



Decision Notice 010/2024

Lochaber Smelter: business case/plan, advice and yearly breakdown

Applicant:

Authority: Scottish Ministers

Case Ref: 202101273

Summary

The Applicant asked the Authority for a range of information about the Lochaber smelter. The Authority disclosed some information, and withheld the remainder under a number of exemptions in FOISA. The Commissioner investigated and found that the Authority had generally complied with FOISA in responding to the request, but required the Authority to disclose further information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 July 2021, the Applicant made a request for information to the Authority. He asked for:
 - (i) Any business plan, business case or document setting out the economic benefit of a deal between GFG Alliance and the Authority, received by the Authority in 2015, 2016 or 2017

- (ii) The unredacted advice provided to the Authority from Ernst & Young around the Lochaber Guarantee
 - (iii) The detail of the advice provided by Ernst & Young to the Authority on the pricing of the charge to GFG Alliance for the Guarantee.
 - (iv) Since 2016, the quarterly or yearly breakdown (i.e. Q1 2017: £2m) of the total amount expected to be paid to the Authority by GFG Alliance over the 25 years of the Guarantee
 - (v) Since 2017, the quarterly or yearly breakdown (i.e. Q1 2017: £2m) of the total amount actually be paid to the Authority by GFG Alliance from Q1 2016 to date.
2. The Authority responded on 10 August 2021, refusing the request in terms of section 12(1) of FOISA as it considered the cost of complying would exceed the specified limit of £600.
 3. On 9 September 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the request was sufficiently narrow to not engage the cost limit and because the Authority had not provided any evidence to justify its response or set out the indicative costs for providing the requested information.
 4. The Authority notified the Applicant of the outcome of its review on 7 October 2021, concluding that the original decision should be overturned. The Authority disclosed five documents in redacted form and also referred to information [previously published online](#)¹ which fell within the scope of the request. The Authority relied on sections 25, 33(1)(b) and 38(1)(b) of FOISA to withhold information falling within the scope of the request.
 5. On 11 November 2021, 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 because he:
 - did not consider section 33 of FOISA applied to the withheld information because
 - it had been applied inconsistently, with aspects of confidential information of other companies published while GFG's projections are kept private
 - the plans for the alloy wheel plant at Lochaber were scrapped, meaning the likelihood of substantial prejudice is nil and there is no genuine link between disclosure of the withheld information and the harm claimed
 - in any case, the deal struck between GFG Alliance, Liberty Steel and the Authority is of significant public interest, which favoured disclosure of the withheld information.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. The Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant.

¹ <https://www.gov.scot/publications/gupta-family-group-documentation-2016-to-2020/>

The Authority provided the information and the case was subsequently allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the Authority's justification for withholding the information requested under the exemptions in sections 25, 33(1)(b) and 38(1)(b) of FOISA.
9. During the investigation, the Authority informed the Commissioner that it wished to withdraw its reliance on section 33(1)(b) of FOISA to withhold the majority of the information, and instead wished to rely on section 30(c) to withhold this information. The Authority also identified specific information within two documents that it considered solely exempt under sections 33(1)(b) (document 2) and 36(1) (document 10) of FOISA.
10. The Authority notified the Applicant of its change of position and the Applicant was given the opportunity to provide comments on the Authority's decision to now rely on sections 30(c) and 36(1) of FOISA to withhold the information requested.
11. During the investigation, the Applicant informed the Commissioner that the Authority had disclosed to him an unredacted copy of document 9. The Authority confirmed that this was an error, and that the redactions previously made to the document still applied at the date of the review response (although it now wished to rely on section 30(c) of FOISA to withhold the information, rather than section 33(1)(b)). However, the Authority subsequently disclosed document 9 in unredacted form again to the Applicant.
12. The Commissioner asked the Authority, during the investigation, to confirm that it had disclosed information to the Applicant in line with the Schedule of Documents it had provided to the Commissioner. The Authority subsequently disclosed to the Applicant an unredacted copy of document 6 and redacted copies of documents 7, 8 and 10, as it could not locate a record of previous disclosure.
13. During the investigation, the Applicant confirmed that he was content to exclude from consideration the Authority's reliance on sections 25(1) and 38(1)(b) of FOISA to withhold information. Consequently, the Commissioner has not considered these matters further.

Commissioner's analysis and findings

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

Background: Lochaber Smelter Guarantee

15. The Authority provided detailed background information, the following parts of which may be helpful in explaining the background of the Lochaber Smelter Guarantee:
16. The Lochaber aluminium complex in Fort William is the UK's last remaining aluminium smelter, the operation of which is a key component of Scotland's industrial capability and a major source of employment in the West Highlands.
17. When Rio Tinto decided to review its Lochaber operations in 2016, the smelter faced the prospect of closure, endangering over 300 jobs in total (direct, indirect and induced). The Authority's focus at the time was to avoid the fragmentation of the Lochaber complex, to

secure the long-term viability of the smelter and to realise further industrial and employment opportunities on site.

18. In September 2016, as part of the Authority's wider overall objective to preserve jobs, protect the economy and sustain the metals industry in Scotland, it indicated a willingness to support any purchaser who would retain the smelter and associated hydro-power scheme together, and make the necessary commitment to significant investment in the development of the Lochaber assets. The Authority's offer included the potential to guarantee the power purchase obligations of the aluminium smelter and was made known on an even-handed basis to all short-listed bidders via the vendor (Rio Tinto).
19. To deliver its objective for the site, the Authority is standing behind a portion of the power purchase obligations of the aluminium smelter operator (Alvance British Aluminium Limited (SmelterCo)) in the event that it cannot pay for the power it is contracted to take from the hydro-electric power station operator (Simec Lochaber Hydropower 2 Limited (HydroCo)). Both companies are part of the GFG Alliance (GFG) which is a collection of global businesses and investments.
20. The commercial guarantee arrangement (the Guarantee) was entered into in December 2016 by the Authority, SmelterCo and HydroCo, and guarantees over a 25 year term that the Authority will pay for a percentage of the power that SmelterCo is contracted to purchase from HydroCo in the event that SmelterCo is unable to do so.
21. The nominal value of the Authority's contingent liability on day one of the Guarantee was £586 million (i.e. the total amount of payments guaranteed by the Authority across the 25 year agreement), and is the largest industrial guarantee ever agreed by the Authority.
22. In return for the Guarantee, the Authority receives a commercial guarantee fee (the Fee) from GFG.
23. In March 2021, GFG's major providers of working capital and investment finance (Greensill Capital (UK) Limited and Greensill Capital Management Company (UK) Limited (together "Greensill")) entered administration.
24. The Authority submitted that should the Lochaber guarantee be called in and if other recovery options prove ineffective, it would have an option to take ownership of the business assets at Lochaber and trade these assets (directly or through lease arrangements) with the intent of satisfying the ongoing payment obligations under the Power Purchase Agreement (PPA) or alternatively seek to dispose of the assets through a managed sales process.
25. The Authority submitted that information within the material remained current and could negatively impact its ability to operate the assets on effective commercial terms and, potentially, inhibit any sale process to the detriment of the public purse if the information was disclosed prematurely.

The Authority's interests

26. 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.

27. The Authority acknowledged that the Commissioner had previously indicated in [Decision 144/2021](#)² 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.
28. 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.

Information disclosed during the investigation

29. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
30. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
31. The Authority identified and provided to the Commissioner copies of ten documents it considered fell within scope of the request. The documents ranged in size from four pages to 109 pages and consisted of letters, presentations and reports dating between 22 August 2016 to 23 October 2017.

Documents 6, 7, 8 and 10

32. The Authority provided to the Commissioner copies of ten documents it considered fell within the scope of the Applicant's request, with an accompanying Schedule of Documents specifying what information it considered exempt within those documents.
33. The Commissioner asked the Authority to confirm whether it had disclosed documents 6, 7, 8 and 10 to the Applicant, as it was not clear that it had.
34. The Authority explained that it did not hold a record of previous disclosure and arranged for those documents to be disclosed to the Applicant.
35. As the Authority disclosed those documents to the Applicant during the investigation and was unable to provide satisfactory evidence that it disclosed them earlier in response to the request, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA.

Information outwith scope of request

36. The Commissioner has considered in detail the terms of the Applicant's request, together with the information provided by the Authority.

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

37. The Commissioner's view is that the information on pages 37 to 41 of document 2 and part of a sentence on page 2 of document 3 fall outwith the scope of the Applicant's request, and, consequently, he has not considered that information further.
38. As the Authority solely relied upon section 33(1)(b) of FOISA to withhold some of the information on page 38 of document 2, the Commissioner will therefore not reach a finding on section 33(1)(b) in relation to this application.

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

39. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
40. 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.
41. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
42. The Authority relied upon section 30(c) to withhold information in the majority of documents. In document 10, the Authority withheld information under section 30(c) (including the source of legal advice) and it also withheld information relating to legal advice under section 36(1) (which is considered separately in the decision).

The Authority's submissions on section 30(c)

43. The Authority submitted that it was essential for it to have a productive relationship with companies like GFG, which run businesses of national and local importance to Scotland. As the Lochaber smelter is a significant employer in the local area, the Authority had a significant interest in the business through the Guarantee.
44. The Authority provided two key reasons for withholding the majority of the information under the exemption in section 30(c) of FOISA, as follows:

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

45. The Authority submitted that it was likely that external lenders will be involved in situations where it is providing guarantees to support businesses. It would be in these lenders' interests to negotiate the most generous guarantee terms possible, thereby passing risk to the Authority (which would be to the detriment of the Authority's interests were such a guarantee more likely to be called up). Disclosure would enable future lenders to form views about the Authority's likely appetite for risk and on how it takes decisions on these matters, and would allow them to use this as part of its 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

46. The Authority submitted that businesses are extremely hesitant to consider financial intervention sponsored by it, or its Agencies, due to the risk of this becoming public knowledge, as this would alert customers and suppliers to the fact that the business was utilising last resort funding to continue to trade. This, in turn, would adversely affect the business as its customers and suppliers would be less willing to deal with it due to fear of wasted costs (e.g. where the business was unable to pay for materials ordered), leading to further difficulties in trading.
47. 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.
48. 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.
49. In terms of the source of the legal advice, the Authority explained that it was under an obligation set out in the Ministerial Code to ensure that its decisions are informed by appropriate analysis of the legal considerations.
50. The Authority stated that the exemption applied because release of the information would breach the long-standing Law Officer Convention which prevents it from revealing whether Law Officers have or have not been asked to provide legal advice on any matter.
51. The Authority noted that the Ministerial Code states at paragraph 2.38 that the Authority must not divulge who provided the advice (whether it is from the Law Officers or anyone else).
52. The Authority considered that the Law Officer Convention has been given particular recognition in FOISA through section 29, subject to it being outweighed by greater considerations of public interest. The Authority submitted that breach of the Law Officer Convention itself substantially prejudices the effective conduct of public affairs.
53. Additionally, the Authority noted that the courts have found that Parliament intended real weight should be afforded to the Law Officers' Convention, and that the general considerations of good government underlining the history and nature of the convention are capable of affording weight to the interest in maintain an exemption even in the absence of evidence of particular damage (see [HM Treasury V IC \[2009\] EWHC 1811\(Admin\) \[2010\] QB 56³](#)).

³ [Microsoft Word - Cabinet Office v IC EA.2010.0031 Decision 13.09.10.doc \(publishing.service.gov.uk\)](#)

54. The Authority also submitted that revealing whether or not Law Officers had been asked to advise on this matter would encourage people to draw conclusions regarding the importance placed by government on the subject.
55. The Authority explained that this would significantly harm the effective conduct of public affairs by placing undue pressure on it and its officials in future when it is considering seeking legal advice and the suitability of who should be asked to provide that advice, in particular when considering seeking advice from the Law Officers.

The Applicant's submissions on section 30(c)

56. The Applicant noted that the plans for the alloy wheel plant at Lochaber had been scrapped by GFG Alliance in late 2020, with a planning application for a recycling plant on the same land as the alloy wheel plant submitted in May 2021.
57. The Applicant explained that he therefore did not consider that disclosure of the withheld information presented a likely or substantially prejudicial risk to the effective conduct of public affairs.
58. The Applicant stated that the Authority has provided no evidence of this risk and that it was clear to him that the Authority's change of position was an admission that the previous exemptions did not apply and that it was simply an attempt to block release of the information requested, rather than a legitimate reason for withholding the information.
59. The Applicant submitted that much of the Authority's submissions are based on the hypothetical impact of disclosure and that the public interest in transparency and accountability, particularly in the case of the deal in question, is much stronger than the public interest in maintaining the exemption.

The Commissioner's view on section 30(c)

60. Information can only be exempt under section 30(c) of FOISA if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
61. 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.
62. The Commissioner notes that the main focus of the withheld information is financial arrangements and discussions relating to a [proposed alloy wheel facility, which was shelved in November 2020](#)⁴, which were, at the date of the Authority's review response, relatively recent.
63. For example, at the date of the Authority's review response, the financial viability of the companies involved (Greensill and CFG) had changed considerably, but the Authority would still have to pay for 80% of the power that SmelterCo is contracted to purchase from HydroCo in the event that SmelterCo is unable to do so.
64. Having considered the nature and content of the withheld information, together with the Authority's submissions, the Commissioner accepts that disclosure of some of the withheld

⁴ [Lochaber alloy wheels plant dropped in favour of new £94m recycled aluminium facility | Scottish Construction Now](#)

information would be likely to cause substantial prejudice to the effective conduct of public affairs. The Commissioner cannot expand on his reasoning here, as to do so would reveal the information being withheld.

65. Consequently, the Commissioner is satisfied that the Authority was entitled to apply the exemption in section 30(c) of FOISA to the majority of the withheld information.
66. However, for some of the withheld information, the Commissioner considers that it either has been published or will be shortly, or that it is generic in nature and does not adequately relate to the ongoing commercial interests of the companies identified to the extent that section 30(c) of FOISA can be engaged.
67. Consequently, the Commissioner finds that the Authority incorrectly withheld some information under section 30(c) of FOISA. As he does not accept section 30(c) applies to that information, he is not required to consider the public interest in section 2(1)(b) of FOISA for that information.
68. The Commissioner will provide a marked-up copy of the withheld information to the Authority indicating what information he considers is not exempt under section 30(c) and which should therefore be disclosed to the Applicant. (As the Authority has now disclosed document 9 to the Applicant in unredacted form, the Commissioner will not require the Authority to take any action regarding that document.)

Public interest test

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

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

70. 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.
71. 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.
72. The Authority argued that it was of vital importance to Scotland and its people that it was able to intervene to protect jobs and the wider economy. When this involved a guarantee, such as this one, the Authority believed the public interest lay in protecting certain sensitive information to allow future interventions.
73. The Authority submitted that, ultimately, the aim of this intervention was to protect jobs, and there was no public interest in disclosing information that would jeopardise such future action.
74. 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.
75. The Authority also recognised that there is some public interest in disclosing the source of legal advice in order to promote transparency and inform public debate.

76. However, the Authority submitted that the public interest does not in this particular case outweigh the public interest in maintaining the Law Officer Convention, as disclosing the source of legal advice would not in any way add to the public's understanding of the issues that are relevant in relation to the Authority's policy position on the Lochaber smelter and related matters.

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

77. The Applicant submitted that the key question around the Lochaber smelter is whether the deal struck by the Authority with GFG Alliance was sound decision making from a taxpayer value-for-money point of view.
78. The Applicant explained that, in this context, the public interest in discovering whether that is the case is obvious: this was a multi-million financial commitment and the political and financial risks of such a decision are clear in how the rescue of companies such as Ferguson Marine, Prestwick Airport, Bifab and Dalzell Steelworks have developed.
79. The Applicant submitted that full transparency is therefore overwhelming and, without disclosure of the withheld information, there is no way for the public to establish whether the deal at Lochaber is in the public interest and there is no accountability.
80. The Applicant also explained that the history of GFG Alliance further increased the public interest in disclosure of the withheld information. The Applicant noted that GFG's recent history raised question marks about the Authority's decision to go into business with it and, while it may well have been the correct decision, it is impossible to judge this without all of the facts.

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

81. The Commissioner has taken account of all of the relevant submissions from both parties, together with the withheld information in this case. He is required to balance the public interest in disclosure of the information requested against the public interest in maintaining the exemption. The public interest, in the context of FOISA, should be considered as "something which is of serious concern and benefit to the public".
82. As rehearsed above, the Commissioner has already accepted that disclosure of the majority of the withheld information would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
83. Given the significant size of the Lochaber Smelter Guarantee and those potentially affected by the circumstances surrounding it, the Commissioner accepts that there is clear and substantial public interest in understanding the finer details of the Guarantee and discussions that the Authority had with GFG and other companies.
84. However, the Commissioner recognises that this must be carefully balanced against any impact that disclosure of the withheld information would have had – at the time when the Authority issued its review outcome – with regard to the Lochaber smelter, the Guarantee itself (underwritten by the Authority) and what the likely circumstances might be were the Guarantee to be called in.
85. The Commissioner acknowledges that, were circumstances to arise requiring the Guarantee to be called in, this would clearly impact the parties involved (including the Authority), the economy of the local area (and the wider Scottish economy) and the jobs of those individuals employed at the smelter and associated businesses, both directly and indirectly.

86. The Commissioner recognises that such a situation could lead to a number of unwanted circumstances presenting themselves, for example job losses, the requirement for a new agreement to be drawn up or entered into by the Authority, and a reduction in crucial commercial information being provided by businesses to the Authority which would inhibit the Authority's ability to take fully informed decisions and secure best value for public money. Such circumstances would clearly impact on the Authority's position with regard to its ability to effectively conduct its public affairs, and that would not be in the public interest.
87. In terms of the source of the legal advice, the Commissioner acknowledges that there is a general public interest in transparency in the conduct of public affairs and that the advice in question relates to a deal of significant public interest.
88. While the Commissioner recognises that there is some public interest in knowing when advice was sought and given, he does not accept that it follows that there is a strong public interest in disclosing who provided the advice.
89. On balance, therefore, the Commissioner is of the view that the public interest in withholding the remaining information outweighs the public interest in disclosing it.
90. The Commissioner therefore finds that the Authority was entitled to withhold the information he has found to be exempt under section 30(c) of FOISA.

Section 36(1) – confidentiality of communications

91. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.
92. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) the information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
 - (ii) the legal adviser must be acting in their professional capacity; and
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with their client.
93. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary substantially reflecting the whole.

The Authority's submissions on section 36(1)

94. The Authority explained that the withheld information (consisting of a single paragraph of text in document 10) summarises legal advice it had received as part of the presentation and consideration of options for policy actions, leading to the adoption of the Authority's legal position. The Authority stated that disclosure would therefore reveal the substance of the legal advice it had received and undermine the consideration of options.

95. The Authority submitted that disclosure of the withheld information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged up for further consideration.
96. The Authority therefore considered that all of the necessary conditions for legal advice privilege to apply are satisfied and stated that the legal advice had only been shared with limited relevant employees within the Authority and with Ernst & Young in order that they could provide further advice.

The Commissioner's view on section 36(1)

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

Public interest test

98. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintain the exemption.

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

99. The Authority recognised that there is a strong public interest in its involvement in the Lochaber smelter and it acknowledged that the disclosure of the withheld information would be likely to contribute to openness and transparency in government, which there was also a public interest in.
100. However, the Authority did not consider that those public interest arguments were sufficiently compelling to outweigh the public interest in maintaining the right to legal professional privilege in order to ensure confidentiality of communications.
101. The Authority submitted that it remains important in all cases that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that advice may be disclosed and, potentially, be taken out of context.
102. The Authority explained that, in areas like this, which are the subject of public scrutiny, an expectation that legal advice would be released would inevitably lead to the legal advice being much more circumspect and therefore less effective.
103. The Authority further submitted that there is a strong public interest in protecting the confidentiality of this information in order to ensure that it is able to discuss and take policy decisions in full possession of thorough and candid legal advice, which ensures that it can take decisions in a fully-informed legal context, having received legal advice in confidence as any other client would.

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

104. The Applicant accepted the information withheld under this exemption was likely to be legal advice, but considered that there is a strong public interest in its disclosure due to the nature of the allegations around the deal (namely that it may breach state aid rules) and because disclosure would potentially aid public understanding and debate around the issue.

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

105. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest on maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
106. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of [Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien \[2009\] EWHC 164 \(QB\)](#)⁵. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
107. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority to receive full, unhindered legal advice.
108. The Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
- the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - the passage of time is so great that disclosure cannot cause harm.
109. Having examined the withheld information, while the Commissioner accepts that the contents of the advice would be of interest to the Applicant and to the general public, he does not consider that any of the above categories would apply.
110. The Commissioner accepts that there is a public interest in the subject matter of the advice and its disclosure in terms of accountability and transparency, particularly given the significant expenditure of public money.
111. However, the Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice.
112. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to Authority, its ability to come to fully-formed decisions would be restricted, which would not be in the public interest.
113. On balance, and after careful consideration, the Commissioner does not find the public interest in disclosure of this information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
114. The Commissioner is therefore satisfied that the Authority correctly withheld this information under section 36(1) of FOISA.

⁵ [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))

Decision

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

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

However, the Authority failed to comply with section 1(1) of FOISA by disclosing documents 6, 7, 8 and 10 during the investigation and by withholding information in some documents under section 30(c) of FOISA.

The Commissioner therefore requires the Authority to disclose the information in the marked up documents by **Monday, 4 March 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

17th January 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

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

36 Confidentiality

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

47 Application for decision by Commissioner

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

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

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