

Decision Notice



Decision 052/2011 Mr Russ McLean and CalMac Ferries Ltd

Route-by-route surplus/loss details

Reference No: 201002268
Decision Date: 14 March 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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Summary

Mr McLean asked CalMac Ferries Ltd (CalMac) for the route-by-route surplus/loss details for the years ending 31 March 2008, 2009 and 2010. CalMac responded by stating that this information was not held. Following a review, Mr McLean remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that CalMac did not hold the information Mr McLean had requested, and had dealt with his request for information in accordance with Part 1 of FOISA by issuing a notice to that effect. He did not require CalMac to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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

Background

1. CalMac operates the Clyde and Hebrides Ferry Services (CHFS) under contract from the Scottish Ministers (the Ministers). It is a wholly-owned subsidiary of David MacBrayne Ltd, which is in turn wholly-owned by the Ministers. As such, CalMac is a publicly-owned company in terms of section 6 of FOISA, and therefore a Scottish public authority in terms of section 3(1)(b) of FOISA.
2. On 16 October 2010, Mr McLean wrote to CalMac requesting “the route-by-route surplus/loss details” for the years ending 31 March 2008, 2009 and 2010. Mr McLean explained that the CalMac accounts for the year ending 31 March 2007 had provided such route-by-route analysis.



3. CalMac responded on 29 October 2010 and stated that it did not hold the requested information. It explained that prior to the current CHFS contract¹, it had recorded surplus/loss details for each route and the figures had been included in the Company's Annual Report and Accounts. However, since 1 October 2007, when the new CHFS contract came into effect, this was no longer a requirement. It stated that its current financial reporting procedures were in line with the CHFS contract and the route results were not held.
4. On 24 November 2010, Mr McLean wrote to CalMac requesting a review of its decision. At this point, he restricted the scope of his request to the route-by-route surplus/loss details for the year ending 31 March 2010. He considered that CalMac should hold the requested information, referring to the Commissioner's *Decision 061/2005 Mr Carl Reavey and Caledonian MacBrayne Limited*,² which he noted had found in favour of the applicant in respect of this class of information.
5. CalMac notified Mr McLean of the outcome of its review on 9 December 2010. It confirmed its previous decision. It explained that it had recorded such information prior to the current CHFS contract, but had not done so since then and therefore was unable to provide the information requested. It confirmed that the Annual Report and Financial Statements from the companies within the David MacBrayne Group were prepared in accordance with and fully compliant with the latest companies legislation and accounting principles, which did not require the production of results on a route-by-route basis.
6. CalMac explained that changes in financial monitoring arrangements had been brought about as a result of the commencement of the current CHFS contract on 1 October 2007. Its financial classifications and headings were now markedly different from those used previously and costs were no longer apportioned by route. It also noted that the payment it received under the current CFHS contract was not apportioned on this basis. While acknowledging that *Decision 061/2005* had required the disclosure of this type of information, CalMac highlighted that this decision had been made in 2005 when it held such information.
7. On 9 December 2010, Mr McLean wrote to the Commissioner, stating that he was dissatisfied with the outcome of CalMac's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr McLean had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

¹ <http://www.scotland.gov.uk/Resource/Doc/935/0056555.pdf>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2005/200501827.asp>



Investigation

9. The investigating officer subsequently contacted CalMac, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, CalMac was asked to describe the steps it had taken to establish whether it held the information, and also to explain whether it was possible to collate the requested information from information it held.
10. CalMac responded to the effect that it did not hold the requested information and explained why this was the case with detailed reference to the changes made to its financial systems from 1 October 2007. The submissions received from both CalMac and Mr McLean will be considered further in the Commissioner's analysis and findings below.
11. The Commissioner would note that he can only consider whether CalMac was correct in its application of FOISA in relation to the information it held at the time Mr McLean's request was received. While in doing this he has taken into account Mr Mclean's views on why the information should be held, it is not within the Commissioner's remit to comment on *whether* CalMac should have held the information, in the format requested or otherwise, nor can he require CalMac to create information which it does not hold.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr McLean and CalMac and is satisfied that no matter of relevance has been overlooked.

Information held by the authority

13. Where a Scottish public authority receives a request for information that it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.
14. In order to determine whether CalMac dealt with Mr McLean's request correctly, the Commissioner must be satisfied as to whether, at the time it received his request (see section 1(4) of FOISA), CalMac held any information which would fall within the scope of that request.
15. Mr McLean asserted that if the information requested was not held in a route-by-route surplus/loss format, then it should be held in some other book-keeping format that was capable of being distilled into a route-by-route loss format. Mr McLean suggested that CalMac held the information, which he believed could be collated and provided in the format requested.



16. Mr McLean asked the Commissioner to investigate if this, or indeed any, accountancy information was held by CalMac on route losses; what format that information was held in, and what was required in the way of time for CalMac to distil that information into a route-by-route loss tabulation as they had in the past.
17. In response to the Commissioner, CalMac explained (as it had in response to Mr McLean's request for review) that from 1 October 2007 onwards the route-by-route figures which had been published previously were no longer required. Consequently, information on any profit/loss by route was no longer gathered or recorded.
18. In support of this position, CalMac provided extracts from and supporting information about the current CHFS contract. It explained that the information required for the purposes of the contract also formed the basis of its internal financial reporting. While acknowledging that the contract had originally required the provision to the Ministers of route-by-route revenue and expenditure statements, it had subsequently been agreed that these were not required as they would involve CalMac incurring unreasonable expenditure and managerial and administrative time. The contract therefore was concerned with the network of routes as a whole, rather than performance on individual routes.
19. In explaining that its financial recording systems no longer held the route-by-route information which had been held before 2007, CalMac also explained that the changes in the arrangements for ferry service provision at the time of the new CHFS contract had been accompanied by a significant corporate restructuring. This had involved the establishment of different companies responsible for ferry operations, crewing and the ownership of vessels and infrastructure, which had forced a radical change to accounting procedures and practices. As a consequence, the procedures used to create route-by-route information when recorded under the auspices of a single company (Caledonian MacBrayne Ltd) no longer applied, and allocations and assumptions had changed substantially. The result was that the data from which route-by-route information had been generated in the past was no longer held.
20. CalMac went on to explain that it therefore considered compliance with Mr McLean's request to involve the generation of new data, rather than simply processing existing data in a different way. Its current systems did not allow for detailed searching for route-by-route loss information, which would require a process which it described in detail and referred to as complex and lengthy. It would also, CalMac submitted, require specialist knowledge.
21. Basically, the steps CalMac identified as being required for this purpose were as follows:
 - identifying all port and vessel overheads, which were not currently allocated on an individual basis (in this connection, it noted that the company which owned the vessels and infrastructure was paid a lump sum in respect of all ports, buildings and facilities)
 - allocating vessel and port costs to individual routes
 - identifying all other overheads, noting that this would involve the assessment of various trading relationships with the David MacBrayne Group and the allocation of management fees payable within the Group



- creating an appropriate spreadsheet model, extracting the relevant data from the accounting system and populating the spreadsheet.
22. CalMac provided estimated times for completing each of these tasks, amounting in total to 196 hours. Given the need for a detailed knowledge of the information, CalMac submitted that the work would require to be carried out by a suitably qualified member of staff costing more than the maximum staff rate of £15 per hour set by regulation 3(2)(b) of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations (giving a total cost of £2,940). Consequently, it contended, even if the requested information were considered to be held, the cost of provision would exceed considerably the upper limit of £600 set for the purposes of section 12(1) of FOISA.
23. In response to Mr McLean's point about the requirements of legislation for such information, CalMac maintained that it complied with all relevant companies legislation and produced information to meet the requirements of that legislation. It stated that company law required directors to prepare financial statements for each financial year, and that these statements were produced in accordance with UK Accounting Standards and applicable law (UK Generally Accepted Accounting Practice). There was no legislative or statutory accounting requirement to produce the type of information requested and CalMac was unaware of any other ferry company operating multiple routes which published information by route.
24. CalMac highlighted that in *Decision 049/2006 Mr Gordon Ross and Caledonian MacBrayne Limited*³, the Commissioner had accepted that the deficit grant then received was not allocated on a route by route basis, but for the network as a whole: the situation since 2007 had been similar. The information produced previously had been for illustrative purposes only and neither met any statutory requirement nor served any financial control purpose.
25. Taking account of all the above arguments, the Commissioner has concluded that CalMac does not (and did not at the time it received Mr McLean's request) hold the information requested. He accepts CalMac's arguments that the tasks involved in producing the information from its accounting records would, in its present circumstances, amount to the creation of new information. Consequently, the Commissioner is satisfied that CalMac was correct to give Mr McLean notice that the information he had requested was not held, as required by section 17(1) of FOISA.
26. The Commissioner has also considered CalMac's submissions on the cost of providing the requested information, should he consider it to be held. From all the information provided by CalMac on the work involved and the associated costs, the Commissioner is satisfied that even if he had found that CalMac held the information, he would also have found that it was entitled to refuse to comply with the request on the basis of excessive cost, in terms of section 12(1) of FOISA.

³ http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2006/200501161_2.asp



DECISION

The Commissioner finds that Cal Mac Ferries Ltd complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr McLean.

Appeal

Should either Mr McLean or CalMac Ferries Ltd wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
14 March 2011



Appendix

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...