



Scottish Information
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Decision Notice 137/2024

The Lochaber Smelter: communications between the Finance Committee and the Scottish Government

Applicant: The Applicant

Authority: Scottish Parliament

Case Ref: 202100629

Summary

The Applicant asked the Authority for communications between the Finance Committee and the Scottish Ministers on the subject of the Lochaber Smelter from 1 January 2015. The Authority disclosed some information, but withheld other information. The Commissioner investigated and found that the Authority had complied with FOISA in withholding the information falling within the Applicant's request.

Relevant statutory provisions

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

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

Background

1. On 18 March 2021, the Applicant made a request for information to the Authority. They asked for all communications between the Scottish Ministers (the Ministers) and the Scottish Parliament's Finance Committee on the subject of the Lochaber Smelter from 1 January 2015 onwards.

2. The Authority responded on 19 April 2021. It identified seven letters falling within the scope of the request. Five of these letters had already been published and a [link](#)¹ to these was provided. The remaining two letters (and associated correspondence) were provided, with some information redacted under various exemptions in FOISA:
 - Letter dated 17 November 2016 from Fergus Ewing MSP, Cabinet Secretary for the Rural Economy and Connectivity to Bruce Crawford MSP, Convener, Finance & Constitution Committee (Document 1 – section 33(1)(b) of FOISA)
 - Annex A - Rio Tinto Alcan Strategic Review: Lochaber Aluminium Smelter intervention by Scottish Minister dated 17 November 2016 (Document 2 – sections 30(b)(i), (ii) and 33(1)(b) of FOISA)
 - Letter dated 28 June 2019 from Fergus Ewing MSP, Cabinet Secretary for the Rural Economy and Connectivity to Bruce Crawford MSP, Convener, Finance & Constitution Committee (Document 3 - section 33(1)(b) of FOISA)
 - Lochaber Aluminium Smelter a low carbon producer of “Green Aluminium” (Document 4 - section 38(1)(b) of FOISA).
3. In addition to the above exemptions, the Authority also stated that the information received by the Finance and Constitution Committee Scottish Government was exempt under section 30(c) of FOISA.
4. On 21 April 2021, the Applicant wrote to the Authority requesting a review of its decision. They were dissatisfied with the Authority’s response because:
 - they did not agree that the exemptions applied (and explained why)
 - they considered that the public interest had not been properly carried out
 - that the public interest favoured disclosure of the information.
5. The Applicant told the Authority that they did not want any personal data, except for the names of “senior parties (such as senior government officials)” and that all other personal data could be redacted.
6. The Authority notified the Applicant of the outcome of its review on 19 May 2021. The Authority confirmed its original decision, but gave additional reasoning as to why it considered the exemptions applied.
7. Later that day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the Authority’s review because they believed that the exemptions cited by the Authority did not apply and/or that the public interest favoured disclosure of the information.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

¹ <https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/100149.aspx>

9. The Authority was notified in writing on 29 June 2021 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 on 13 July 2021 and the case was subsequently allocated to an investigating officer.
10. 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.
11. The Authority provided submissions at various points during the investigation.
12. On 13 July 2021, the Authority told the Commissioner that, after it had been notified of the application, it had asked the Ministers to reassess the sensitivity of the withheld information. The Ministers advised that they considered further information could be disclosed from Documents 2 and 3. The Authority subsequently disclosed this information to the Applicant.
13. The Applicant acknowledged this disclosure and expressed concern that the Authority appeared to be presenting the views of the Ministers as to whether information should be disclosed rather than carrying out its own independent and objective assessment.
14. During the investigation, the Authority confirmed that it wished to rely on sections 30(c) and 33(2)(a) of FOISA to withhold the information from the Applicant. This was subsequently conveyed to the Applicant by the investigating officer.
15. The Authority had also withheld a small amount information within Document 4 under section 38(1)(b) of FOISA. The Applicant's requirement for review stated that they did not want any personal data, except for the names of "senior parties (such as senior government officials)", and that all other personal data could be redacted.
16. Having reviewed the withheld information within Document 4, the Commissioner is satisfied that none of it would satisfy the Applicant's criteria. The Commissioner will therefore not consider the application of section 38(1)(b) of FOISA any further in his decision notice.

Commissioner's analysis and findings

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

Section 30(c) of FOISA

18. 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.
19. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b) of FOISA. This is a broad exemption and the Commissioner expects any Scottish 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.
20. 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. The 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.

The Authority's submissions about the exemption

21. The Authority submitted that section 30(c) of FOISA applied to all the withheld information. The Authority explained that its reasoning for withholding the information in the present case was similar to that given in another contemporaneous case (the application which resulted in the Commissioner's [Decision 102/2023²](#)).
22. The Authority's review outcome had explained the background and relationship between its Finance and Constitution Committee and the Scottish Government as the Authority believed that this was important in understanding why the exemptions applied (and why the public interest at the time of the review outcome favoured withholding all the information). In its submissions to the Commissioner, the Authority reiterated this. Much of what follows, in terms of the background and that relationship, is also set out in [Decision 102/2023](#).
23. The Authority explained that the Public Finance and Accountability (Scotland) Act 2000 (the 2000 Act) sets out the budgetary processes informing the annual Budget (Scotland) Acts. All public expenditure, including that by the Ministers for any financial year, must be authorised by the Budget Act for that year. Ultimately, the 2000 Act provides that all public expenditure must be accounted for and approved by the Authority.
24. To ensure proper scrutiny of expenditure, or financial liabilities undertaken, by the Scottish Government, and to allow a smoother budget process, agreement was reached on how that should be done. The Session 5 Budget Process Agreement between the Scottish Government and the Finance Committee was formally approved by a motion of the Authority on 8 May 2018. It sets out the terms of the agreement between the Authority (its Finance Committee in particular) and the Scottish Government on the administrative arrangements for the annual budget scrutiny process and other related budgetary matters, including contingent liabilities. The Session 5 Agreement arose from the findings of the Budget Process Review Group, established by the Finance Committee and the Scottish Government, to carry out a fundamental review of the Authority's budget process, including the process for considering Contingent Liabilities.
25. The information held by the Authority that is within the scope of this request is information shared with the Finance Committee for the purposes of considering a contingent liability, where the Minister specifically requested that the contingent liability be considered in private.
26. The Parliament's process for dealing with contingent liabilities has its origins in the Consultative Steering Group's (CSG's) [Report](#) of 1998³, on which the Authority's rules and procedures were based. Paragraph 1.35 of the Report states:

Contingent liabilities

The Westminster Parliament has established conventions to limit the ability of Ministers to enter, without informing Parliament, into agreements with outside bodies that might result in future expenditure. FIAG [The Finance Issues Advisory Group] concludes that the Scottish Parliament should make similar arrangements and recommends that the Executive must

² <https://www.foi.scot/decision-1022023>

³

https://archive2021.parliament.scot/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf

obtain authority from the Scottish Parliament before entering into any agreement that might result in subsequent spending in excess of £1 million.

27. The FIAG reported to the CSG in 2008 on “proposals for the rules, procedures, standing orders and legislation which the Scottish Parliament might be invited to adopt for handling financial issues”.

28. The section on contingent liabilities contained in the FIAG’s report is:

FIAG report: Contingent liabilities

7.1 A guarantee or indemnity given by a Minister of the Crown is a legally enforceable undertaking. And, a letter or general statement of comfort, while not necessarily giving rise to a legal obligation, may nevertheless impose a moral obligation on the Government.

7.2 At Westminster agreements have been reached between the Government and the Public Accounts Committee which has established conventions which ensure, as far as possible, that Parliament is not asked to authorise the provision of funds to meet liabilities of which it has not had reasonable notice and for which no justification has previously been provided.

7.3 Where a non-statutory liability could exceed £100,000, Parliament should be notified in accordance with the procedure agreed with the PAC. After obtaining Treasury approval, a Department which proposes to give a guarantee or indemnity must lay before the House of Commons a minute describing the amount and duration of the guarantee or indemnity and the body or bodies involved, and any other relevant information. Members of Parliament have the opportunity to raise questions and an undertaking cannot proceed until these have been answered.

7.4 FIAG has considered whether an equivalent procedure is required for Scotland in the recognition that the procedures described above relate to the procedures against the background of cash accounting systems. The Group recognise that resource accounting would mean, in future, that provision would have to be made in the accounts for liabilities likely to mature. Nevertheless, FIAG recommends there should be some constraint on the Executive’s ability to enter into such liabilities, and the Scottish Parliament may wish to consider a limit above which prior approval must be sought. It also recommends that this limit should be set considerably higher than the Westminster precedent - £1m might be reasonable.

29. The first [Budgeting Process Agreement on the Budgeting Process](#) between the Scottish Government and the Finance Committee⁴, published on 27 June 2000, puts in place the recommendations of the FIAG (and CSG) on contingent liabilities. The Parliament noted the written agreement and agreed its terms on 28 June 2000.

30. Each session, the Finance Committee and Scottish Government endorse the Written Agreement for that session. The Written Agreements have evolved over time. The Budget Process Review Group, in its 2017 report, recommended that the section in the Written Agreement on contingent liabilities be updated to provide more flexibility to the Committee in terms of scrutiny and on the thresholds and these arrangements still stand today.

31. The Written Agreement contains provisions (a) for information from a Minister to be received and considered in confidence if the Committee is satisfied with the reasons given as to why that is necessary, and (b) that neither party will disclose information that has been identified

⁴ <https://archive.scottish.parliament.uk/business/committees/historic/finance/reports-00/fi-bpa-01.htm>

as confidential without the agreement of the other party. Both conditions were agreed to and ratified by the Authority, and establish a legitimate expectation that that is how these matters will be dealt with.

32. The Authority advised the Commissioner that the Scottish Public Finance Manual (produced under the 2000 Act) provides for the accounting of contingent liabilities in the Scottish Government's annual accounts and acknowledges the status of the Written Agreement as follows:

Only contingent liabilities above the threshold of £1m, which have to be reported and authorised by the Scottish Parliament in accordance with the written agreement between the Finance Committee and the Scottish Government, are included in the consolidated annual accounts.
33. The Authority told the Commissioner that, on receipt of the information requested, it contacted the Scottish Government for their position on the potential release of the information in the letters in line with good practice set out in the [Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA](#)⁵ (Section 60 Code), and in line with the Written Agreement. At the time the letters were submitted, the Committee had agreed to the Scottish Government's request that the contents should be treated as confidential and should be considered in private session. The Scottish Government confirmed that it still considered the content of the information to be confidential.
34. The Authority argued that it was "imperative to the effective conduct of public affairs that the Scottish Government can share such communications in confidence with the Finance Committee when required in terms of the Written Agreement".
35. The Authority stated that its role is to hold the Scottish Government to account through scrutiny of its policies in the committees. In its view, it is imperative that both the Finance Committee (a group of elected representatives carrying out scrutiny on behalf of the public) and the Scottish Government adhere to the terms of the Written Agreement, including the Finance Committee's commitment not to make information publicly available where a request not to do so has previously been agreed to.
36. Although this scrutiny may take place in private session, it does so only if the Finance Committee is satisfied with the Scottish Government's explanations as to why that discussion should take place in private, and that decision and the explanations that inform it, as well as the subsequent discussions in private, are key parts of the work of the Finance Committee in holding the Scottish Government to account.
37. The Authority suggested that, should the Parliament not adhere to the terms of the Written Agreement despite the Finance Committee having previously agreed to do so, this would risk significant damage being done to the relationship and trust between the two, resulting in a real risk that the Scottish Government may be less willing to share such information in a timely and fulsome manner with the Finance Committee in the future. This, the Authority claimed, "will greatly diminish effective parliamentary scrutiny of the work of the Scottish Government".
38. The Authority commented that the Finance Committee has a significant role in scrutinising the Scottish Government's annual budget, including revenue raising and expenditure, as the

⁵ [Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA](#)

Scottish Government is accountable to the Finance Committee in relation to those matters. Furthermore, the Committee's report informs the Parliament's scrutiny of the Scottish Government's annual budget.

39. In support of its use of the exemption under section 30(c) of FOISA, the Authority noted the decision of the Commissioner in relation to applications that relate to the use of this exemption. [Decision 130/2017](#)⁶ refers to the fact that the Commissioner accepts that public authorities need to concentrate on the potential impact that disclosure may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information.
40. In the Authority's view, should it not adhere to the terms of the Agreement, despite the Finance Committee having previously agreed to do so, there was and is a real risk of significant damage being done to the relationship between the two, resulting in the risk that the Government may be less willing to share such information in a timely manner with the Finance Committee in the future which is necessary for effective parliamentary scrutiny. It also may increase the risk that it is now seen to be more acceptable for one of the parties to the agreement (which mainly relates to the process for annual budget scrutiny) to override other aspects of it.

The Applicant's view

41. Over the course of the investigation, the Applicant provided several arguments in respect of their case. The Commissioner has considered these in full and has summarised them below.
42. The Applicant referred to [an article](#)⁷ that they said provided useful and relevant background. The Applicant said that "a key public argument for full disclosure is whether the Parliament's finance committee were provided complete and accurate information about the financial guarantee."
43. The Applicant also commented that it was of public interest that "two of the parties to the financial guarantee relationship (the GFG Alliance, Greensill Capital) are currently being investigated by the Serious Fraud Office (the Lochaber deal is not specifically mentioned by the SFO but the Lochaber deal contains unusual and complex arrangements)".
44. The Applicant commented that the Commissioner's [Decision 144/2021](#)⁸ had "a very strong relevance" to their case." (In this decision, the Commissioner did not accept that the Ministers had demonstrated substantial prejudice and decided that section 33(1)(b) of FOISA was not correctly applied to the withheld gross liability figure.)
45. The Applicant suggested that the information due to be disclosed as a result of Decision 144/2021 would very likely be included in the redacted documents of the present application. The Applicant also said that the comments from the Commissioner about the Ministers being unable to demonstrate substantial prejudice would, apply, in this case, to the Authority. The Applicant supplied a link to a [media article](#)⁹ relating to Decision 144/2021.
46. The Applicant added that an aspect of their requirement for review had been ignored in the Authority's review response. The Applicant had told the Authority that "two of the parties to the Lochaber Smelter agreement ... are under investigation for suspected fraud, fraudulent

⁶ <https://www.foi.scot/decision-1302017>

⁷ <https://www.reuters.com/article/uk-scotland-government-gupta-exclusive-idUKKCN1T7006>

⁸ <https://www.itspublicknowledge.info/decision-1442021>

⁹ <https://www.ft.com/content/4a332e59-27bc-4f6c-9b93-f201c595b38f>

trading and money laundering. I believe a much high bar must apply in this case if information is withheld claiming commercial confidentiality. This is in order to prevent the parties concerned hiding illegal activity under the guise of commercial confidentiality.”

47. The Applicant said that they were also “particularly interested in references to Greensill Capital” which they believed were included in the redacted documents. The Applicant further noted that it was “already in the public domain that Greensill Capital (now in administration) were/are part of the Lochaber smelter financing arrangements.”
48. The Applicant disagreed with the Authority’s claim that if the Scottish Government failed to adhere to the terms of the agreement by not sharing information with the Scottish Parliament, one option available to the Parliament would be not to approve the Scottish budget. The Applicant commented that the argument’s logic was difficult to follow and was “overly-dramatic”. The Applicant submitted that the subject of the request had “absolutely no connection whatsoever with the annual (or otherwise) budget-setting process of the parliament. The association with the budget appears to be a false shield used to prevent disclosure”.
49. The Applicant explained that their request had nothing whatsoever to do with the Scottish Government’s annual (or otherwise) budget for schools, hospitals, roads, etc., but related to information submitted by the Scottish Government to the Authority’s Finance Committee in order to obtain approval “for a specific ad hoc project, with a private company, creating a contingent liability on public funds of up to £586m”.
50. The Applicant described this project as “highly-unusual, highly-complex and extremely high-value” and added that a government does not normally engage in this specific type of project with private companies and such projects must be “subject to full public scrutiny”.
51. The Applicant also explained their belief that at least some of the withheld information was already in the public domain (at the time of the request). This included information about the security the Scottish Government have obtained over the assets of member companies of the GFG Alliance in return for entering into the guarantee.
52. The Applicant also provided a copy of a response to another information request (from another requester) in which the requester asked for details of the securities the Scottish Government hold in relation to the Lochaber guarantee (i.e. the same information that is withheld in this request). In that case, the Scottish Government disclosed the information to the requester citing that most of the information was already in the public domain.

The Commissioner’s conclusions on section 30(c)

53. The information which is the subject of this investigation was provided to the Finance Committee in terms of the Written Agreement, which sets out an understanding between the MSPs who sit on the Committee and the Scottish Government on the administrative arrangements for the annual budget process and other related budgetary matters, including in relation to contingent liabilities.
54. The Commissioner accepts that, were the Authority to disclose the information, contrary to the terms of the Written Agreement, and despite the Finance Committee having previously agreed not to disclose it, it would risk significant damage being done to the relationship between the Authority and the Scottish Government, resulting in a real risk that the Scottish Government may be less willing to share such information in a timely and fulsome manner with the Finance Committee in the future.

55. While the Written Agreement may not have a statutory legal basis, it is the basis on which the information was provided to the Authority by the Scottish Government, and as such is more akin to a convention. As noted elsewhere, the Authority is not the only parliament which has similar agreements in order to ensure that the work of the executive can be scrutinised effectively by elected representatives.
56. The Commissioner acknowledges that, if the information were to be disclosed contrary to the Written Agreement, this would diminish effective parliamentary scrutiny of the Scottish Government.
57. In the circumstances, the Commissioner is satisfied that disclosure would have the effects claimed by the Authority; if the information were disclosed, contrary to the Written Agreement, disclosure would negatively impact the Scottish Government's trust in the Finance Committee and consequent willingness to provide information. This would clearly diminish effective parliamentary scrutiny of the budgetary process and would, or would be likely to, prejudice the effective conduct of public affairs.
58. The Commissioner is therefore satisfied that the exemption in section 30(c) of FOISA applied to all the information withheld (except that withheld under section 38(1)(b)) by the Authority at the time of the review.
59. As rehearsed earlier, the Authority, during the investigation, disclosed further information in Documents 2 and 3 to the Applicant after it had asked the Ministers, following being notified of the application to the Commissioner, to reassess the sensitivity of the withheld information.
60. The Authority explained that it had, in line with paragraph 7 of the Section 60 Code, consulted with the Ministers on 26 March 2021 regarding disclosure of the information requested on receipt of the request. In response, the Ministers advised that they were "unable" to provide all of the requested information, citing the exemptions under sections 30(b), 33(1)(b) and 38(1)(b) of FOISA.
61. The Authority adhered to this position in response to the Applicant's requirement for review and explained that it was unable to provide the information requested, having regard to the importance of effective Parliamentary scrutiny of the Scottish Government's budgetary proposals, and the Written Agreement.
62. In the circumstances, the Commissioner accepts, on balance, that the information disclosed by the Authority during the investigation was properly withheld at the time of the review outcome.

The public interest test - section 30(c)

63. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
64. The public interest is not defined in FOISA, but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

The Applicant's submissions about the public interest

65. The Applicant provided detailed public interest arguments to the Commissioner, which he has fully considered but will not fully reproduce here.
66. The Applicant submitted that there was a public interest in ensuring the Finance Committee was provided with complete and accurate information by the Scottish Government prior to approving the contingent liability. Disclosure would show whether the documents provided to the Finance Committee were accurate at the time of presentation “and presented without intention to mislead or other bias” and, in particular, that the Finance Committee was presented with a clear and full understanding of project risks.
67. The Applicant also argued that there was a public interest in ensuring that the Finance Committee provided effective independent scrutiny prior to approving any contingent liability. Disclosure would reveal the extent of the Finance Committee’s scrutiny of the agreement and its suitability (or otherwise) for evaluating high-value, long-term, highly-complex financial arrangements
68. Similarly, there was a public interest “in broad public scrutiny” to increase the quality of the scrutiny over that achievable by a small number of politicians and disclosing the information would allow a much larger and, in their view, more skilled population to scrutinise the agreement, thus increasing public engagement, improving transparency and improving accountability.

The Authority's submissions about the public interest

69. The Authority agreed that openness and transparency around the expenditure of public funds are in the public interest. In its view, the Written Agreement respects that principle. However, it argued that there are occasions where disclosure could impact adversely on the public interest, and this included the arrangements for contingent liabilities. It was, the Authority said, very much in the interests of the public that the parties to the Written Agreement can collaborate, deal openly with each other and strictly observe the terms of the Agreement.
70. The Authority argued that it is imperative that both the Finance Committee and the Scottish Government adhere to the terms of the Written Agreement, including the process for considering contingent liabilities and the Finance Committee’s commitment not to make information publicly available where it has agreed to a Government request to keep that information private.
71. Should the Authority not adhere to the terms of the Agreement, despite the Finance Committee having previously agreed to do so, there is a real risk of significant damage being done to the relationship between the two, resulting in the risk that the Government may be less willing to share such information in a timely manner with the Finance Committee in the future; such sharing of information is necessary for effective parliamentary scrutiny. Disclosure may also increase the risk that it is now seen to be more acceptable for one of the parties to the Written Agreement (which mainly relates to the process for annual budget scrutiny) to override other aspects of it.

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

72. The Commissioner accepts that there is a general public interest in ensuring that information is accessible. The Commissioner acknowledges that the Finance Committee has a significant role in scrutinising the Scottish Government’s annual budget, including revenue

raising and expenditure, as the Scottish Government is accountable to the Committee in relation to those matters. There is a significant public interest in such scrutiny, especially as the Finance Committee's report informs the Parliament's scrutiny of the Scottish Government's annual budget. Similarly, there is a public interest in scrutiny of the Authority and its relationship with the Ministers.

73. As stated in many previous decisions, there is a significant public interest in the transparency and accountability of the use of public funds. As the Applicant has argued, there is a public interest in the scrutiny of the Authority's conduct through its Finance Committee both in general and in respect of this particular information. The Applicant is correct to point to the public interest in information that increases scrutiny of such high value financial decisions.
74. The Commissioner also acknowledges that some weight must also be assigned to the public interest in the success of the Scottish Government's investing of public money on commercial terms.
75. As stated in many previous decisions, the Commissioner will consider all applications to him on a case-by-case basis. He has done so here, taking into account all the circumstances drawn to his attention by both applicant and authority.
76. Both the Applicant and the Authority agree in the value of scrutiny of financial decisions in the context of the Scottish government, though they disagree in how that scrutiny is best accomplished in this instance. The Commissioner has considered these public interest arguments carefully and he must do so in light of the prevailing circumstances at the time of this request and the review – not at the time of the Applicant's application or at the time of this decision notice.
77. In this instance, the Authority has disclosed some information. The Applicant is aware of the information at issue (each document is described) and there are redactions within documents. There is therefore a degree of scrutiny available, though not to the extent wished for by the Applicant.
78. The Commissioner accepts that there is a public interest in the effective conduct of public affairs which involves ensuring that one public authority (in this case the Ministers) can share communications in confidence – where justified – in terms of an existing Agreement. The sharing of such information does favour the public interest in facilitating the Scottish Parliament's role in scrutinising the commercial terms of an investment. There is a high public interest in such facilitating such scrutiny. The Commissioner finds that in this instance there is a greater public interest lies in ensuring that the Committee remains able to receive complete information that facilitates its scrutiny role.
79. In all the circumstances, having carefully weighed the public interest arguments in favour of disclosure against those in favour of maintaining the exemption, the Commissioner concludes, on balance, that the public interest in maintaining the exemption outweighs the public interest in disclosing the remaining withheld information. The Commissioner therefore finds that the Authority was entitled to withhold the information under section 30(c) of FOISA.
80. Given that the Commissioner has accepted that the withheld information was correctly withheld by the Authority in terms of section 30(c) of FOISA, the Commissioner will not go on to consider whether the information would also be exempt under any other exemption.

Decision

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

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.

David Hamilton
Scottish Information Commissioner
20 June 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

2 Effect of exemptions

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

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

47 Application for decision by Commissioner

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

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

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).