



Decision Notice 114/2023

Lochaber Smelter: Correspondence with Liberty Steel or GFG Alliance concerning investment activity

Authority: Scottish Ministers
Case Ref: 202200959

Summary

The Applicant asked the Authority for correspondence with Liberty Steel or GFG Alliance about the company's "investment activity". 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 correspondence on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs. He also found that some third party personal data had been correctly withheld. For the remainder, the Commissioner found that this information had been wrongly withheld under the exemptions claimed 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) and (2)(e)(ii) (Effect of exemptions); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 38(1)(b), (2A), (5) (definitions of "the data protection principles", "data subject", "personal data" and "processing", "the UK GDPR") and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of "personal data") (Definitions); 5(1)(a) (Principles relating to the processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

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 23 June 2022, the Applicant made a two-part request for information to the Authority relating to the Lochaber smelter, the first part of which (solely) is the subject of this Decision Notice. In part one of his request, the Applicant asked for any internal or external correspondence between [the Authority] and Liberty Steel or the GFG Alliance on the topic of the company's "investment activity" at Lochaber from 1 January 2022 to date.
2. The Authority responded on 21 July 2022. It disclosed some information and withheld the remainder (variously), under the exemptions in:
 - (i) section 30(b)(ii) (Prejudice to effective conduct of public affairs) of FOISA, on the basis that disclosure of some of the information would, or would be likely to, prejudice substantially the free and frank provision of advice and exchange of views for the purposes of deliberation. The Authority stated that disclosure would inhibit its ability, in future, to have a private space within which to seek advice and views from officials before reaching a settled public position, particularly as discussions relating to a sensitive or controversial issue were still ongoing and final decisions had not been taken. The Authority recognised the public interest in open, transparent and accountable government, and to inform public debate. It considered, however, that this was outweighed by the public interest in allowing a private space within which officials could provide free and frank advice. In the Authority's view, there was no public interest in prematurely disclosing information which could lead to a reduction in comprehensive and frank views being provided in future, leading to less-informed significant decisions being taken.
 - (ii) section 33(1)(b) (Commercial interests and the economy) of FOISA, on the basis that disclosure of some of the information would, or would be likely to, prejudice substantially the commercial interests of the company and the Authority as an interested party. The Authority recognised the public interest in transparency; however, it considered this was outweighed by the risk to the commercial interests of the company, the Authority and the taxpayer.
 - (iii) section 36(1) (Confidentiality) of FOISA, on the basis that some of the information comprised legal advice, disclosure of which would breach legal professional privilege. The Authority recognised the public interest in disclosure as part of open and transparent government, and to inform public debate. However, it considered this was outweighed by that in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure it was able to receive legal advice in confidence.
 - (iv) section 38(1)(b) (Personal information) of FOISA, on the basis that some of the information was third party personal data (i.e. names and contact details), disclosure of which would contravene data protection principles.

3. On 21 July 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not believe the exemptions applied to the extent they had been used and, even if they did, the public interest favoured disclosure of the information. In the Applicant's view, full disclosure of the information would provide for meaningful scrutiny of the Authority's dealings with GFG Alliance, which were of significant political and public interest.
4. The Authority notified the Applicant of the outcome of its review on 18 August 2022, upholding its original decision with modifications. It withdrew reliance on section 36(1) which, it stated, had been referenced in error, and disclosed some further information (originally withheld under section 33(1)(b)). The Authority withheld the remainder of the information (variously) under the exemptions in:
 - (i) section 30(b)(ii) of FOISA, for the reasons originally stated. The Authority recognised the need for transparency as part of open and responsible government; however, it considered it was necessary for officials to have a private space in which to make decisions. Where events with external parties were still ongoing, the Authority believed it was important to maintain a well-functioning relationship with companies and external advisers. The Authority considered there was no public interest in disclosing information that would prejudice this and deprive the taxpayer of best value for money.
 - (ii) section 33(1)(b) of FOISA, on the basis that disclosure of some of the information would negatively impact the business and potentially damage negotiations, day-to-day operations and other activity. Recognising the public interest in openness, the Authority considered this was outweighed by the public interest in ensuring that private sector partners were able to share commercially sensitive information with the Authority, with confidence that such information would be handled with due sensitivity.
 - (iii) section 38(1)(b) of FOISA, for information comprising the personal data of individuals named in the information, to ensure compliance with data protection principles. The Authority confirmed that the names of relevant senior civil servants or equivalents had been disclosed.
5. On 19 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review for the reasons set out in his request for review: he believed the exemptions did not apply and the public interest favoured disclosure.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 3 October 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment

on this application and to answer specific questions. These related to the Authority's justification for withholding some of the information requested (variously) under the exemptions in section 30(b)(ii), section 33(1)(b) and section 38(1)(b) of FOISA.

9. On 16 December 2022, the Authority informed the Commissioner that it now wished to withdraw its reliance on section 33(1)(b) for the information originally considered to be commercially sensitive and now, instead, wished to apply section 30(c) to that same information. It provided submissions in support of its reliance on section 30(c) and section 38(1)(b).
10. In the absence of any submissions from the Authority in respect of its reliance on section 30(b)(ii), the Investigating Officer asked it to clarify whether it still wished to rely on that exemption to withhold any information. In response, on 13 January 2023, the Authority confirmed it wished to withdraw its reliance on section 30(b)(ii) and now, instead, wished to apply section 30(c) to that same information, for the reasons previously submitted.
11. The Authority notified the Applicant of its changes of position on 16 December 2022 and on 12 January 2023.
12. The Applicant was asked to provide any comments he wished to make on the public interest in disclosure of the information now being withheld under section 30(c) of FOISA, and to explain why the personal data withheld under section 38(1)(b) was important to him or of value to the public.
13. On 30 January 2023, the Applicant provided submissions to the Commissioner in relation to the exemptions now being relied on by the Authority.

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 in its submissions, the following parts of which may be helpful in explaining the background of the Lochaber Smelter Guarantee:
 - The Lochaber aluminium complex in Fort William is the UK's last remaining aluminium smelter, the operation of which is a key component of Scotland's industrial capability and a major source of employment in the West Highlands.
 - When Rio Tinto decided to review its Lochaber operations in 2016, the smelter faced the prospect of closure, endangering over 300 jobs in total (direct, indirect and induced). The Authority's focus at the time was to avoid the fragmentation of the Lochaber complex, to secure the long-term viability of the smelter and to realise further industrial and employment opportunities on site.
 - In September 2016, as part of the Authority's wider overall objective to preserve jobs, protect the economy and sustain the metals industry in Scotland, it indicated a willingness to support any purchaser who would retain the smelter and associated hydro-power scheme together, and make the necessary commitment to significant investment in the development of the Lochaber assets. The Authority's offer included

the potential to guarantee the power purchase obligations of the aluminium smelter and was made known on an even-handed basis to all short-listed bidders via the vendor (Rio Tinto).

- To deliver its objective for the site, the Authority is standing behind a portion of the power purchase obligations of the aluminium smelter operator (Alvance British Aluminium Limited (SmelterCo)) in the event that it cannot pay for the power it is contracted to take from the hydro-electric power station operator (Simec Lochaber Hydropower 2 Limited (HydroCo)). Both companies are part of the GFG Alliance (GFG) which is a collection of global businesses and investments.
- The commercial guarantee arrangement (the Guarantee) was entered into in December 2016 by the Authority, SmelterCo and HydroCo, and guarantees over a 25-year term that the Authority will pay for a percentage of the power that SmelterCo is contracted to purchase from HydroCo in the event that SmelterCo is unable to do so.
- The nominal value of the Authority's contingent liability on day one of the Guarantee was £586 million (i.e. the total amount of payments guaranteed by the Authority across the 25-year agreement), and is the largest industrial guarantee ever agreed by the Authority.
- In return for the Guarantee, the Authority receives a commercial guarantee fee (the Fee) from GFG.
- In March 2021, GFG's major providers of working capital and investment finance (Greensill Capital (UK) Limited and Greensill Capital Management Company (UK) Limited (together "Greensill")) entered administration.

Authority's interests

16. 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.
17. The Authority acknowledged that the Commissioner had previously indicated in [Decision 144/2021](https://www.itspublicknowledge.info/decision-1442021)¹ that he did not consider the Authority to be a commercial actor in respect of Scotland's energy sector, but that it may have other economic interests in relation to the smelter.
18. 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.

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

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

19. 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.
20. 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.
21. 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.
22. As noted above, 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 the exemptions in section 30(b)(ii) and section 33(1)(b) of FOISA.

The Authority's submissions on section 30(c)

23. 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.
24. 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

25. 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

26. The Authority submitted that businesses may be hesitant to consider financial intervention sponsored by it, or its Agencies, due to the risk of this becoming public knowledge, as this would alert customers and suppliers to the fact that the business was utilising last resort funding to continue to trade. This, in turn, would adversely affect the business as its customers and suppliers would be less willing to deal with it due to fear of wasted costs (e.g. where the business was unable to pay for materials ordered), leading to further difficulties in

trading. In the Authority's view, disclosure would exacerbate the issue by underscoring not only that fact, but also the underlying basis on which decisions are made about sensitive business operations and situations, and this risk was not one that arose where a business secured support from a third party which was not a Scottish public authority. The Authority also believed this would heighten concerns about seeking support from the Authority, making such support less effective and thereby prejudicing its own commercial interests.

27. As these companies had not consented to disclosure, the Authority considered that release of the information would likely undermine trust in it, leading to businesses being reluctant to engage with it on such matters in the future, to the detriment of the Scottish economy and employment. For these reasons, the Authority believed disclosure would substantially prejudice its ability to take similar action to secure the future of employers and jobs.
28. The Authority argued that it must be able to assure businesses that sensitive information about their financial position and future plans will not be released as a result of their involvement with the Authority. In the Authority's view, maintenance of trust was important to allow it to engage with businesses in the best interests of Scotland, with the ultimate aim of preserving employment and growing the economy. It believed that disclosure of the information would jeopardise its ability to work in partnership with commercial actors such as GFG in future.

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

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

The Applicant's submissions on section 30(c)

31. In his submissions to the Commissioner, the Applicant stated that, given he did not know what information was being withheld, he could not comment in anything other than generalities.
32. The Applicant did not believe that the risk to the effective conduct of public affairs was either likely, or risked substantial prejudice, as argued by the Authority. Given that the Authority had provided no evidence of this, the Applicant believed any potential argument would be based around hypothetical impact. In the Applicant's view, this was outweighed by the public interest in transparency and accountability, particularly in the case of the deal in question.

The Commissioner's views on section 30(c)

33. The Commissioner has considered the submissions from both parties. He has also taken into account the age of the information as at the date when the Authority issued its review

outcome (i.e. 18 August 2022). Given the correspondence in question dates between February 2022 and April 2022, the Commissioner notes that the information requested is relatively recent in relation to the date of the Authority's review.

34. 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.
35. 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.
36. The Commissioner has considered the information in the correspondence being withheld by the Authority. He is, however, unable to describe that information in any 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 August 2022 (i.e. when it withheld that same information under, variously, section 30(b)(ii) and section 33(1)(b)).
37. 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.
38. Having considered all 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.
39. The Commissioner is satisfied that, if the majority of the withheld information in the correspondence 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.
40. However, for certain other information in the correspondence, 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.
41. 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.

42. Given that the Commissioner does not accept that the exemption applies to certain information in the correspondence being withheld under section 30(c), he is not required to consider the public interest test in section 2(1)(b) for that information.
43. As the Authority is not relying on any other exemption to withhold that information, the Commissioner 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.)
44. 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)

45. 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)

46. 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.
47. 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.
48. 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)

49. In his submissions to the Commissioner, the Applicant stated that, in terms of the wider public interest, the key question around the Lochaber smelter was whether the deal struck by the Authority with GFG was sound decision-making from a taxpayer value-for-money point of view. He argued that, in this context, the public interest in knowing this was obvious, given this was a £multi-million financial commitment, in addition to any potential future commitment to keep the smelter open, pay staff wages and attempt to return it to full financial health. In the Applicant's view, the political and financial risks of such a decision were clear. In this regard, he referred to the rescue of companies such as Ferguson Marine, Prestwick Airport, Bifab and Dalzell Steelworks.

50. For this reason, the Applicant believed the public interest in full transparency was overwhelming, where transparency was integral for public confidence in the Authority. Unless details of the deal and associated correspondence were made public, there was no way for the public to establish whether the Lochaber deal was in the public interest.
51. The Applicant further argued that, due to the lack of transparency on the issue, there was no accountability. He submitted that MSPs speak in the Scottish Parliament without being armed with sufficient information to hold the Authority to account. He argued that, while the Authority continued to hide behind commercial sensitivity as a justification for not providing full information, the public was unable to make an informed decision as to whether the deal itself, and the reasons behind it, justified the extent of taxpayer financial commitment.
52. In the Applicant's view, the public interest in this case was overwhelmingly in favour of disclosure, particularly as the private company involved (GFG) was under suspicion for fraud and money laundering. The Applicant submitted that GFG's history, in recent years, demonstrated that the Authority's decision to go into business with it was questionable. Recognising that this may well have been the correct decision, the Applicant argued that it was impossible to judge this without knowing all of the facts. Without disclosure, the Applicant believed there existed a vacuum of accountability around this deal, and this gave the Authority a free hand to control the narrative and avoid any difficult scrutiny.

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

53. 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 within the correspondence requested). 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.
54. As rehearsed above, the Commissioner has already accepted that disclosure of the remaining information in the correspondence would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
55. 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.
56. 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.

57. 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.
58. 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.
59. The Commissioner therefore finds that the Authority was entitled to withhold the remaining information requested under the exemption in section 30(c) of FOISA.

The information held by the Authority

60. The Commissioner has considered all of the information provided to him by the Authority during the investigation, some of which, the Authority claimed, fell outwith the scope of the Applicant's request. He considers that this particular information does, in fact, fall within scope. In the Commissioner's view, the majority of this information is not captured by any exemptions or provisions in FOISA, and he therefore 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.)
61. In the Commissioner's view, the remainder of the information which the Authority considered to be outwith the scope of the request would fall to be considered under the exemption in section 38(1)(b) of FOISA. He will therefore include it in what follows.

Section 38(1)(b) – Personal information

62. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR or (where relevant) in the DPA 2018.
63. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
64. To rely on this exemption, the Authority must show that the information withheld is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Article 5(1) of the UK GDPR.
65. The Commissioner must decide whether the Authority was correct to withhold some of the information requested under section 38(1)(b) of FOISA.

Is the withheld information personal data?

66. The first question that the Commissioner must address is whether the withheld information is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable individual. "Identifiable living individual" is defined in

section 3(3) of the DPA 2018 - see Appendix 1. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR, also set out in in Appendix 1.)

67. Information which could identify individuals will only be personal data if it relates to those individuals. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
68. In its submissions to the Commissioner, the Authority explained that the information in question comprised the names, signatures and direct contact details of individuals who could be identified from that information. As such, the Authority considered the information to be personal data as defined by section 3(2) of the DPA 2018.
69. Having considered the withheld information, it is clear to the Commissioner that the information being withheld in this case "relates to" identifiable living individuals.
70. The Commissioner therefore concludes that this particular information is personal data for the purposes of section 3(2) of the DPA 2018.

Which of the data protection principles would be contravened by disclosure?

71. The Authority stated that disclosure of this personal data would contravene the first data protection principle (Article 5(1)(a) of the UK GDPR). Article 5(1)(a) states that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.
72. In terms of section 3(4)(d) of the DPA 2018, disclosure is a form of processing. In the case of FOISA, personal data is processed when it is disclosed in response to a request.
73. The Commissioner must now consider if disclosure of the personal data would be lawful (Article 5(1)(a)). In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
74. In its submissions, the Authority concluded that the only condition that would allow it to process the data, in order to answer the Applicant's request, was condition 6(1)(f) (set out in full in Appendix 1).
75. The Commissioner agrees that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

76. Although Article 6 states that condition (f) cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
77. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - (i) Does the Applicant have a legitimate interest in obtaining the personal data?
 - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
 - (iii) Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

78. The Applicant argued, in his submissions to the Commissioner, that the names of civil servants involved should be disclosed if they had since become senior civil servants, along with the names of those who were public figures within GFG or other public companies.
79. In its submissions to the Commissioner, the Authority stated that it was not aware of any legitimate interest the Applicant had in the names and direct contact details of officials. In addition, it did not believe that identifying the individuals would aid in the understanding of the withheld information.
80. Having considered the submissions from both parties, the Commissioner accepts that the Applicant has a personal legitimate interest in knowing the identities of the individuals to whom reference is made in the correspondence, with a view to understanding that correspondence, and those involved, more completely. The Commissioner also accepts that this legitimate interest would extend to the other members of the public in the West Highland area (and potentially to the rest of Scotland) with an interest in the Lochaber smelter agreement, given its importance to that community. Consequently, the Commissioner accepts that there is a legitimate interest in disclosure of this personal data.

Is disclosure of the personal data necessary?

81. Having accepted that the Applicant has a legitimate interest in the withheld personal data, the Commissioner must consider whether disclosure of those personal data is necessary for the Applicant's legitimate interests. In doing so, he must consider whether these interests might reasonably be met by any alternative means.
82. The Commissioner has considered this carefully in light of the decision by the Supreme Court in [South Lanarkshire Council v Scottish Information Commissioner \[2013\] UKSC 55²](#).
83. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.
84. In its submissions to the Commissioner, the Authority argued that disclosure would be unfair as the individuals in question, who were more junior members of staff, would not expect their personal data to be processed in this way. The Authority did not consider such processing was necessary to meet the terms of the request, and it had no lawful basis under which to process the personal data for this purpose.
85. Having considered the Applicant's legitimate interests, the Commissioner accepts that, to some extent, disclosure of the information is necessary in order to fulfil them: disclosure of the withheld personal data would provide the Applicant with information which would aid his understanding of the information disclosed, and the level of involvement by the parties referenced in the correspondence.
86. The Commissioner can identify no viable means of fully meeting the Applicant's legitimate interests which would interfere less with the privacy of the data subjects than providing the withheld personal data in full. In all the circumstances, therefore, the Commissioner is

² <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

satisfied that disclosure of the information is necessary for the purposes of the Applicant's legitimate interests.

87. The Commissioner will now consider whether the Applicant's legitimate interest in obtaining the withheld personal data outweighs the rights and freedoms of the data subjects.

The data subjects' interests or fundamental rights and freedoms

88. The Commissioner must balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary for him to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOISA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override any legitimate interests in disclosure. Only if the legitimate interests of the Applicant outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.

89. The [Commissioner's guidance on section 38 of FOISA](#)³ notes factors that should be taken into account in balancing the interests of parties. He notes that much will depend on the reasonable expectations of the data subjects. These are some of the factors public authorities should consider:

- Does the information relate to an individual's public life (their work as a public official or employee) or to their private life (their home, family, social life or finances)?
- Would the disclosure cause harm or distress?
- Whether the individual has objected to the disclosure.

Does the information relate to public or private life?

90. In its submissions to the Commissioner, the Authority explained that its general approach was to disclose information about senior members of staff, those within senior civil service roles and officials with relatively senior roles that were public facing, but to withhold those details for junior staff members. It stated it took broadly the same approach to individuals within third party organisations, where their level of seniority may not be known, and based on whether or not they had a high public profile.
91. The Commissioner acknowledges that the withheld information relates to the individuals' public lives, in that it identifies them as Authority staff or officials, or individuals connected to the external companies involved in the correspondence. However, he also acknowledges that, by association, the information also relates to their private lives.
92. In the circumstances, the Commissioner concludes that the withheld information relates to both the private and public lives of the data subjects.

Would disclosure cause harm or distress to the data subjects and have the individuals objected to the disclosure?

93. In its submissions to the Commissioner, the Authority stated that, even if the Applicant did have legitimate interests in the information, it did not believe these would outweigh the interests in protecting the privacy of the individuals to whom the personal data related.

³ <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

94. The Commissioner has considered the harm or distress that might be caused by disclosure. He notes that disclosure of any information under FOISA – although in response to a request made by a specific Applicant – effectively places that information into the public domain. As such, he must consider the effects of publicly disclosing any personal data under FOISA.
95. The Commissioner has considered the relevant submissions from both parties, together with the personal data withheld. He is not persuaded that the harm or distress claimed by the Authority applies to all of the personal data being withheld, specifically certain information which appears to have been disclosed elsewhere in the correspondence. Given that this information has clearly already been disclosed by the Authority, the Commissioner cannot accept that disclosure of that same information (being withheld elsewhere in the same correspondence), in response to the Applicant's request, would equate to an unwarranted intrusion into the private lives of the individuals to whom that information relates.
96. Accordingly, the Commissioner does not accept that the Authority has sufficiently evidenced that disclosure of that particular personal data would cause any harm or distress to the data subjects, or that they have objected to disclosure.
97. For the remainder of the personal data withheld, the Commissioner recognises that it records the involvement of those individuals in the correspondence.
98. Insofar as the personal data relates to Authority staff, the Commissioner acknowledges that some of these individuals can be considered relatively senior and therefore subject to a higher level of scrutiny. It is still appropriate, however, to consider what reasonable expectations they would have in relation to disclosure of the information concerned. He also recognises that the roles of other individuals could be considered to be more junior. He accepts that these individuals would have no expectation that their personal details (names and contact details) would be disclosed into the public domain, in response to a request under FOISA.
99. For the remaining personal data, which records the names and contact details of external (i.e. non-Authority) individuals, the Commissioner accepts that these individuals would, likewise, have no expectation that their personal data would be publicly disclosed in response to a request under FOISA, and he again recognises their right to privacy in this regard.

Balance of legitimate interests

100. After carefully balancing the legitimate interests of the data subjects against those of the Applicant, the Commissioner finds that, for certain of the information, already disclosed elsewhere in the correspondence, the legitimate interest in that information overrides the interests or fundamental rights and freedoms of the data subjects.
101. For that particular information, the Commissioner cannot identify any reason why disclosure of that same information, in the context of the request under consideration here, could prejudice the rights and freedoms or legitimate interests of those data subjects.
102. The Commissioner does not accept that there would be a degree of distress caused to the data subjects by the disclosure of this information, sufficient to override the legitimate interests of the Applicant. In all the circumstances, he concludes that condition (f) could be met in this case and that disclosure of that specific information would therefore be lawful.

103. Accordingly the Commissioner does not accept that the Authority was entitled to rely on section 38(1)(b) to withhold that particular information (i.e. the names and contact details of certain external individuals).
104. For the remainder of the personal data, the Commissioner has balanced the competing interests set out above. He has concluded that the legitimate interest in the personal data is overridden by the interests or fundamental rights and freedoms of the data subjects and that the requirements of condition (f) cannot be met here.
105. In the absence of a condition which would permit disclosure of the remaining withheld personal data, the Commissioner must conclude that disclosure would be unlawful.
106. For the remainder, given that the Commissioner has concluded that the processing of the personal data would be unlawful, he is not required to go on to consider whether disclosure of that personal data would otherwise be fair.

Fairness

107. Given that the Commissioner has determined that the processing of certain of the personal data would be lawful, and bearing in mind his reasons for reaching that conclusion, he can identify no reason for finding that its disclosure would be other than fair.

Conclusion on the data protection principles

108. For the personal data found to have been correctly withheld, the Commissioner finds that disclosure of this information would breach the first data protection principle and that this particular information is therefore exempt from disclosure (and was properly withheld) under section 38(1)(b) of FOISA.
109. For the remaining withheld personal data (i.e. certain names and contact details which have already been disclosed elsewhere in the correspondence), the Commissioner is satisfied that this particular information has been wrongly withheld under section 38(1)(b), and can be disclosed without breaching the data protection principles in Article 5(1) of the UK GDPR.

Action required by Authority

110. The Commissioner requires the Authority to disclose to the Applicant the personal data which he has found to be wrongly withheld under section 38(1)(b). This will be indicated on a marked-up copy of the withheld information to be provided to the Authority along with this Decision Notice.
111. In order to assist the Applicant's understanding of the involvement of those individuals whose personal data the Commissioner has found to have been correctly withheld, the Commissioner requires the Authority to indicate, for each redaction, whether the individual is a member of Authority staff, or which external organisation the individual is connected to.

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 (variously) under the exemptions in section 30(c) and section 38(1)(b) 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 information under (variously) the exemptions in section 30(c) and section 38(1)(b) of FOISA 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 exemptions in section 30(c) and section 38(1)(b) of FOISA, and to indicate (for each redaction under section 38(1)(b)) which body the individual is connected to, 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 –
 - (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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (e) in subsection (1) of section 38 –
 - ...
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - ...
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (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).

...

38 Personal information

(1) Information is exempt information if it constitutes-

...

- (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A));

...

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -

- (a) would contravene any of the data protection principles, or
- (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in –

- (a) Article 5(1) of the UK GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

...

"personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

"the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

(5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

...

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).

...

UK General Data Protection Regulation

Article 4 Definitions

For the purpose of this Regulation:

- 1 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person:

...

Article 5 Principles relating to processing of personal data

- 1 Personal data shall be:
- a. processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency")

...

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

...

- f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

...

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –

...

- (d) disclosure by transmission, dissemination or otherwise making available,

...

- (10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).

...

- (14) In Parts 5 to 7, except where otherwise provided –

- (a) references to the UK GDPR are to the UK GDPR read with Part 2;

...

- (c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;

- (d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

...