

Decision Notice 144/2021

Lochaber Hydro Plant/Aluminium Smelter – Scottish Government guarantee

Applicant: The Applicant

Public authority: the Scottish Ministers

Case Ref: 202000634



Scottish Information
Commissioner

Summary

The Ministers were asked for information on their guarantee in respect of the Lochaber hydro plant and aluminium smelter. They disclosed some information, withholding the remainder. After a review, the Applicant remained unhappy that the Ministers had withheld the amount of the total gross liability under the guarantee, considered harmful to various commercial interests. The Commissioner did not accept that the Ministers were entitled to withhold this information and required them to disclose it to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interest and the economy)

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 19 February 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was:
 - i) The size of the total gross liability of the Scottish Government under the 25-year financial guarantee relating to the hydro plant and aluminium smelter at Lochaber, entered into in December 2016.
 - ii) The methodology used to value the asset at the time of the agreement in 2016/17.
 - iii) Documents and correspondence drawn up or sent as part of the Scottish Government's [i.e. the Ministers'] due diligence before entering into this guarantee.
2. For part ii), the Ministers sought clarification (24 February 2020), which the Applicant provided on 3 March 2020.
3. The Ministers responded to the whole request on 20 March 2020, disclosing information for parts ii) and iii) but withholding the information for part i), citing reasons of commercial confidentiality.
4. On 26 April 2020, the Applicant wrote to the Ministers requesting a review of their response to part i). Given the amount of taxpayers' money involved, he believed the public interest overrode any argument of commercial confidentiality.
5. The Ministers notified the Applicant of the outcome of their review 26 May 2020, upholding their decision to withhold the information covered by part i) as they considered the exemptions in section 33(1)(b) and 33(2)(b) of FOISA (Commercial interests and the economy) to apply. They provided additional detail on their reasons for claiming the exemptions.
6. On 13 June 2020, the Applicant wrote to the Commissioner, applying for a decision on part i) of their request, in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers review because he believed the public interest in knowing the taxpayers' potential economic exposure outweighed any commercial interest in withholding the total gross liability figure.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
8. On 4 August 2020, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant: they did so and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to provide any comments they wished to make on this application and, additionally, to answer specific questions. The Ministers responded, and additional submissions were obtained during the investigation. The Commissioner notes that during the course of submissions, the Ministers expressly stated that they no longer wished to rely on section 33(2)(b), and he has therefore only considered the remaining exemption argued by the Ministers, namely section 33(1)(b) of FOISA.

Commissioner's analysis and findings

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

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

11. The Ministers submitted that the withheld information was exempt from disclosure under section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is set out in full in Appendix 1. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
12. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
 - (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.
13. In order to evidence that this exemption is engaged, an authority has to show that disclosure of the information would, or would be likely to, be the catalyst that would cause the substantial prejudice to a commercial interest. The prejudice must be substantial, in other words of real and demonstrable significance.
14. The Applicant submitted that the taxpayers' potential economic "exposure" here outweighed any commercial interest in withholding the total gross liability figure.
15. The Commissioner is unable in this decision to discuss the precise detail of much of the submissions: he must be careful not to disclose the withheld information in his reasoning, or anything which would lead to the withheld information being confirmed or otherwise

discovered. This restriction limits the level of detail he can give to justify his conclusion. (This consideration has been acknowledged by the courts. In the case of *Scottish Ministers v Scottish Information Commissioner (William Alexander's Application)* [2006] CSIH 8¹, the Court of Session commented that, in giving reasons, the Commissioner is necessarily restrained by the need to avoid disclosing information which ought not to be disclosed.)

16. The Ministers stated that the figure in question was not in the public domain, despite press and public speculation about it. They submitted that there were just unconfirmed reports, in effect “guesses”.
17. The Ministers also identified several commercial interests here, specifically (i) the Ministers themselves and (ii) GFG Alliance and its constituent entities operating the smelter and hydro plant. They also referred to Greensill Capital. They explained the nature and composition of the guarantee and the liabilities it was designed to underwrite.
18. It is certainly apparent that GFG Alliance and its constituent entities are operating in a highly competitive commercial market. The guarantee relates to those commercial operations and the Commissioner is satisfied that they have commercial interests in this area. He is not, however, satisfied that the same can be said of the Ministers themselves.
19. The Ministers do not, in general, operate in a commercial environment and the Commissioner does not consider them to be doing so simply because they are providing funding to, or guaranteeing the liabilities of, business. They do not undertake such activities as participants in the market with the businesses concerned, in pursuit of profit, but rather to promote the economic and social well-being of the country, or parts of it, in furtherance of the wider public good. Nothing in the submissions offered here persuades the Commissioner that the Ministers interests should be regarded as specially “commercial” here: there might be prejudice to the public purse if the guarantee were to be called up, and disclosure might (although the Commissioner considers this less likely) prejudice the negotiation of future guarantees, but neither of these considerations suggests an interest that should properly be considered commercial (as opposed to more widely economic, or social).
20. The Commissioner will now consider how the commercial interests identified in paragraph 18 above would, or would be likely to, be prejudiced substantially by disclosure of the withheld information under consideration here.
21. On the question of harm, the Ministers submitted that the total gross liability could be used to the disadvantage of the operators of the hydro plant and smelter. The Ministers stated that this figure could be used, in conjunction with other information already in the public domain (or at least in the hands of competitors and customers) to calculate commercially-sensitive information relating to the operators’ costs and pricing. At the same time, however, they submitted that disclosure of the gross liability figure, without a full breakdown of the underlying figures (which would generally be considered confidential), would be commercially misleading. While the Ministers (and, apparently, the operators) were clearly concerned that the withheld information might be deconstructed into commercially-valuable constituent parts, and while much detail was provided on the guarantee and related financial arrangements and business operations, it was not explained how this might actually be achieved without resorting to a degree of speculation.

¹ <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

22. From the submissions received, the Commissioner is not satisfied that disclosure of the withheld information the Applicant is seeking, combined with publicly-available information or even the expert knowledge of competitors in the field, would allow identification (or calculation) of the essential elements of the operators' cost and pricing structures. The Ministers have not explained adequately how this might be done.
23. A further harm envisaged by the Minister related to the operators' relationship with lenders in future. They submitted that lenders and others, with the guarantee figure, could make a reasonable estimate of the GFG's credit rating when the guarantee was given, thus placing lenders at an advantage in future loan negotiations.
24. The guarantee has been in place since late 2016, well over 3 years before the request for information was made. Even if GFG's credit rating as at 2016 could be arrived at readily if the withheld information were to be disclosed (and, again, it is not clear how), it does not seem in any way likely that current, never mind future, potential lenders would place significant weight on any appraisal of a business's credit-worthiness made several years previously. In safeguarding substantial lending, it must be presumed that they would rely on more current intelligence and research.
25. The Ministers have also suggested that the gross liability figure could be commercially misleading in isolation. While this statement appears somewhat at odds with the claim that the figure is also of considerable commercial value, it is always open to the Ministers to explain that the figure is underpinned by much important detail, without necessarily revealing what that detail is and disclosing anything sensitive. In any case, as the Commissioner has said on more than one occasion in the past, potential to mislead is not – by itself – a basis for finding substantial prejudice.
26. For the reasons set out above, the Commissioner does not accept that the Ministers have demonstrated substantial prejudice in this case and he must find that section 33(1)(b) was not correctly applied to the withheld gross liability figure. In light of this finding, the Commissioner need not go on to consider the public interest test in section 2(1)(b) of FOISA.
27. The Commissioner now requires the Ministers to disclose the withheld information to the Applicant, by the date stated below.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds section 33(1) of FOISA was misapplied to the withheld information, with the result that the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to disclose the withheld information, by **16 November 2021**.

Appeal

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

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

29 September 2021

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.

...

- (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.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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