

Decision Notice 046/2022

Lochaber Smelter – Guarantee and Reimbursement Agreement

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202100942



Scottish Information
Commissioner

Summary

The Ministers were asked for information about interactions with Greensill Capital (UK) Limited in connection with the Lochaber Smelter - Guarantee and Reimbursement Agreement. The Ministers told the Applicant they did not hold any information falling within the scope of the request.

The Commissioner investigated and found that the Ministers had breached FOISA by informing the Applicant they did not hold any relevant information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held).

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 May 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was a copy of all interactions with Greensill Capital (UK) Limited in connection with the Lochaber Smelter - Guarantee and Reimbursement Agreement (GRA), to include (but not limited to) all letters, emails, minutes and notes of meetings.
2. The Ministers responded on 22 June 2021 in terms of section 17(1) of the FOISA, stating they did not hold the information requested. They explained that Scottish Government (SG) officials had performed a number of comprehensive searches of shared and restricted archives, but no information falling within the scope of the request had been located.
3. That same day, the Applicant wrote to the Ministers, requesting a review of their decision on the basis that they believed information was held.
4. The Ministers notified the Applicant of the outcome of their review on 20 July 2021, fully upholding their original decision. They explained that relevant policy area officials had been consulted and had advised that any interaction between SG officials and representatives of Greensill in the past regarding the GRA was limited, due to the fact that the SG Guarantee involved no material or long-term obligations of Greensill. In order to reaffirm their position that they did not hold this information, the Ministers provided a weblink¹ to their response to a previous information request which sought similar information.
5. On 3 August 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Ministers' review because they believed information was held.

¹ [Fergus Ewing meeting GFG Alliance, Greensill Capital and GAM Investments: FOI release - gov.scot \(www.gov.scot\)](https://www.gov.scot/Information/Releases/2021/08/2021080311)

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
7. On 31 August 2021, the Ministers were notified in writing that the Applicant had made a valid application 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 Ministers were invited to comment on this application and to answer specific questions. These focused on the searches carried out by the Ministers to identify and locate any information falling within the scope of the Applicant's request.
9. During the investigation, the Ministers changed their position. They withdrew reliance on section 17(1) of FOISA and, on 9 February 2022, provided the Applicant with a revised review outcome in different terms.
10. The Applicant subsequently confirmed they wished to continue with their application for a decision by the Commissioner in this case.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

The Ministers' change of position during the investigation

12. As explained above, during the investigation, the Ministers provided submissions to the effect that, having reconsidered their position, they no longer wished to rely on section 17(1) of FOISA.
13. The Ministers explained that, to establish whether the information requested was held, SG officials had conducted the following searches:
 - searches of the electronic Record and Document Management System (eRDM) and the MiCase system using the following keywords - "Greensill Capital", "Greensill", "Greensill Capital Guarantee & Reimbursement Agreement" and "Due diligence on Greensill Capital".
 - a search of the mailbox for the business area for all emails from "@greensillcapital.co.uk", "@greensillcapital.com", and "Lex Greensill", as well as for "Due diligence on Greensill Capital".
14. The Ministers confirmed that these searches identified no information falling within the scope of the request.
15. In their submissions to the Commissioner, the Applicant highlighted that the Ministers' review outcome had made reference to an earlier freedom of information request², their response to

² <https://www.gov.scot/publications/foi-19-00251/>

which detailed a meeting between Scottish Ministers and Greensill Capital (amongst others). In the Applicant's view, this meeting fell firmly within the scope of the request.

16. The Ministers explained that this was a meeting between the relevant parties, the note of which contained no information about an interaction "in connection with the Lochaber Smelter - Guarantee Reimbursement Agreement (GRA)". Therefore, the Ministers did not consider this would fall within the scope of the request. They explained the meeting was referenced in the review outcome as the reviewer thought it may be of interest to the Applicant.
17. The Ministers further submitted that the Lochaber GRA, which was entered into in 2016, was between the Scottish Government and the GFG Alliance (not Greensill Capital (UK) Limited). Greensill, as a supply-chain finance business, was a financier of the GFG Alliance. The Ministers explained they had no material or long-term obligations with Greensill, and would not have carried out due diligence on GFG Alliance's financiers, as this would have been within GFG Alliance's remit.
18. However, during the Commissioner's investigation, the Ministers identified that information, held on their behalf by their legal and commercial advisers, would fall within the scope of the request. The Ministers apologised for this oversight and conceded they were not entitled to respond to the request in terms of section 17(1) of FOISA.
19. The Ministers explained that the relevant information was now being gathered and that a revised review outcome would be issued to the Applicant.
20. Having considered the submissions provided by the Ministers, in which they confirmed that information falling within the scope of the Applicant's request had now been identified, the Commissioner can only conclude that the Ministers were not entitled to inform the Applicant, either in their initial request or in their review response, that they did not hold information relevant to the request in terms of section 17(1) of FOISA, and therefore breached section 1(1) of FOISA in doing so.
21. Turning to the specific meeting referenced in the review outcome, the Commissioner notes that the recorded themes of the discussion included a trip to see GFG operations in Scotland (including a visit to Lochaber), and plans for growth at Lochaber and more broadly. They did not, however, specifically detail the GRA specified in the Applicant's request.
22. While the Commissioner accepts that the references to Lochaber might lead the Applicant (and indeed any reasonable person) to believe that this should capture any discussions that might have taken place regarding the GRA (had any such discussions occurred), ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority. The information does not detail any discussion regarding the GRA and therefore the Commissioner cannot accept that it falls within the scope of the request.
23. As the Ministers issued the Applicant with a revised review outcome on 9 February 2022, otherwise than in terms of section 17(1) of FOISA, the Commissioner does not require the Ministers to take any further action in response to the Applicant's application.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply 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 incorrectly informing the Applicant that they did not hold information falling within the scope of the request, the Ministers failed to comply with section 1(1) of FOISA.

Given that, during the investigation, the Ministers provided the Applicant with a revised review outcome, otherwise than in terms of section 17(1) of FOISA, the Commissioner does not require the Ministers to take any action in response to this failure in response to the Applicant's application.

Appeal

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

Daren Fitzhenry
Scottish Information Commissioner

13 April 2022

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-

(a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info