

Decision Notice

Decision 149/2015: Firm A and Transport Scotland

Memorandum of Understanding with DFDS and Forth Ports

Reference No: 201500592

Decision Date: 23 September 2015



Scottish Information
Commissioner

Summary

On 6 November 2015, Firm A asked Transport Scotland for a copy of the Memorandum of Understanding (MoU) entered into by the First Minister with the ferry company DFDS and Forth Ports in relation to the Rosyth/Zeebrugge ferry service.

Transport Scotland provided a redacted version of the MoU. Following a review, Firm A remained dissatisfied and applied to the Commissioner for a decision. Further information from the MoU was disclosed during the investigation.

The Commissioner investigated and found that Transport Scotland had responded to Firm A's request for information in accordance with Part 1 of FOISA. The Commissioner accepted that disclosing the remaining information would be likely to prejudice substantially the commercial interests of those private entities who were parties to the MoU. She also concluded, on balance, that the public interest in disclosure was outweighed by that of maintaining the exemption.

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 interests 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 6 November 2014, Firm A made a request for information to Transport Scotland. The information requested was:

“... a copy of the Memorandum of Understanding that was entered into by the First Minister on 4th November 2014 with the CEO of the ferry company DFDS and the CEO of Forth Ports.”
2. Transport Scotland responded on 5 December 2015. Transport Scotland disclosed some information on the Scottish Government's commitments in the MoU, but withheld the MoU itself on the basis that section 33(1)(b) of FOISA applied.
3. On 9 January 2015, Firm A wrote to Transport Scotland, requiring a review of its decision as they did not accept the application of section 33(1)(b) of FOISA to the information (or that the public interest favoured withholding the information).
4. Transport Scotland notified Firm A of the outcome of its review on 6 February 2015. Transport Scotland reconsidered the information and disclosed a redacted version of the MoU. Information was withheld on the basis that section 33(1)(b) of FOISA applied.
5. On 30 March 2015, Firm A wrote to the Commissioner. Firm A applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Firm A stated they were dissatisfied with

the outcome of Transport Scotland's as they did not accept the application of section 33(1)(b) or that the public interest favoured maintaining the exemption.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Firm A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. Transport Scotland is an agency of the Scottish Ministers (the Ministers). Subsequent references to contact with or submissions from Transport Scotland should be read as including contact with or submissions made by the Ministers on behalf of Transport Scotland.
8. On 23 April 2015, Transport Scotland was notified in writing that Firm A had made a valid application. Transport Scotland was asked to send the Commissioner the information withheld from Firm A. Transport Scotland provided the information and the case was allocated to an investigating officer.
9. Transport Scotland provided Firm A with further information from the MoU early in the investigation. Firm A asked the Commissioner to consider whether the remaining information was properly withheld in terms of the exemption claimed.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and answer specific questions, with particular reference to its application of section 33(1)(b) of FOISA.

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 Firm A and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

Background

12. On 14 November 2014, the Scottish Ministers, DFDS and Forth Ports entered into a MoU regarding the Rosyth/Zeebrugge ferry service. The MoU sets out a variety of measures that are designed to secure the continuation and future sustainability of the Service¹.

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

13. Transport Scotland submitted that the great majority of the MoU text was released to Firm A, with all the aspects relating to the actions of the Scottish Ministers being released. The aspects relating to the negotiations between DFDS and Forth Ports were withheld on the basis that section 33(1)(b) of FOISA applied.

¹ <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-29896285>

14. Section 33(1)(b) 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). This is a qualified exemption and is subject to the public interest test in section 2(1)(b) of FOISA.
15. An authority relying on this exemption must be able to show whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced by disclosure of the information. 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 be (or would be likely to be) harmed, it must make this clear: in this connection, consulting the third party is generally advisable.
16. Transport Scotland explained that the commercial interests in question were those of DFDS and Forth Ports Ltd. Transport Scotland stated that both parties had commercial interests, as both were signatories to the MoU, had invested money into the Rosyth to Zeebrugge ferry service and shared a commercial interest in the route's success.
17. The Commissioner accepts that both DFDS and Forth Ports Ltd have commercial interests in relation to the withheld information.
18. Firm A did not accept that Transport Scotland had provided sufficient evidence to support the contention that substantial prejudice would, or would be likely to, result from disclosure of the information requested. It did not consider the tests outlined in paragraph 15 above to have been met. It did not accept that disclosure of high-level information, such as that contained in the MoU, might lead to substantial prejudice to DFDS and Forth Ports. Firm A argued that the MoU simply conveyed public sector support terms, the benefits of which were, in principle, available to all other port users: in this context, they did not understand the connection between customer negotiations and prejudice.
19. Transport Scotland explained that both Forth Ports Ltd and DFDS had expressly stated that the information should not be disclosed. This statement was made in response to Parliamentary Questions, but Transport Scotland considered their views to be equally applicable in relation to disclosure of the information under FOISA. There had, Transport Scotland explained, been further discussions with both parties at review stage.
20. Transport Scotland provided evidence of the positions taken by both DFDS and Forth Ports Ltd. They also provided further comments, from discussions with both parties. It was made clear that each of them considered that disclosing the remaining information from the MoU, which related to their respective commitments, would be likely to prejudice substantially their commercial interests.
21. Transport Scotland set out in detail the harm likely to be caused to these parties' commercial interests were this information to be disclosed. Both parties set out their concerns relating to their ability to attract and retain customers. Transport Scotland submitted that disclosure of the information would be likely to harm the other parties' negotiating positions in relation to current and future clients, to the advantage of competitors. According to Transport Scotland, negotiations around aspects of the MoU were still ongoing, and were reaching a crucial stage: therefore, disclosure would also be likely to significantly harm these negotiations. They provided reasons in support of these arguments, which the Commissioner cannot

repeat in any detail without, in effect, giving an indication of the nature of the withheld information.

22. The Commissioner has considered the harm described by Transport Scotland in detail. While unable to go into further detail, she notes that the withheld information relates to commitments undertaken by and between private commercial entities. It does not relate in any way to commitments undertaken by Transport Scotland, or cast any further light on the commitment of public funds or resources. In the circumstances, the Commissioner accepts that disclosure of the information would be likely to have a substantially prejudicial effect on the commercial interests of Forth Ports and DFDS, given the potential for competitors to undermine the purpose of the MoU, as argued by Transport Scotland and highlighted by the parties themselves. She is therefore satisfied that this information is exempt under section 33(1)(b): its disclosure would, or would be likely to, prejudice substantially the commercial interests of both DFDS and Forth Ports.

Public interest

23. As stated above, the exemption in section 33(1)(b) 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 maintain the exemption.
24. Firm A submitted that the MoU involved a material level of public expenditure in support of particular private companies, in the absence of a competitive selection process. In these circumstances, Firm A argued that the starting point should be a strong presumption that the public interest required disclosure, so that important value for money and accountability considerations could be met. Firm A submitted detailed arguments relating to the relationship between this MoU and state aid law, highlighting that the UK is bound under EU state aid law. Generally, they submitted, state aid law rests on a full and frank disclosure of public sector expenditure: they provided more detailed arguments in support of this. They also provided similar arguments in relation to compliance with EU public procurement law.
25. Transport Scotland highlighted that the great majority of the MoU text had been released, emphasising that this included all aspects relating to the commitments of Scottish Ministers and the use of public funds. Transport Scotland argued that most of the arguments presented by Firm A were based on an erroneous assumption that the redacted aspects related to the commitment of public sector funding or other public resources, or other issues pertinent to compliance with EU state aid regulations and public procurement law. Transport Scotland emphasised that this was not the case.
26. Transport Scotland recognised some public interest in disclosure, to promote openness and transparency in relation to the ongoing negotiations regarding the future of the freight ferry service. It argued that the public interest had been partially met by the contents of the MoU which had been disclosed already, including all information relating to the use of public funds.
27. Given that the remaining withheld information related to aspects of commercial negotiations between two private bodies, which the Scottish Government would not normally be aware of and had no direct involvement in, Transport Scotland considered there to be little public interest in disclosure of the remaining information.

28. On the other hand, Transport Scotland submitted that there was a strong public interest in avoiding significant harm to the commercial interests of both Forth Ports and DFDS, and in avoiding jeopardising the likely future commercial viability of the route and, therefore, its long-term future. Transport Scotland did not consider there to be a public interest in the possible withdrawal of a service which was important for the Scottish economy. In this connection, Transport Scotland highlighted the 200,000 euro grant given to DFDS by the Scottish Government, aimed at securing the long-term viability of the ferry service: jeopardising the service would not secure best value for Scottish taxpayers for this grant funding.
29. On balance, Transport Scotland concluded that the public interest in withholding the information, in order to help safeguard the service's future viability as well as the commercial interests of DFDS and Forth Ports Ltd, significantly outweighed the public interest in disclosing the information.
30. The Commissioner acknowledges the general public interest in transparency and accountability. Having considered the information in detail, she accepts that these public interest arguments have been satisfied to a large extent in the disclosure of the information to date. She is conscious that the information remaining withheld relates to the commitments of private entities: the commitments relating to public expenditure has been disclosed.
31. The Commissioner has considered fully all the submissions presented by Firm A, in the light of the content of the withheld information. Obviously, she has the advantage (which she is unable to share with Firm A) of knowing what that content actually is, as opposed to what it might be inferred to be. Although the Commissioner accepts that there may be a strong public interest in disclosing information which has a bearing on the type of issues highlighted by Firm A, she does not accept that disclosure in this instance can further the public interest arguments they have put forward. As indicated above, the remaining withheld information relates in its entirety to commitments undertaken by private entities, and not to any of the kinds of issues highlighted by Firm A.
32. On balance, therefore, having considered the withheld information in the context of all relevant submissions she has received, the Commissioner finds that the public interest in disclosing the remaining withheld information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA. Consequently, she is satisfied that Transport Scotland correctly withheld the information in terms of section 33(1)(b) 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 Firm A.

Appeal

Should either Firm A 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

23 September 2015

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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