

Decision Notice

Decision 101/2017: Mr G and Transport Scotland

Contract subsidy payments

Reference No: 201700557

Decision Date: 29 June 2017



Summary

Transport Scotland was asked about the subsidy paid to Argyll Ferries in respect of variations to a Public Service Contract. Transport Scotland provided some information, explaining that other information was either otherwise accessible or not held.

Following investigation, the Commissioner found that Transport Scotland had not justified its position that the information was either otherwise accessible or not held. She also found a failure to provide adequate advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 21(4)(b) Review by Scottish public authority; 25(1) (Information otherwise accessible)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 30 January 2017, Mr G made a request for information to Transport Scotland. He asked for the total amount of subsidy paid to Argyll Ferries, since July 2011, in relation to the Public Service Contract (PSC) with Argyll Ferries and subsequent contractual variations in respect to:
 - a) the charter of the MV Coruisk from CalMac Ferries Limited/Caledonian MacBrayne Assets Limited;
 - b) the provision of the replacement bus service;
 - c) section 5.7.1(a) and section 5.7.1(b) of the PSC;
 - d) fares not being increased by the agreed formula contained within the PSC;
 - e) any other variations of the PSC.
2. Transport Scotland responded on 10 February 2017. It made reference to the responses it had provided in relation to previous requests and confirmed it held information within the scope of Mr G's request. It provided some further information. Transport Scotland informed Mr G that it wished to rely upon section 25(1) of FOISA, for information that was published on its website, and section 17(1) of FOISA as it did not hold some of the information in "a suitable format".
3. On 22 February 2017, Mr G wrote to Transport Scotland requesting a review of its decision, on the basis that the information provided, together with the information publicly available,

was insufficient to determine the subsidy cost associated with the various contractual variations. He provided an example of this, stating that from the information available there was an unexplained variance of £871,000.

4. Mr G also submitted that the financial information from the annual accounts was based on the financial year rather than the PSC contract year, and so it was not possible to determine the costs of the contractual variations
5. On 1 March 2017, Transport Scotland wrote to Mr G and commented that in the review request he had asked for details of the subsidies paid in a contract year. It submitted that this was not specified in the original request. It asked him to clarify which specific question and information he was asking Transport Scotland to review.
6. On 8 March 2017, Mr G wrote and agreed the initial request could have been more specific with regard to the information being provided on a contract year basis. He noted, however, that the information provided in Transport Scotland's response had been by contract year. Mr G stated that the purpose of his request was to understand the difference between the original contract subsidy level (as tendered) and the overrun actual subsidy in terms of the PSC variations.
7. Transport Scotland notified Mr G of the outcome of its review on 22 March 2017. Transport Scotland confirmed the original decision (i.e. upholding sections 25(1) and 17(1)), with modifications. It stated that it was satisfied it had provided the information requested for parts a) to c) of the request. Transport Scotland clarified its response regarding part d) of the request.
8. In relation to part e) of the request, Transport Scotland informed Mr G that it held information which was not published on its website and therefore was not exempt under section 25(1) of FOISA. To this information, Transport Scotland applied section 33(1)(b) of FOISA, as disclosure would (or would be likely to) prejudice substantially the commercial interests of David MacBrayne Ltd and its subsidiaries.
9. On 23 March 2017, Mr G wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr G stated he did not agree with Transport Scotland's reasons for withholding the information requested, confirming that his application was in relation to part e) of his request.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr G 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.
11. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 5 April 2017, in line with agreed procedures, the Ministers were notified in writing that an application had been received from Mr G and were asked to provide the Commissioner with the information withheld from Mr G. The Ministers provided a schedule of documents together with the documents listed. The case was then allocated to an investigating officer.
12. Subsequent references to contact with or submissions from Transport Scotland are references to contact with or submissions made by the Ministers on behalf of Transport Scotland.

13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 11 May 2017, Transport Scotland was invited to comment on this application and answer specific questions. Transport Scotland was informed that the schedule and documents provided to the Commissioner did not fully explain what information falling within the scope of Mr G's request was actually being withheld. Transport Scotland was asked to provide the Commissioner with the information that it held falling within the scope of Mr G's request.
14. It was explained that the Commissioner would expect to be provided with the totals since 2011 in respect of any of the variation within the PSC (with the exception of the information already disclosed in response to parts a) to b) of Mr G's request). It was also invited to provide detailed submissions in support of any exemptions claimed.
15. Transport Scotland responded, explaining that the information initially provided to the Commissioner did not fall within the scope of the request (and so it no longer wished to apply any exemptions as they were not considered relevant to the request).
16. Transport Scotland did not provide the Commissioner with the information it held falling within the scope of part e) of Mr G's request, but provided submissions to the effect that it was applying sections 17(1) and 25(1) of FOISA.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr G and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.
18. The Commissioner is disappointed in the submissions by Transport Scotland, in particular its failure to provide her with any information withheld from Mr G. The submissions received are somewhat confusing; on the one hand it is claiming that the information is publicly available and on the other that it does not hold the information.
19. The Commissioner will first of all consider whether she is satisfied that Transport Scotland holds information falling within the scope of the request and, if so satisfied, whether it can then rely on section 25(1) of FOISA.

Information held by Transport Scotland

20. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to restrictions which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The restrictions contained in section 1(6) are not applicable in this case. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
21. The Commissioner notes that at part e) of his request of 30 January 2017, Mr G requested:
Since July 2011, the total amount of subsidy paid to Argyll Ferries in respect to any other variations of the PSC.
22. In its initial response to Mr G, Transport Scotland informed him that it did not hold the information in "a suitable format". It did not explain to Mr G (and has not explained to the

Commissioner) what it meant by “suitable”. The Commissioner notes that Mr G did not seek any specific format, merely the total amount of subsidy paid in respect to any other variations to the PSC.

23. In its submissions to the Commissioner, Transport Scotland explained that it did not hold a table or other compiled information for the total running figure of contract variations for Argyll Ferries. It stated that, as it did not consider it held the information in the form requested, it was under no obligation to compile and produce information not already held.
24. It explained that in order to provide Mr G with the “total figures” he had requested, it would have to conduct the same actions it had suggested to Mr G for identifying the costs (see below).
25. Transport Scotland further submitted that with regard to Contract Year 6, the finalised subsidy costs and associated contract variations were not known, as Transport Scotland had not yet received Argyll Ferries’ annual accounts. The Contract Year 6 Actual Outcome Statement detailing total Contract Year 6 costs would be received following the expiry of the current contract year (1 July 2017), usually within three months as detailed within the publicly available PSC.
26. As a result, Transport Scotland claimed it did not hold the total amount of subsidy paid to Argyll Ferries in respect of any other variations within the PSC and would not hold this information until after year-end accounts were received for Contract Year 6. It stated that the next publication of Section 70 reports, usually in Autumn of every year, would contain financial year information for 2016-17 (April 2016 – March 2017) and detail actual spend for part of Contract Year 6.
27. Transport Scotland explained that Mr G would be able to determine the relevant cost of contract variations by deducting the information released in the original response, dated 10 February 2017 (above), from the subsidy reported in David MacBrayne Limited’s website as well as in the publicly available information contained within the Section 70 reports.
28. The Commissioner notes that Mr G made his request on 30 January 2017 and, as such, she has to consider the information Transport Scotland held at that time. Any information which only became available following the subsequent submission of year-end accounts would not be information falling within the scope of Mr G’s request. It cannot follow that information held already (i.e. for previous years) is not held for the purposes of FOISA until these accounts are submitted.
29. The Commissioner notes Transport Scotland’s submissions to the effect that it did not hold a table or other compiled information for the total running figure of contract variations for Argyll Ferries. Equally, however, this is not necessarily a reason for concluding that Transport Scotland did not hold the information requested. Given that Transport Scotland has confirmed it could carry out certain actions, as suggested to Mr G, in order to provide Mr G with the “total figures” he requested, the Commissioner is satisfied that it holds the “building blocks” from which the requested information could be generated. It appears to acknowledge (bearing in mind its purported application of section 25(1)) that the information could be generated quite readily from those base data.
30. Taking account of all of the submissions provided by Transport Scotland, it is apparent therefore that Transport Scotland does hold the information falling within the scope of part e) Mr G’s request. Consequently, the Commissioner does not accept that section 17(1) of FOISA applies here.

31. Having concluded that Transport Scotland does hold the information requested by Mr G, the Commissioner will consider whether Mr G can reasonably obtain this information other than by requesting it under section 1(1) of FOISA.

Section 25(1) – Information otherwise accessible

32. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
33. In its initial response to Mr G, Transport Scotland informed him that information was available on its website. It upheld this on review. In its submissions to the Commissioner, Transport Scotland stated that:

The financial information of Argyll Ferries requested by the correspondent is publically available on David MacBrayne Limited's website and the Scottish Government's publically available Section 70 reports. A detailed breakdown of the cost of individual contract variations has been released in the original response of 10 February 2017 – attached below for ease of reference.

34. In relation to part e) of the request, Transport Scotland provided this link to its website to show what information was publicly available:
https://www.transport.gov.scot/media/2459/argyll_ferries_variations.pdf.
35. Transport Scotland further submitted that Mr G would be able to determine the relevant cost of contract variations by deducting the information released in the original response, dated 10 February 2017 (above), from the subsidy reported on David MacBrayne Limited's website, as well as on the publicly available information contained within the Section 70 reports.
36. In his requirement for review, Mr G explained that the information was insufficient to determine the subsidy amount associated with the various contract variations.
37. In this case, the Commissioner must consider whether the information held by Transport Scotland is reasonably available to the individual requesting the information, i.e. Mr G. Having been asked to provide her with the information Transport Scotland actually held, Transport Scotland basically informed the Commissioner that Mr G could work out the details for himself from the information publicly available. It did not fully explain to the Commissioner where this information was available, other than to provide the above link, which had been provided to Mr G in its initial response. From this link, the Commissioner is unable to identify the relevant information. She notes that within one of the documents available via the link provided, financial detail is redacted. No other financial information is apparent, although some may be known to Transport Scotland. In the circumstances, it would appear that not all, and perhaps not any, of the information is readily available to Mr G.

Section 15(1) - Duty to provide advice and assistance

38. The Commissioner's Guidance on section 25(1) of FOISA¹, and the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)², both make it clear that section 15(1) of FOISA requires public authorities to provide reasonable advice and assistance to people who have made, or intend to make an information request. If a public authority refuses a request on the basis that the information is otherwise accessible to the requester, the refusal notice must explain to the requester why the exemption applies. The authority should not assume that the requester will know where and how they can obtain the information. If the information is already publicly available, the authority should tell the requester how to access it, and should provide adequate signposting, e.g. by giving them direct links to online information.
39. In previous decisions the Commissioner has found that failing to provide adequate signposting is a failure to comply with the duty under section 15(1) of FOISA.
40. While the Commissioner acknowledges that there may be further relevant information available on Transport Scotland's website and David MacBrayne Limited's website, she has to consider the submissions she has received from Transport Scotland. The submissions received do not provide adequate signposting for her to establish that the information requested is readily available. Neither does any of the information Transport Scotland provided to Mr G. Transport Scotland has commented that Mr G can undertake certain actions to establish the information that Transport Scotland holds, but she is not satisfied that he has been provided with sufficient information to do this, even if it were achievable.
41. In all the circumstances, therefore, the Commissioner finds that Transport Scotland failed to provide adequate advice and assistance to Mr G, and thereby failed to comply with section 15(1) of FOISA.
42. In all the circumstances, the Commissioner is not satisfied that the information held by Transport Scotland is reasonably obtainable by Mr G other than by requesting it under section 1(1) of FOISA, and the Commissioner does not believe it to be the intention underlying section 25(1) of FOISA that applicants should have to carry out their own research and analysis to obtain information the authority claims is readily accessible elsewhere.
43. In all the circumstances, therefore, the Commissioner does not accept that Transport Scotland was entitled to rely upon either section 17(1) or section 25(1) of FOISA in responding to Mr G.
44. The Commissioner now requires Transport Scotland to respond to Mr G on the basis that information is held and is not publicly available. In other words, it must provide him with a new review outcome, in terms of section 21(4)(b) of FOISA (i.e. substituting a new decision for its original decision), and not relying on sections 17(1) or 25(1) of FOISA..
45. Incidentally, despite being given the opportunity to provide submissions regarding the application of any relevant provisions of FOISA, the Commissioner has been given no reason why Transport Scotland cannot simply provide Mr G with the information requested and that is what she presumes Transport Scotland will now do. Having claimed that Mr G can readily work out the total figures for himself, she would expect that Transport Scotland can also

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx>

² <http://www.gov.scot/Resource/0051/00510851.pdf>

readily work out the total costs without claiming reliance on any of the other provisions in FOISA.

Decision

The Commissioner finds that Transport Scotland failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr G. The Commissioner finds that Transport Scotland was incorrect in responding in terms of section 17(1) and 25(1) of FOISA. She also finds that it failed to comply with its duty under section 15(1) of FOISA.

The Commissioner therefore requires Transport Scotland to provide Mr G with a review outcome in terms of section 21(4)(b) of FOISA, by **14 August 2017**.

Appeal

Should either Mr G 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.

Enforcement

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

Margaret Keyse
Acting Scottish Information Commissioner

29 June 2017

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.

...

- (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.

...

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 –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

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.

...

21 Review by Scottish public authority

...

(4) The authority may, as respects the request for information to which the requirement relates-

...

(b) substitute for any such decision a different decision; or

...

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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