

Decision Notice

Decision 206/2014: Shetland Line (1984) Ltd and Transport Scotland

Northern Isles ferry service: minutes of meeting

Reference No: 201401012

Decision Date: 22 September 2014



Scottish Information
Commissioner

Summary

On 17 October 2013, Shetland Line (1984) Ltd (SLL) asked Transport Scotland for the minutes of a particular meeting discussing the Northern Isles ferry service. Transport Scotland withheld some of the information under the exemptions in FOISA relating to legal advice and the effective conduct of public affairs.

Following an investigation, the Commissioner accepted that the information was exempt from disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality)

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. On 17 October 2013, Maclay Murray and Spens LLP, on behalf of their client, SLL, wrote to Transport Scotland and requested information which included the minutes of a particular meeting (discussing the Northern Isles ferry service). In this decision, all references to correspondence with SLL include correspondence with their solicitors.
2. On 19 December 2013, SLL wrote to Transport Scotland and requested a review on the basis that it had failed to respond to its request.
3. On 11 February 2014, SLL wrote to the Commissioner stating that they were dissatisfied with Transport Scotland's failure to respond to their requirement for review. This resulted in the Commissioner issuing *Decision 067/2014* concerning Transport Scotland's failure to respond.
4. Transport Scotland notified SLL of the outcome of its review on 12 March 2014. It provided SLL with a copy of the minutes, with information redacted in terms of section 30(c) and 36(1) of FOISA. It explained why it considered these exemptions applied.
5. On 6 May 2014, SLL wrote to the Commissioner, stating that they were dissatisfied with the outcome of Transport Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA
6. The application was validated by establishing that SLL made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 21 May 2014, in line with agreed procedures, the Ministers were notified in writing that an application had been received from SLL and were asked to provide the Commissioner with any information withheld from SLL. Transport Scotland responded with the information requested and the case was then allocated to an investigating officer.
8. Subsequent references to contact with or submissions from Transport Scotland are therefore references to contact with or submissions from the Ministers on behalf of Transport Scotland.
9. The investigating officer subsequently contacted Transport Scotland, 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. Transport Scotland was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, in particular sections 30(c) and 36(1) of FOISA.
10. Transport Scotland responded with submissions in support of its position that the withheld information was exempt from disclosure in terms of sections 30(c) and 36(1).

Commissioner's analysis and findings

11. 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 her by both SLL and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will first of all consider the exemption under section 30(c) of FOISA, before going on to consider section 36(1).

Section 30(c) – Prejudice to effective conduct of public affairs

13. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
14. As the Commissioner has said in previous decisions, the standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
15. In its review outcome, Transport Scotland explained to SLL that it considered it essential for Ministers and officials to be able to meet, often in confidence, with external stakeholders on a range of issues, including competitive tendering exercises such as the Northern Isles ferry services tender. It considered disclosure of information about these meetings, particularly without the consent of the stakeholder, likely to undermine trust and substantially inhibit future communications on this type of issue. It believed stakeholders would be reluctant to

participate in such meetings, or even future competitive tendering exercises, if they thought their views were likely to be made public or attributed to individual board members, particularly if the discussions related to a sensitive ongoing issue such as the Northern Isles ferry services tender.

16. Transport Scotland further submitted that this inhibiting effect was likely to significantly harm the Ministers' ability to successfully carry out future similar tendering exercises, to the substantial prejudice of the effective conduct of public affairs.
17. In its submissions to the Commissioner, Transport Scotland provided background to the award of the contract in question, in early May 2012, and the subsequent legal proceedings. It explained that the meeting in question (after the award of contract had been announced) was with representatives of David MacBrayne Limited (DML), a company wholly owned by the Ministers. One of the unsuccessful bidders was a subsidiary of DML. The meeting had been considered an appropriate means, in the circumstances, of allowing DML to comment on aspects of the contract award. Transport Scotland provided more detailed comments on the information and context, which cannot be repeated here without referring directly to the withheld information.
18. Transport Scotland explained that to conduct its business effectively, maintaining a good working relationship with DML (to help it deliver its objectives effectively), the DML Board had to be able exchange information and views clearly and unambiguously with the Ministers as the company's sole shareholder. Transport Scotland acknowledged that during the routine course of business, the disclosure of the subject matter and content of such meetings would not be significantly disruptive. However, it also argued that there would be occasions (such as in this case) when discussions of a particularly sensitive nature need to be carried out confidentially.
19. Transport Scotland explained that discussions of this level of sensitivity and confidentiality could cover, for example:
 - internal governance and management difficulties, including allegations of fraud or other impropriety
 - industrial and employee relations issues;
 - financial and legal matters affecting the fiduciary duties of DML directors under the Companies Act and
 - as in this case, highly sensitive matters relating to the core commercial business of the company.

Transport Scotland considered it important for the proper functioning of the DML Board that the Board had direct access to the sponsor Minister and was able to provide information and exchange views openly and honestly, and for the Minister to give direction and guidance to the Board. In this context, it reiterated what it considered to be the likely inhibiting effect of disclosure.

20. Transport Scotland also submitted that the information remained particularly sensitive, given that there were two further ferry contracts to be retendered within the next 12 months.
21. Noting the different roles of the Ministers in letting the contract and as owner of DML, SLL identified potential for conflict of interest. It was not clear to SLL in which capacity DML had

met the Minister. At the time of the meeting, they did not consider there to be any ongoing issues to be determined in relation to the contract.

22. Having considered the nature and content of the withheld information, together with SLL's and Transport Scotland's submissions, the Commissioner accepts that the Minister's involvement in the meeting was as a representative of the Ministers as the sole shareholder of DML. She is also satisfied, for the reasons advanced by Transport Scotland, that disclosure of the withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs, and specifically to the effective functioning of Transport Scotland and, in its necessary relationship with the sponsoring Minister, DML.
23. In all the circumstances, the Commissioner accepts that Transport Scotland was correct to apply the exemption in section 30(c) of FOISA to this information.
24. 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.

Public Interest– Section 30(c)

25. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described 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.
26. As indicated above, SLL submitted that there was potential for conflict of interest in this situation, given the two roles of the Ministers in relation to DML. From Transport Scotland's responses, the believed there to be confusion as to the role in which the Minister had met DML. They argued that there was a public interest in clarifying this. Suggesting that it was highly unusual for the Minister to be involved personally in a meeting with a tenderer, they considered this public interest to be particularly strong.
27. SLL further submitted that there was a public interest in compliance with procurement law, and particularly in ensuring that public companies competing in public tendering processes could do so on a fair and equal basis. To verify that this was the case, SLL believed it important for discussions to be open to public scrutiny. An important aspect of such fairness, they argued, was the maintenance of an appropriate separation between a publicly owned company tendering for a contract and the arm of Government conducting the procurement.
28. Transport Scotland recognised the public interest in release of this information as part of open, transparent and accountable government, in order to ensure that public procurement exercises were properly conducted. As indicated above, Transport Scotland accepted that in the routine course of business, the disclosure of the subject matter and content of such meetings would not be significantly disruptive.
29. On the other hand, Transport Scotland submitted that any public interest in disclosure was significantly outweighed in this case by the public interest in allowing DML and their shareholder to discuss issues in confidence. It submitted there was a strong public interest in avoiding damaging working relationships between DML and the Ministers/Transport Scotland by releasing comments DML had shared in confidence, given the importance of the effective working relationship referred to above.

30. Transport Scotland did not believe it was in the public interest for the effective conduct of public affairs to be disrupted. This would be the effect of compromising the ability of the DML Board to discuss difficult and sensitive issues with their sponsor Minister, in confidence, by requiring disclosure of even the most sensitive discussions. They accepted, however, that there might be situations where the public interest should override confidentiality.
31. The Commissioner acknowledges the general public interest in transparency and accountability, particularly where this might contribute to understanding how Scottish public authorities, and companies wholly owned by them, carry out their specific roles and relate to each other. She acknowledges that the withheld information might cast some light on these matters.
32. The Commissioner has considered the submissions made by SLL regarding the potential conflicts of interest and ensuring that the tender exercise was conducted properly, on a fair and equal basis. She does not believe disclosure of the withheld information would contribute significantly to scrutiny of these matters.
33. The Commissioner has also taken account of the submissions made by Transport Scotland on the public interest in maintaining the exemption. She has already acknowledged the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the effective functioning of Transport Scotland and, in its necessary relationship with the Minister, DML. She accepts that such harm would not be in the public interest.
34. Taking all of the circumstances into consideration, on balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding this particular information. The public interest in disclosure might be greater in other cases, but the Commissioner must consider the information and the circumstances in each individual case. Having reached this conclusion, the Commissioner finds that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. Therefore, Transport Scotland was entitled to withhold the information under that exemption.

Section 36(1) – Confidentiality

35. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege, one aspect of which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in the course of which legal advice is sought or given.
36. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - a. The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
 - b. The legal adviser must be acting in his/her professional capacity, and
 - c. The communications must occur in the context of the legal adviser's professional relationship with his/her client.

- d. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
37. Transport Scotland submitted that section 36(1) of FOISA applied to legal advice redacted from the minutes disclosed. The Commissioner will only consider this exemption in relation to information she has not already found to be properly withheld under section 30(c) of FOISA.
38. Transport Scotland also explained that the minute was not prepared for sharing with DML. The information redacted under section 36(1) related to legal advice obtained by Transport Scotland after the meeting. The advice was internal and had not been shared outwith the Ministers.
39. Transport Scotland submitted that the withheld information related to the content of legal advice which was provided by a qualified legal adviser, acting in their professional capacity as such (and in the context of their professional relationship with their client, the Ministers). It considered the information to be subject to legal advice privilege. It submitted that the advice had not been shared externally and therefore confidentiality had been maintained.
40. SLL did not agree that legal privilege applied to the information. It submitted that a meeting with an external stakeholder, if that characterisation was maintained, would not enjoy legal privilege. It did not accept that a meeting with a bidder, even one owned by the Ministers, where the bidder was contemplating raising proceedings against Transport Scotland, would enjoy privilege or even a form of joint privilege.
41. SLL further submitted that it understood the reference to be to advice within the Scottish Government/Transport Scotland. That should not have been disclosed to DML, as a third party. In the circumstances, SLL did not consider any redacted legal advice to enjoy legal privilege.
42. The Commissioner has considered the information and accepts that the circumstances are as narrated by Transport Scotland. As such, the Commissioner is satisfied that the information maintains a quality of confidence and is protected as legal advice privilege. She accepts that it is (and was) subject to the exemption in section 36(1) of FOISA.
43. The exemption in section 36(1) is, however, a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. As with the information withheld under section 30(c), therefore, the Commissioner must consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public Interest – Section 36(1)

44. The submissions by SLL are set out above, in relation to section 30(c).
45. Transport Scotland recognised the public interest in the transparency and accountability of procurement processes involving the public purse. However, it considered there to be a much greater, overriding public interest in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials could receive legal advice in confidence, like any other public or private organisation. It was important, Transport Scotland continued, to allow decisions to be taken in a fully informed legal context. This required confidentiality, to ensure that the client and their shareholders were able to defend or consider their legal interests and were not prejudiced by inappropriate disclosure of information or legal analysis.

46. Transport Scotland further submitted that there was a vital public interest in ensuring that the Government and its wholly-owned companies could defend their interests. In Transport Scotland's view, disclosure of legal advice had a significant potential to prejudice that ability – both directly, by unfairly exposing their legal position to challenge, and indirectly by diminishing the reliance they could place on the advice having been fully considered and presented without fear or favour. For these reasons Transport Scotland believed the public interest in disclosure to be outweighed considerably by the public interest in maintaining this exemption.
47. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
48. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. For example, disclosure may be appropriate where:
- the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
49. After careful consideration, the Commissioner is satisfied that none of the considerations set out above apply here. She can identify no other compelling public interest arguments in favour of disclosure.
50. Having considered the public interest arguments advanced on both sides, and while accepting that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. Consequently, she accepts that Transport Scotland correctly withheld the information to which it applied section 36(1) of FOISA.

Decision

The Commissioner finds that Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Shetland Line (1984) Ltd.

Appeal

Should either Shetland Line (1984) Ltd or Transport Scotland 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.

Margaret Keyse
Head of Enforcement

22 September 2014

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.

...

- (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.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

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