Scottish Information Commissioner
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Decision Notice 273/2026

Kinlochleven Hydro-Electric Plant

Authority: Scottish Ministers
Case Ref: 202201339

Summary

The Applicant asked the Authority for correspondence with GFG Alliance in relation to the Kinlochleven hydro-electric plant. The Authority withheld certain information under the exemptions in sections 33(1)(b) and 38(1)(b) of FOISA. The Commissioner investigated and found that the Authority wrongly withheld some of the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 33(1)(b) (Commercial interests and the economy); 38(1)(b), (2A), (5) (definitions of "the data protection principles", "data subject", "personal data" and "processing", "the UK GDPR") and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner).

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

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

Background

1. On 15 August 2022, the Applicant made a request for information to the Authority. They asked for "all correspondence between the Authority and the companies of the GFG Alliance on the subject of the Kinlochleven hydro-electric plant. The correspondence can be limited to that to / from Ministers and that to/ from the Economic Development directorate."

2. The Authority responded on 12 September 2022. The Authority provided four letters between a minister (at the time) and the chief executive of SIMEC (also at the time) which had been redacted for release. The Authority explained in its response that it considered parts of the letters, if disclosed, would, or would be likely to, prejudice substantially the commercial interests of GFG Alliance. The Authority stated the public interest in upholding the exemption outweighed that in disclosure, as it considered there to be a greater public interest in protecting the commercial interests of companies who entered into contracts with the Authority, to ensure that the Authority was always able to obtain the best value for public money. The Authority also withheld some names and contact details as it considered these to be third party personal data, disclosure of which would contravene the data protection principles.

3. On 15 September 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because "the information provided was incomplete and the FOISA exemptions did not apply".

4. The Authority notified the Applicant of the outcome of its review on 23 November 2022. The Authority upheld its previous response, with modifications. The Authority disclosed some of the information it had previously withheld on the basis that it was commercially sensitive. It continued to rely on the exemption in section 33(1)(b) for withholding other information. The Authority also upheld its decision to rely on section 38(1)(b) for withholding some information.

5. On 24 November 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not consider the exemptions in FOISA which had been relied upon by the Authority to apply and, in any event, he considered the public interest to favour 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. On 12 January 2023, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information. 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 application of sections 33(1)(b) and 38(1)(b), but also to whether, given the passage of time, the Authority would consider a change of position on the withheld information.

9. In response the Authority released almost all of the previously withheld information, stating that the passage of time had decreased the sensitivity. The Authority continued to rely on the exemption in section 38(1)(b) to withhold one piece of information.

10. During the investigation, the Applicant confirmed that he had received full disclosure from the Authority, but that he required a formal Decision Notice because there appeared to be no valid reason for the information being withheld originally.

Commissioner's analysis and findings

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

Section 33(1)(b) – Commercial interests and the economy

12. Section 33(1)(b) provides that information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person. This exemption is subject to the public interest test in section 2(1)(b).

13. There are several elements a Scottish public authority needs to demonstrate are present when relying on this exemption. It needs to establish:

    I. whose commercial interests would (or would be likely to) be harmed by disclosure;

    II. the nature of those commercial interests; and

    III. how those interests would (or would be likely to) be prejudiced substantially by disclosure.

14. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

The Authority's submissions

15. The Authority provided limited submissions in respect of this exemption because of its change of position. However, the current Decision Notice must consider the circumstances prevailing at the time of the original request (2022) and whether the explanation supplied in the review outcome issued in 2022 was appropriate.

16. The Authority advised in its review outcome issued on 23 November 2022 that its application of 33(1)(b) should be upheld, but that some further information could be disclosed. The Authority stated that full disclosure could negatively impact the business and potentially damage negotiations and day to day operations.

17. The Authority commented that it had a duty of care to the handling of commercially sensitive material, particularly where disclosure could negatively impact the wider global refinancing activities of the GFG Alliance.

18. The Authority considered the hydro-electric plant to be of importance to the West Highlands economy and to the employees working there.

19. In its submissions in response to the Commissioner, the Authority conceded that the application of section 33(1)(b) was not the most appropriate exemption to apply at any stage of this request.

The Applicant's submissions

20. The Applicant did not agree that any information should be withheld and advised that the exemptions cited were not applicable. As mentioned above, whilst the Applicant confirmed receipt of the information, which was disclosed to him on 25 August 2026, he confirmed that he still required a Decision Notice.

21. The Applicant advised that there had been no valid reason for the information to be withheld.

22. Having received a copy of the withheld information the Applicant stated that the 2018 legislative amendment to the Renewables Obligation (Scotland) Order conferred a clear commercial benefit on GFG Alliance, as confirmed by the Authority's own modelling and ministerial correspondence. The Applicant commented that there was no evidence that any other operator benefited from the change. The Applicant added that the amendment appeared to have been driven by direct lobbying from GFG Alliance and implemented in a manner that aligned closely with GFG's commercial interests.

23. The Applicant further posited that, given the subsequent sale of the Kinlochleven hydro asset, the amendment likely increased its market value and thus sale proceeds. These factors significantly heightened the public interest in transparency and undermined any claim that disclosure of related information would prejudice commercial interests or the effective conduct of public affairs at the time of request.

The Commissioner's view

24. The Commissioner notes that the withheld information comprised correspondence between a government minister and the Chief Executive of SIMEC, which owns and operates the Kinlochleven hydro-electric plant (Documents 1-4), as part of a wider consultation occurring regarding a change to The Renewables Obligation (Scotland) Order 2009[1]. The consultation process included 11 different organisations, of which GFG Alliance were one. The Commissioner would highlight this consultation process to the Applicant; it may be of interest.

25. For context, the Commissioner understands that the Renewables Obligation Scheme[2] was introduced in 2002 and places a legal annual renewable energy production "obligation" on energy suppliers, by requiring them to purchase Renewable Obligation Certificates (ROCs). Eligible generators receive one ROC for every megawatt hour (MWh) of renewable energy produced subject to audit and accreditation criteria with Ofgem, who also issue the ROCs. ROCs are issued based on the net renewable energy produced.

26. The Commissioner notes that The Renewables Obligation (Scotland) Amendment Order 2018[3] was published, along with the responses from the organisations involved in the consultation process[4]. This was all available online prior to the request made by the Applicant in this case in 2022.

27. To better understand how this correspondence might be considered commercially sensitive in 2022, the Commissioner has considered what other information was already publicly available. He would draw the Authority's attention to the announcement[5] by GFG Alliance in 2020, where the Kinlochleven capacity was published.

[1] https://www.legislation.gov.uk/ssi/2009/140/contents

[2] https://www.businessenergydeals.co.uk/blog/renewables-obligation-scheme/

[3] https://www.legislation.gov.uk/sdsi/2018/9780111039687/pdfs/sdsipn_9780111039687_en.pdf

[4] https://consult.gov.scot/energy-markets/renewables-obligation/consultation/published_select_respondent

[5] https://www.gfgalliance.com/media-release/simec-highland-hydro-station-produces-enough-energy-to-power-a-city-the-size-of-inverness/

28. The Commissioner also notes that Kinlochleven Hydro-Electric[6] plant has a long and well documented history[7]. Online sources discuss[8] the technical workings of the generator at that site, which demonstrates that the workings of this plant, its limitations and environmental operational requirements are well known and publicly available, further reducing the veracity of a commercial sensitivity argument.

29. The Authority has now disclosed the information to the Applicant, having conceded that section 33(1)(b) would not have been applicable to the withheld information at any point. The Commissioner considers that the withheld information could have been disclosed at the time of the request as he is not satisfied that the Authority provided sufficient evidence that disclosure would have caused harm to the commercial interests of either itself or the GFG Alliance.

30. For the reasons set out above, and because the Authority conceded an error, the Commissioner does not accept that the Authority demonstrated substantial prejudice in this case, and he must find that section 33(1)(b) was not correctly applied to the withheld information. In light of this finding, the Commissioner need not go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Section 38(1)(b) – Personal information

31. Section 38(1)(b) read in conjunction with section 38(2A) (a) or (b), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.

32. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

33. To rely on this exemption, the Authority must show that the withheld information is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles in Article 5(1) of the UK GDPR.

34. In its submissions in response to the Commissioner, the Authority acknowledged that it had not been entitled to rely on the exemption in section 38(1)(b) for information that it had subsequently disclosed to the Applicant. However, it noted that it continued to maintain its position in respect of a mobile phone number that it continued to withhold.

35. As mentioned above, while the Commissioner notes the concession on the part of the Authority that it was not entitled to rely on the exemption in section 38(1)(b) for information it has since disclosed to the Applicant, he must consider the circumstances prevailing at the time of the Authority's response to the Applicant's requirement for review.

Is the withheld information personal data?

36. The first question the Commissioner must address is whether the information is personal data for the purposes of section 3(2) of the DPA 2018. The two main elements of personal data are that:

[6] https://portal.historicenvironment.scot/apex/f?p=1505:300:::::VIEWTYPE,VIEWREF:designation,LB51834
[7] https://portal.historicenvironment.scot/apex/f?p=1505:300:::::VIEWTYPE,VIEWREF:designation,LB51833
[8] https://www.esru.strath.ac.uk/EandE/Web_sites/18-19/Kinlochleven/futureenergylocalgeneration.html

- the information must “relate to” a living person; and
- the living individual must be identifiable.

37. Information will “relate to” a person if it is about them, linked to them, has biographical significant for them, is used to inform decisions affecting them or has them as its main focus.

38. An “identifiable living individual” is one who can be identified, directly or indirectly, by reference to an identifier such as a name, an identification number, location data or an online identifier, or one or more factors specific to the individual (see section 3(3) of the DPA 2018).

39. Given the terms of the request and having considered the withheld information, the Commissioner is satisfied that the withheld information is personal data: the names of employees of both the Authority and GFG Alliance, along with the signature of one individual and an email address. There is also a work mobile phone number, which by itself would not lead to a data subject being identifiable. However, as this was included within the same document as identified the name and job title of the person to whom it belonged, this information, taken together with the mobile number, would have allowed for the identification of the individual concerned.

Would disclosure contravene one of the data protection principles?

40. The Commissioner must now consider whether disclosing this personal information would breach the first data protection principle.

41. The Authority argued that disclosure of the data it was continuing to withhold would breach Article 5(1)(a) of the UK GDPR, which requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject".

42. "Processing" of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available. The definition therefore covers disclosure of information into the public domain in response to a FOISA request.

43. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.

44. The Authority considers that condition (f) in Article 6(1) is the only condition that could be applicable in the circumstances of this case.

Condition (f) – legitimate interests

45. Condition (f) states that processing shall be lawful if it “is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data...”

46. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.

47. The three tests which must be fulfilled before Article 6(1)(f) can be relied on are as follows:

    I. does the Applicant have a legitimate interest in the personal data?

II. if so, would the disclosure of the personal data be necessary to achieve that legitimate interest?

III. even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?

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

48. The Applicant advised that their legitimate interest was in the names of senior officials involved, which was included in the data they received. The Applicant advised that they had no interest in junior officials or contact details.

49. In 2022 information in four documents was disclosed. In document (i), section 38(1)(b) was applied to a signature and two names, document (ii) had no section 38 redactions, document (iii) had section 38(1)(b) applied to the same signature, a direct email address and mobile phone number. Document (iv) had no section 38 redactions. The signature and email address were subsequently disclosed and only the mobile phone number continued to be withheld.

50. On the basis of the seniority of the individuals whose names were included in the withheld information the Commissioner considers that the Applicant did have a legitimate interest in obtaining these personal data. However, as these names have since been disclosed and the Authority has conceded that it was not entitled to rely on the exemption for withholding it, he need not consider this further. In the circumstances, he finds that it was not entitled to apply the exemption.

51. The test considers whether the Applicant has a legitimate interest in receiving the mobile phone number. As mentioned above, the Authority conceded that it was not entitled to rely on the exemption in section 38(1)(b) for withholding the names, email address and signature, but remained clear that it still applied to the mobile phone number.

52. The Authority also advised that it was unaware of the Applicant having a legitimate interest in the phone number.

53. As the Applicant has explained that his legitimate interest is in obtaining the names of senior officials, the Commissioner is satisfied that this does not extend to the mobile phone number that continues to be withheld.

54. As the Commissioner has concluded that the Applicant does not have a legitimate interest in obtaining the personal data that continues to be withheld, he finds that condition (f) of Article 6(1) of the GDPR cannot be satisfied. Accordingly, he accepts that making the personal data available would be unlawful.

55. Given that the Commissioner has found that the processing (i.e. making the information available, in response to the Applicant's request) would be unlawful, he is not required to go on to consider separately whether disclosure of the withheld personal data in question would be necessary to fulfil any legitimate interest, or consider the data subject's interests or fundamental rights and freedoms, and balance them against any legitimate interest in disclosure.

56. In all the circumstances of the case, in the absence of a condition in Article 6(1) of the GDPR being met, the Commissioner must conclude that making the withheld personal data in question available would be unlawful and would breach the data protection principle in Article

5(1)(a) of the GDPR. Consequently, he is satisfied that disclosure of the mobile phone number is not permitted by section 38(1)(b) of FOISA.

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 correctly withholding some information under section 38(1)(b) of FOISA, the Authority complied with Part 1 in relation to the mobile phone number.

The Commissioner also finds that the Authority failed to comply with Part 1 of FOISA by incorrectly withholding information under sections 33(1)(b) and 38(1)(b).

Given that the Applicant has now received all of the information (apart from the mobile phone number, which the Commissioner is satisfied is exempt from disclosure and properly withheld), the Commissioner does not require the Authority to take any action in respect of these failures, in response to the Applicant's application.

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.

Euan McCulloch
Head of Enforcement

12 November 2026