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Richard Leonard MSP
Convener
Public Audit Committee
Room T3.60
The Scottish Parliament
EDINBURGH EH99 1SP

4 April 2025

Dear Mr Leonard

Strategic Commercial Assets: Transparency Review

Please find our Report of Findings and Recommendations of the Strategic Commercial Assets Transparency Review attached at Annex A to this letter.

Thank you for your letter of 17 March relating to the information pack we shared with the Committee on 7 February. We note the Committee's feedback on the level of redactions applied to the information pack and welcome the opportunity at the Committee session scheduled for 21 May to discuss our approach with you. In the meantime, we offer some preliminary responses to your key points below.

The Committee asks if the Scottish Government sought any further clarification or raised concerns with FMI or other consultants regarding redactions?

The Scottish Government model contract terms and conditions were adopted in contracting First Marine International (FMI) which include conditions stipulating that all information will be treated as commercial in confidence by the parties. Exceptions to that condition relate only to information required by law, regulation or judicial order, such as in response to a Freedom of Information (Scotland) 2002 (FOISA) request, which includes provisions to withhold information through application of exemptions.

In addition, FMI applied a disclaimer to the report which requires their consent for the report, or information contained within the report, to be shared beyond the parties to the contract. FMI were not willing to prejudice their commercial interests nor those of Ferguson Marine and did not consent to the release of information contained within their report deemed by them to be commercially sensitive.

The methodology we applied to the material, before publication, includes a panel of officials who reviewed the material line-by-line to strike the right balance between transparency and the public interest with the protection of commercial interests, personal information, and legal

rights. We are content that the panel's judgement in relation to the redactions applied is appropriate.

Information was redacted from the reports prepared by FMI and Teneo where it was considered that disclosure would (or would be likely to) substantially prejudice commercial interests.

The Committee would welcome clarification on the broader due diligence process undertaken by the Scottish Government when selecting external consultants. This would help the Committee better understand how the Scottish Government ensures that consultants provide reports of adequate transparency.

Contracts for the provision of commercial advice from external advisors are tendered in accordance with the Public Contracts (Scotland) Regulations 2015 which include commitments to transparency. The due diligence of suppliers is completed as part of the tendering exercise.

Your sincerely,

GREGOR IRWIN

Director-General Economy
Scottish Government

**Report of Findings and Recommendations
Strategic Commercial Assets Division
Transparency Review**

Transparency Review of the Strategic Commercial Assets Division

A Report of Findings and Recommendations

APRIL 2025

Chapter 1 – Background

Introduction

1. This report concerns the transparency of the work of the Scottish Government's Strategic Commercial Assets Division (SCAD). It recommends to Scottish Ministers a series of steps to improve transparency whilst protecting commercial interests.
2. SCAD was established in July 2022 to ensure the effective governance and stewardship of commercial assets where the government has a financial stake or exposure. The division is responsible for the government's shareholdings in Ferguson Marine (Port Glasgow) Limited (a non-departmental public body) and Glasgow Prestwick Airport (a public corporation). The division also oversees the government's financial interest in the guarantee for the aluminium smelter and hydro-electric power station at Fort William and the government's creditor interest in the administration of Burntisland Fabrications Ltd (BiFab).
3. SCAD separates the sector policy function from the commercial function, lessening the potential for unintended bias in support of wider sectoral policy objectives. The division advises Ministers on key decisions to secure full value for money, provide a strong return on investment and maximise the benefits for local communities and the public good by securing skilled jobs.
4. The division is supported by external commercial and legal advisors who provide additional specialist commercial, financial and technical expertise. This external expertise tends to be contracted on a time-limited basis to support specific projects: for example, due diligence on a business case, asset valuations, support for market testing and divestment activity or pursuing a creditor claim during an administration process.
5. The subject matter of SCAD's work tends to involve gathering and holding sensitive information with a high degree of commercial confidentiality to which access is tightly controlled. In handling this information, care is needed to balance transparency interests and the need to protect commercial interests.

Transparency Policy

6. The transparency review takes place in the context of well-established policy and legal frameworks supporting open government.
7. The National Performance Framework, which sets out the government's long-term vision, has transparency as a strategic objective. This aim is supported by the [Information Management Strategy \(2021\)](#) which outlines the many benefits that high quality information management brings. The government is embedding the strategy via the [Open Government action plan 2021 to 2025](#). The principles of open government are set out in the [Scottish Ministerial Code](#) and captured in the fifth Nolan Principle: *Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for doing so.*

Transparency Legislation and Guidance

8. Transparency and openness are important for effective government. Under the Freedom of Information (Scotland) Act 2002 (FOISA) anyone who requests information, which is held by a Scottish public authority, is entitled to receive it within twenty days subject to certain conditions and exemptions set out in the Act.
9. Once information is disclosed to individuals, the Scottish Government also publishes it under the "publication scheme" duty to ensure the wider public has access to it. All Scottish public authorities have adopted the Scottish Information Commissioner's Model Publication Scheme which requires them to publish a Guide to Information that they make available. The Scottish Information Commissioner is the independent public official responsible for promoting and enforcing Scotland's freedom of information (FOI) law. The Commissioner's work includes issuing Decision Notices in relation to appeal applications from requesters who are dissatisfied with the response they received from a Scottish public authority.
10. The Public Finance and Accountability (Scotland) Act 2000 sets out the framework for managing public finances in Scotland. It establishes rules on how public money is collected, spent, audited, and reported to ensure transparency and accountability in government financial operations. The Act enhances transparency through several key mechanisms:
 - By establishing the role of the Auditor General for Scotland (AGS), who is responsible for auditing the government, public bodies and agencies.
 - Audit Scotland was created to support the AGS, ensuring that public spending is independently examined, with powers to conduct value for money performance audits, which are published.
 - Requiring public bodies to prepare annual accounts in a standard format. These accounts must be audited and published, allowing public access to financial information.
 - Scrutiny by the Scottish Parliament: The Act gives the Scottish Parliament's Public Audit Committee the power to review public spending. The AGS reports findings to Parliament.
11. Compliance with the Scottish Public Finance Manual (SPFM) provides assurance to Accountable Officers and Ministers that decisions have been based on advice supported by the appropriate evidence and due process, and that the Scottish Government and other relevant bodies follow the principles that ensure the proper handling and reporting of public funds. Specifically, the SPFM sets out:
 - The responsibilities of Ministers for policy decisions and of Accountable Officers for the propriety and regularity of the finances under their stewardship and for the economic, efficient and effective use of all related resources.
 - That Accountable Officers have responsibility to ensure appropriate advice to Ministers in respect of those duties.

- The process for Accountable Officers to seek written authority.
 - The Business Investment Framework which highlights the key steps that must be considered when Scottish Ministers are considering an initial or follow-on investment in, or financial support to, private businesses.
12. Further development of the SPFM is planned to place greater emphasis on transparency in relation to Accountable Officer assessments for key SG projects.
13. Sections 31 and 32 of the Public Services Reform (Scotland) Act 2010 impose duties on the Scottish Government and listed public bodies to publish information on expenditure and certain other matters as soon as is reasonably practicable after the end of each financial year ([see duties on public bodies to provide information gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/duties-on-public-bodies-to-provide-information/gov.scot)). The guiding principle is to publish as much information as possible and to interpret the duties imposed by Parliament widely rather than narrowly. The Procurement Reform (Scotland) Act 2014 requires public bodies to publish contracts registers, procurement strategies, and annual procurement reports.
14. Whilst not all analysis undertaken involves external commercial advisors, where advisors are procured there is a cost. The award of such contracts is governed by procurement law in which transparency features strongly. The Public Contracts (Scotland) Regulations 2015 set out the government's commitment to transparency. All regulated contracts and those with a value greater than £50,000 for goods and services and £2 million for works are advertised on Public Contracts Scotland. Public Contracts Scotland data is published in line with Open Contracting Data Standards, which supports organisations to increase transparency and allow deeper analysis of contracting data.
15. The Subsidy Control Act 2022 (UK) sets out requirements to publish information. The Act looks to aid private enforcement of the subsidy control rules through strict transparency requirements, obliging public authorities to publish subsidy information on a central transparency database and provide pre-action information to complainants on their assessment of compliance with the subsidy control requirements.
16. This transparency review has considered the policy and legislative landscape described above and the processes already embedded in the arrangements of the Strategic Commercial Assets Division, including:
- The framework agreements in place to govern sponsorship arrangements.
 - The assurance function that assists sponsor teams to adhere with the policy and legislation framework including the SPFM.
 - The project management office that oversees freedom of information responses in line with the legislation.
 - The commercial advisory framework that ensures all contracts are procured in line with legislation and contract award notices published.
 - The publication of written authorities.

Chapter 2 – Transparency Review Workstreams

Workstreams

17. The transparency review was split into four workstreams covering different aspects of the division's work:

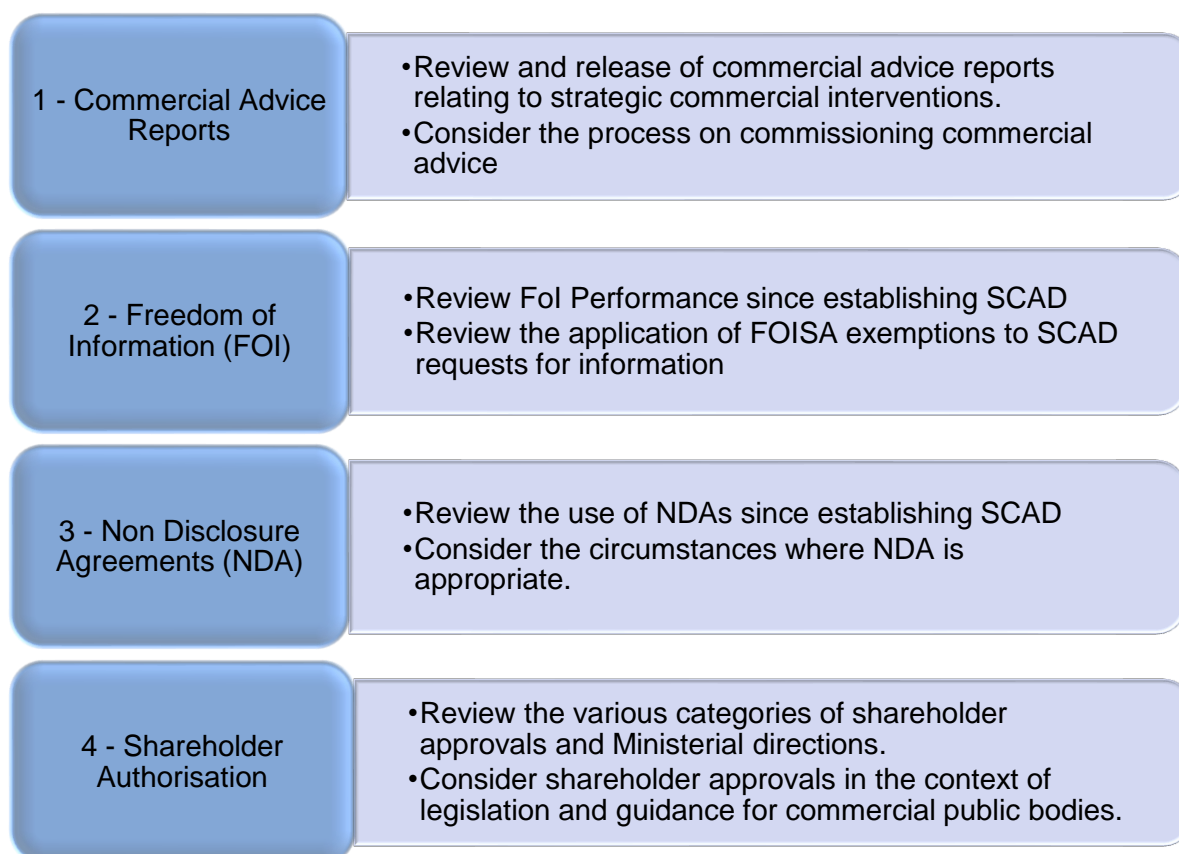


Figure 1 – Workstreams for the Transparency Review

Workstream 1: Commercial Advice Reports

18. SCAD is supported by external commercial and legal advisors who provide additional specialist commercial, financial and technical expertise. The product of this work often culminates in a commercial advice report.

19. We have reviewed thirty-two existing commercial advice reports, some produced before the division was formed, to assess their potential for release. We have also explored ways to sustain a publication scheme that strikes the appropriate balance between facilitating access to information, promoting openness and scrutiny, and protecting commercial interests and contractual rights and privileges.

20. To assess the suitability for publication of various commercial advice reports, we convened a transparency review panel that used a RAG rating system to assess the reports (see Table 1 below).

Table 1		
Status	Recommendation	Comments
R	Not for publication currently	Report is strictly commercially sensitive. The material may impact the commercial prospects of the business if released into the public domain.
A	Publication options to be considered	Report is partially commercially sensitive, but transparency enhancements can be made without compromising commercial confidentiality. Redactions to protect commercial confidentiality may be made.
G	Report to be published	Report is no longer classed as commercially sensitive and there is public value in publishing. Minor redactions may be made in line with freedom of information principles.

Progress made

21. During the review, on 7 February 2025, we shared seven reports prepared by external consultants with the Public Audit Committee¹: six reports relating to Ferguson Marine (rated as amber) and a further evaluation report (rated as green) covering the Scottish Government’s intervention with the BiFab business prior to its administration. The reports rated as amber were shared with appropriate redactions to protect commercial interests, personal information and contractual rights and legal privileges. The report rated green was published without redaction on the Scottish Government’s website: [BiFab: intervention analysis - gov.scot](https://www.gov.scot/bifab-intervention-analysis).
22. Most of the remaining reports reviewed as part of the transparency review have been rated red with one report rated green and one rated amber. The report rated green will be published on www.gov.scot on completion of its publication assessment. The sensitivity status of the remaining reports, including the report rated amber, will be reviewed on a 6-monthly basis to consider readiness for publication.

Workstream 2: Freedom of Information (FOI)

23. As part of the review, we examined the division’s responses to requests for information made under the Freedom of Information (Scotland) Act 2002 (FOISA) and under the Environmental Information (Scotland) Regulations 2004.
24. In 2022, when the division was established, it took on FOISA cases that originated in other divisions of the Scottish Government. Since then, the division has experienced a comparatively high volume of FOI traffic when compared with other divisions of the Scottish Government, responding to forty-two FOI requests and reviews in 2024.

¹ [DG Co-ordination - Enterprise & Environment dot](https://www.gov.scot/bifab-intervention-analysis)

25. Currently, the Scottish Government is consistently replying to over 95 per cent of requests within statutory deadlines, which is above the average across Scottish public authorities and SCAD has achieved a 100 per cent response rate over the past twelve months.

26. The transparency review found that in all instances where a case had been appealed to the Office of the Scottish Information Commissioner (OSIC), OSIC partially upheld the appeal (i.e. OSIC determined that some information was withheld correctly, and some was not). Further analysis showed that the information that was originally exempted incorrectly from release was not substantial in terms of volume or content (for instance, roles/job titles, sub-headers and dates).

Workstream 3: Non-Disclosure Agreements (NDA)

27. Non-disclosure agreements (NDAs) are legal contracts that protect confidential information disclosed between parties. They are implemented whenever confidential information must be protected and its circulation controlled, for example, in conducting due diligence or during transactions. NDAs create enforceable obligations between the signatories, namely that they will not disclose any confidential information to third parties or use the information for any purpose other than that set out in the agreement.

28. NDAs feature in some of the division's work where we have no existing commercial relationship with the other parties, and they are used to govern how sensitive commercial information is shared. The division is not involved with any NDAs that govern personnel matters, employment contracts or severance terms.

29. In this review, we have reviewed the NDAs linked to recent commercial advice reports to ensure standardisation and propose to maintain a register of NDAs linked to the division's work that describes their purpose.

Workstream 4: Shareholder Authorisation

30. SCAD manages Scottish Ministers' shareholder responsibilities for two public bodies – Ferguson Marine and Prestwick Airport. This activity can involve three levels of shareholder authorisation: (i) issuing routine shareholder approvals, (ii) shareholder authorisation – where Ministers issue Written Authorities governed by the Public Finance and Accountability Act 2000 which are relevant only to bodies audited by Audit Scotland and (iii) Shareholder Directions where Ministers operate in their capacity as sole shareholders of a business.

31. Requests for the first category, shareholder approvals, are commonplace and arise frequently in the normal course of business. Details of these approvals are not currently held centrally or made public. The second and third categories – written authorities and shareholder direction – arise infrequently if at all.

(i) *Shareholder approvals*

32. The Portfolio Accountable Officer is responsible for putting in place a framework document to provide a governance structure for the business to work effectively with the government, including offering clarity where approvals are required.
33. Whilst framework documents do not confer any legal duties or powers, they articulate the various instances where businesses are expected to liaise and/or gain approval from their sponsor division, and they confirm where Ministers are required to authorise strategic company matters. This includes approving the corporate and annual business plans; any budgets including loans and grant in aid for any investments as well as securing the necessary Parliamentary approvals for those monies. Ministers' approval is also required to confirm the appointment and the remuneration package of the person holding the office of Accountable Officer of the business.
34. Compliance with the framework document is the responsibility of the business itself, specifically its executive team. The Accountable Officer of the business is personally responsible and answerable to the Scottish Parliament for ensuring the resources made available to the business are used economically, effectively and efficiently. The Chair may also be asked to provide evidence to the Scottish Parliament and is responsible for effective communication with the Board in ensuring that the framework document alongside the objectives of Scottish Ministers are understood and considered as part of Board decision making.

(ii) *Written authorities*

35. Unlike shareholder approvals, requests for written authorities from Scottish Ministers are infrequent and they are always made public. Since devolution, the Scottish Government has issued only six written authorities². The Public Finance and Accountability (Scotland) Act 2000 defines written authority as a document that grants permission to an Accountable Officer to take an action that might otherwise be inconsistent with their responsibilities. After a written authority from Scottish Ministers is granted, the Accountable Officer must provide copies of the request and written authority to the Auditor General for Scotland and the Clerk to the Public Audit Committee.

(iii) *Shareholder directions*

36. Scottish Ministers as sole shareholder of a business hold common law and statutory powers under the Companies Act 2006 allowing them to direct company directors by special resolution to take or refrain from taking specified actions.
37. In the case of Ferguson Marine, its framework document sets out the shareholder relationship between the Scottish Government and the business and the means of notifying Parliament of the Board's direction by the shareholder: "...copy the *Written Direction* or any *Oral Direction* confirmed in

² [Written authorities from Scottish Ministers - gov.scot](https://www.gov.scot/Topics/consultations/consultations/2017/04/04170401)

writing to the Auditor General for Scotland and the Scottish Parliament, under publication arrangements agreed by the Shareholder”.

38. The good practice on notifying Parliament on ministerial directions is not currently part of the SPFM. This review recommends that the Business Investment section of the SPFM is updated in relation to the strategic commercial assets managed by SCAD.
39. The Permanent Secretary gave an undertaking to the Public Audit Committee on 22 January 2025 that the SCAD transparency review would consider whether any current guidance, including the Scottish Public Finance Manual, should be updated to take account of instances where Ministers direct the Board of a public body to act contrary to its own views.

Chapter 3 – Findings and Recommendations

Key findings

40. This review has looked at the current transparency arrangements of the Scottish Government's Strategic Commercial Assets Division across four workstreams: (i) Commercial Advice Reports, (ii) Freedom of Information, (iii) Non-Disclosure Agreements and (iv) Shareholder Authorisation.
41. The review finds there is a strong foundation of existing policy and legal frameworks underpinning the approach to transparency regarding the Scottish Government's management of its strategic commercial assets.
42. The review concludes this foundation can be built upon and enhanced in several respects. Therefore, it recommends to Scottish Ministers a series of steps to improve transparency whilst protecting the commercial interests of its business shareholdings. This chapter outlines the review's eight recommendations.

Recommendations

Workstream 1: Commercial Advice Reports

43. SCAD regularly commissions advice from external advisers to supplement in-house expertise. It is right and proper that key decisions relating to commercial enterprises are informed by thorough due diligence.
44. There is often a need for a high level of confidentiality when dealing with sensitive commercial matters and preparing advice to ministers. It would not be appropriate to publish unredacted commercial advice in real time in most cases.
45. The passage of time, though, can impact the sensitivity of commercial advice and processes are required to ensure that commercial advice is assessed, managed and ultimately published appropriately. Good procurement and contract management processes are essential to facilitate confidence in information sharing. The following recommendations are intended to enhance transparency in relation to commercial advice reports commissioned by SCAD:
 - 1) **Create a webpage with up-to-date information on the government's Strategic Commercial Assets Division and its work.**
 - 2) **Establish a transparency assurance panel to review the sensitivity status of material recorded in SCAD's register of commercial advice on a six-monthly cycle.**
 - 3) **Identify commercially sensitive information at the outset of contractual relationships as part of the procurement process.**
 - 4) **Incorporate terms and conditions in the commissioning of external commercial advice to promote access to information once the assignment is complete.**

Workstream 2: Freedom of Information

46. The Scottish Government has adopted OSIC's model publication scheme. This review considered data which demonstrates that the Strategic Commercial Assets Division is performing well in responding to FOI requests on time.
47. A regular report of FOISA cases will be published on the SCAD webpage.

Workstream 3: Non-Disclosure Agreements

48. The review finds that NDAs are being used appropriately in the division's work to protect commercially sensitive information. Where they have been used the NDAs have been confined to the handling of commercial information. NDAs will remain a required tool to allow sensitive commercial information to be shared with confidence between parties involved in due diligence and commercial assurance activity.
49. The following recommendations are proposed in relation to the design, use and retention of NDAs:

- 5) Develop and publish a policy for the appropriate use of NDAs relating to strategic commercial assets.**
- 6) Publish the number of NDAs signed by SCAD bi-annually.**

Workstream 4: Shareholder Authorisation

50. The legal and policy frameworks that govern shareholder approvals for commercially focused public bodies are well-established. The recommendations below seek to improve transparency specifically for the businesses within the remit of the Strategic Commercial Assets Division:
- 7) Publish a summary all shareholder approval requests from the businesses sponsored by the division annually.**
 - 8) Update the Business Investment Framework section of the SPFM to be clear when Parliament should be notified of Ministerial directions to commercially focused public bodies.**



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