that it can take decisions in a fully-informed legal context, having received legal advice in confidence as any other client would.

The Applicant's submissions about the public interest – section 36(1)

86. The Commissioner has given due consideration to the public interest submissions provided by the Applicant (which are set out in paragraphs 63 and 64).

The Commissioner's view on the public interest – section 36(1)

87. 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.
88. 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 \(QB\)](#)⁶. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
89. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority to receive full, unhindered legal advice.
90. However, 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.

⁶ [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+)))

91. 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, but he does not consider that any of the above categories would apply.
92. The Commissioner accepts that there is a public interest in the subject matter of the advice and its disclosure in terms of accountability and transparency, particularly given the significant expenditure of public money.
93. However, 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.
94. 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 Authority, its ability to come to fully-formed decisions would be restricted, which would not be in the public interest.
95. On balance, and after careful consideration, 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.
96. 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 Applicant.

The Commissioner finds that, by relying upon sections 30(c) and 36(1) of FOISA to withhold the majority of the redacted information in the advice note, the Authority complied with Part 1.

However, by withholding other information in the advice note under sections 30(c) and by withholding information under 38(1)(b) of FOISA that it later disclosed, the Authority failed to comply with Part 1.

The Commissioner therefore requires the Authority to disclose the information in the marked-up document by **Monday, 19 February 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

4 January 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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 –
 - (a) the provision does not confer absolute exemption; and
 - (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.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

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).