



Decision Notice 038/2024

Deloitte quarterly reports

Authority: Scottish Ministers

Case Ref: 202101138

Summary

The Applicant asked the Authority for each quarterly report compiled by Deloitte and delivered to the Scottish Government regarding the Lochaber Guarantee from September 2016 to July 2021.

Following an investigation, the Commissioner found that the Authority had correctly withheld some of the information in the reports, 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 he 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); 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. The Lochaber aluminium complex in Fort William is the UK's last remaining aluminium smelter. In December 2016, the Scottish Government entered into a commercial guarantee arrangement (the Guarantee) with GFG Alliance (GFG) a collection of global businesses and investments, predominantly owned by Sanjeev Gupta.

2. On 11 July 2021, the Applicant made a request for information to the Authority. He asked for:

Each quarterly report compiled by Deloitte and delivered to the Scottish Government around the Lochaber guarantee from September 2016 to the date of this request.

3. The Authority responded on 6 August 2021, and provided the Applicant with redacted versions of the reports, with information withheld under section 30(b)(ii) and 33(1)(b) of FOISA.
4. On 10 August 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not believe that the information was commercially sensitive and he argued that the public interest favoured disclosure.
5. The Authority notified the Applicant of the outcome of its review on 7 September 2021. It disclosed some information that it had wrongly withheld under section 30(b)(ii) and 33(1)(b) of FOISA, but it upheld the exemptions for the remaining information it was withholding.
6. On 10 September 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he believed that disclosure was in the public interest, particularly when considering the exceptionally high figures of financial liability for the Scottish Government.

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 30 September 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
9. 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 on the exemptions it had applied to the information it was withholding.

Commissioner's analysis and findings

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

Information disclosed during the investigation

11. During the investigation the Authority withdrew its reliance on section 30(b)(ii) and 33(1)(b) of FOISA and it disclosed some information from pages 6 and 9 of document 1, to the Applicant.

12. The Authority submitted that it now considered all of the information it was withholding to be exempt under section 30(c) of FOISA, with some limited information in documents 1 and 6, also being withheld under section 36(1) of FOISA.
13. In the absence of submissions to the contrary, the Commissioner must find that the above described information was not exempt from disclosure and that the failure to disclose it at an earlier stage was a breach of Part 1 of FOISA.

Scope of the investigation

14. The Commissioner will consider all of the information in documents 1 to 8 that the Authority is now withholding under section 30(c) of FOISA, as well as the information in documents 1 and 6, which is also being withheld under section 36(1) of FOISA.

Section 30(c) – Effective conduct of public affairs

15. As noted above, the Authority has relied on the exemption in section 30(c) of FOISA to withhold all of the information it has redacted from documents 1 to 8.
16. 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”. 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
17. The standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, 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).

The Authority’s submissions about the exemption

18. The Authority argued that it was essential that it could continue to have a productive relationship with companies like GFG, who run businesses of national and local importance to Scotland. It noted that the Lochaber Smelter was a significant employer in the local area, and the Authority has significant interest in the business through the Guarantee.
19. 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

20. 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 other businesses less likely to engage with Authority support

21. 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 argued this would heighten concerns about seeking support from the Authority, making such support less effective and thereby prejudicing its own commercial interests.
22. The Authority commented that as these companies had not consented to disclosure, release of the information would likely undermine their trust in the Authority, 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 submitted that disclosure would substantially prejudice its ability to take similar action to secure the future of employers and jobs.
23. 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. It argued that the maintenance of trust (between itself and commercial entities) 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. The Authority argued 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

24. 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.
25. 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 about the exemption

26. The Applicant argued that the redactions carried out by the Authority were done in such a way so as to present only a positive view of the situation, deliberately hiding any negative

comments in the reports behind the exemption. He suggested that the majority of the information redacted was embarrassing to both the Authority and GFG and that this, rather than sensitivity of the information, was why redactions had taken place. He argued that such an approach was contrary to FOI guidance.

27. The Applicant submitted that he did not believe that GFG was currently undergoing any refinancing, but even if it was, this did not have any impact on the commercial sensitivity of the information.

The Commissioner's view about the exemption

28. The Commissioner has considered the submissions from both parties alongside the withheld information, which comprises a series of eight reports produced by Deloitte in relation to the hydro generation and aluminium smelter businesses at Lochaber. While the documents were described as quarterly reports, it is clear that they are less frequent than that, with some covering a 6 month, 9 month and 12 month period.
29. The Commissioner recognises that the information redacted from these reports under section 30(c) of FOISA is sensitive, as parts of the reports provide a detailed review of the financial status of both the hydro and smelter businesses, including balance sheets and income statements for specific time periods from 2017 to 2021.
30. 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)).
31. 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.
32. In the Commissioner's view, disclosure of this detailed financial 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.
33. The Commissioner is satisfied that, if the redacted information 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 information redacted from reports 3, 4, 5, 7 and 8, and he finds that the Authority was entitled to rely on the exemption to withhold most, but not all, of the redactions in reports 1, 2 and 6.
34. There is some information in reports 1, 2 and 6 which does not engage the exemption and the Commissioner finds that this information has been wrongly withheld by the Authority. The Commissioner will provide the Authority with a list of documents that indicate where the he has not found the information to be exempt. In general terms, he has not upheld the redactions to information that he considers to be lacking in sensitivity and where he has concluded that disclosure would not cause the harm claimed by the Authority. Some of this information is mundane, while some of it contains statements or comments that could be

deduced from information that is already publicly available. In all instances, the Commissioner is not satisfied that disclosure of this information would be detrimental to the effective conduct of public affairs.

35. The Commissioner requires the Authority to disclose the information in reports 1, 2 and 6 that he has found to have been incorrectly withheld under section 30(c) of FOISA.
36. As noted above, the Authority has withheld some information in documents 1 and 6 under sections 30(c) and 36(1) of FOISA. Having reviewed this information, the Commissioner is satisfied that the exemption in section 30(c) of FOISA has been correctly applied to this particular information.
37. The Commissioner will now go on to consider the public interest test in relation to all of the information that he has found to be correctly withheld under section 30(c) of FOISA.

The public interest test – section 30(c)

38. As mentioned above, 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.
39. The public interest is not defined in FOISA, but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

The Authority's submissions about the public interest

40. The Authority recognised that there was a public interest in the release of the information as part of an open, transparent and accountable government and to inform public debate. It also recognised the public interest in the aluminium smelter complex, and in how the government works with companies such as GFG when public funds are involved. However, given the importance of the smelter to Scotland, the Authority commented that the arguments in favour of disclosure were outweighed by the public interest in protecting the trust of GFG in their relationship with the Authority.
41. The Authority argued that it was of vital importance to Scotland, and the people of Scotland, that it can intervene to protect jobs and the wider economy. It submitted that when this involves a guarantee, as in this case, the public interest lies in protecting some sensitive information in the service of allowing future interventions. The Authority explained that the aim of this intervention was to protect jobs, and it was clearly in the public interest to withhold information that would jeopardise such actions in the future. It noted that approximately 200 people were employed within the smelter business operating at Lochaber. The Authority argued that the public interest lay in maintaining the exemption, given the importance not only to the individuals employed at the sites but to the wider economy of the local area.

The Applicant's submissions about the public interest

42. The Applicant submitted that the information withheld in this case was not inherently financial. He stressed the importance of transparency and accountability of the deal in terms of public scrutiny of the Ministerial decision to back the smelter and agree the Guarantee.

43. The Applicant referred to [Decision 063/2020](#)¹, where the Commissioner concluded that the public interest of jobs being saved and the potential impact of information being made public on the confidence of the financial situation at Lochaber, was paramount. He argued that this position skips an earlier, much more integral public interest point around the decision itself (to make the Guarantee) rather than the consequences of the decision, and the consequences of undermining the results of the deal.
44. The Applicant argued that there was a strong public interest in knowing whether or not the rationale for the government to back the Guarantee was justifiable, regardless of any external factor. He provided the Commissioner with a newspaper article that he had authored, which contained an interview with Jeff Kabel of GFG, where, on record, Kabel stated that the Government was advised by one of the consultants they hired, that the decision to back the Guarantee may have breached state aid rules.
45. The Applicant commented that this demonstrated that the main commercial partner engaged in this discussion was not just willing, but happy to provide information about the deal and considerations made by Ministers at that time. Given these comments, the Applicant argued that the Authority could not have any reasonable concerns about disclosure of the withheld information prejudicing substantially the effective conduct of public affairs. He noted that, at the time he requested a review, the information concerned decisions that were made more than five years ago.
46. The Applicant argued that exposing the deal to public scrutiny, transparency, and accountability is overwhelmingly in the public interest. He argued that it would be a significant blow to transparency if the disclosure of information concerning the management of the Guarantee was dependent on how well a company was likely to survive the potential impact of negative political information being made public.
47. The Applicant reiterated his view that the public interest required the public scrutiny, transparency and accountability of a deal which could have cost the Scottish taxpayer more than half a billion pounds, and came perilously close to being called on.

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

48. 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. In the context of FOISA, the public interest should be considered as "something which is of serious concern and benefit to the public".
49. As noted above, the Commissioner has already accepted that disclosure of the information which has engaged the exemption contained in section 30(c) of FOISA, would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
50. 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 how the businesses, that were the focus of the Guarantee were performing on a year to year basis. 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

¹ <https://www.itspublicknowledge.info/decision-0632023>

the Lochaber smelter, the Guarantee itself (underwritten by the Authority) and what the likely circumstances might be were the Guarantee to be called in.

51. 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.
52. 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.
53. The Commissioner acknowledges the public interest arguments put forward by the Applicant, and he considers them to have merit. There is a strong public interest in understanding how the smelter and the hydro plant have fared financially and operationally since the Guarantee was in place. The Guarantee was made with public money and the Commissioner can see why the Applicant, and the wider public, may require this information in the interests of transparency and accountability.
54. The Commissioner has read the newspaper article referenced by the Applicant, which features comments from Mr Kabel, which suggest that the Scottish Government was advised that the Guarantee may have breached state aid rules. The Commissioner recognises the public interest in knowing whether or not the Scottish Government was advised against making the Guarantee by its own consultants. He notes the sizable public funds involved and the importance of transparency in the Authority's decision-making processes.
55. However, in this case, the information that has been requested is not related to the decision-making process of the Authority, it is Deloitte reports on the businesses covered by the Guarantee. As noted above, this information is sensitive and details the financial and commercial status of the smelter and the hydro plant from 2017 to the time of the request. Given the time period covered by the request, the information is current and of some sensitivity. As set out above, the Commissioner considers the very real economic harm that may occur as a result of disclosure to be contrary to the public interest, and he is satisfied that this outweighs any arguments in favour of disclosure.
56. 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.
57. The Commissioner therefore finds that the Authority was entitled to withhold the remaining information requested under the exemption in section 30(c) of FOISA.
58. As stated previously, the Authority withheld some information in documents 1 and 6 under the exemptions contained in section 30(c) and 36(1) of FOISA. As the Commissioner is

satisfied that this information is wholly exempt under section 30(c) of FOISA, he will not go on to consider the application of section 36(1) of FOISA to this information.

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 **7 May 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

20 March 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 –
 - ..
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).