

# Decision Notice

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## Decision 118/2018: Mr D and Transport Scotland

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### Value for money and community needs analyses

Reference No: 201800687

Decision Date: 27 July 2018



Scottish Information  
Commissioner

## Summary

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Transport Scotland, in relation to the Gourock to Dunoon ferry service, was asked for information relating to (a) the latest value for money analysis and (b) the latest analysis justifying the appropriate level of service based on the communities' needs. Transport Scotland stated that it did not hold the information requested.

The Commissioner accepted that this was the case.

## Relevant statutory provisions

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

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

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1. On 13 September 2017, Mr D made two requests for information to Transport Scotland. The requests were for:
  - a) the latest value for money analysis undertaken for the Gourock to Dunoon service; and
  - b) the latest analysis undertaken which justifies the appropriate level of service based on the communities' needs.
2. Transport Scotland responded to each request on 10 October 2017. In relation to both requests, Transport Scotland stated that the information was exempt in terms of section 30(c) of FOISA, as disclosure would, or would be likely to, substantially prejudice the effective conduct of public affairs.
3. Transport Scotland stated that the request was substantially similar to an earlier request, which sought the business case for the Gourock to Dunoon service, and that the exemption applied at that time still applied. It explained that, as the tender process for the route was only paused, disclosure could prejudice that process and give an unfair advantage. It stated that any public interest in transparency was outweighed by that in maintaining effective conduct of public affairs during a live procurement.
4. On 11 October 2017, Mr D wrote to Transport Scotland, requesting a review of its decisions on the basis that it had published similar information in previous exercises and disclosure would cancel out any disadvantage. Mr D further submitted that he believed the refusal was due to either the non-existence of the analyses, or them being less robust than in the earlier case. Given the estimated £4m annual subsidy cost for the service, Mr D believed it was in the public interest to know that the level of funding was appropriate to the established needs of the community.
5. In relation to the request at a), Transport Scotland notified Mr D of the outcome of its review on 7 November 2017. It maintained its original decision, explaining that the information was contained within the business case document, disclosure of which would prejudice substantially the effective conduct of the (still live) tendering process.

6. In relation to the request at b), Transport Scotland notified Mr D of the outcome of its review on 8 November 2017. Again, it advised that the information requested was contained in the business case document and disclosure would not be in the public interest. It maintained the information was exempt in terms of section 30(c) of FOISA.
7. On 8 November 2017, Mr D wrote to the Commissioner in relation to the request at a). He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr D stated he was dissatisfied with the outcome of Transport Scotland's review because he disagreed with the application of section 30(c) of FOISA.
8. On 13 November 2017, Mr D wrote to the Commissioner in relation to the request at b). Mr D applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr D stated he was dissatisfied with the outcome of Transport Scotland's review because he disagreed with the application of section 30(c) of FOISA.
9. During the Commissioner's investigation of the above applications, it became apparent that the information contained in the business case document referred to by Transport Scotland did not contain information that fell within the scope of either of Mr D's requests of 13 September 2017.
10. As a result, on 11 April 2018, Transport Scotland provided Mr D with a new review outcome for both of his requests. Transport Scotland provided Mr D with a formal notice in terms of section 17(1) of FOISA, informing him that it did not hold information which focused specifically on value for money or community needs analysis.
11. Transport Scotland advised that, in order to provide the specific information requested, it would need to collate information focusing specifically on value for money or community needs analysis from several complex individual documents and communications which, when taken together, would serve to inform such analyses. It explained that this information could not easily be extracted from the documents held, and it would require skill and complex judgement to collate the information held.
12. Following receipt of this new review outcome, Mr D withdrew his initial applications to the Commissioner.
13. On 18 April 2018, Mr D wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr D stated he was dissatisfied with the outcome of Transport Scotland's review of his requests. In his view, the review outcome clearly stated that Transport Scotland held documentation in relation to a value for money analysis and an assessment of communities' needs and, as such, the section 17(1) provision was inappropriate.

## **Investigation**

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14. Mr D's application was accepted as valid. The Commissioner confirmed that Mr D made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to him for a decision.
15. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 11 May 2018, in line with agreed procedures, the Ministers were notified in writing that Mr D had made valid applications to the Commissioner. The case was allocated to an investigating officer.

16. 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.
17. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 5 July 2018, Transport Scotland was asked to provide evidence to show that it did not hold the information requested and to comment on its potentially contradictory response of 11 April 2018.
18. In its correspondence with the investigating officer, Transport Scotland apologised for the confusing review outcome of 11 April 2018, with submissions to the effect that it did not hold the analyses requested by Mr D.

## **Commissioner's analysis and findings**

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19. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr D and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.

### **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. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. These qualifications do not apply in this case.
21. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
22. The Commissioner notes the submissions provided by Mr D, in which he provides reasons why he considers Transport Scotland should hold the requested information.
23. The Commissioner also notes that, in his requirement for review of 11 October 2017, Mr D stated that he believed Transport Scotland's refusal might have been due to the non-existence of the analyses requested.
24. During the investigation into Mr D's initial applications to the Commissioner, Transport Scotland had stated that, while it did not hold any single definitive documents entitled "Value for Money" or "Communities' Needs" analysis, any information on analysis was contained in an outline business case document. Having considered that document, it was apparent to the Commissioner that the information requested by Mr D in his requests of 13 September 2017 was not contained in the outline business case document. This appeared to be accepted by Transport Scotland.
25. As mentioned above, on 11 April 2018, Transport Scotland issued Mr D with a formal notice under section 17(1) of FOISA, stating that that it did not hold information which focused specifically on value for money or community needs analysis.
26. Then, however, Transport Scotland appeared to confuse matters by advising Mr D that, in order to provide him with the information requested, it would need to collate information focusing specifically on value for money or community needs analysis from several complex

individual documents. It stated that this would require skill and complex judgement, although the relevance of these statements was not made clear.

27. As has been explained in previous decisions, FOISA provides the right of access to recorded information held by a Scottish public authority. It does not require an authority to create information in order to respond to a request for information: that would be the situation if skill and complex judgement were required to collate information from existing sources.
28. However, if what was actually requested (for example, an analysis with specified parameters) was not held, that would be an end to the matter. If the public authority does not hold such an analysis, the information is simply not held and its creation goes beyond collation, complex or otherwise.
29. In its correspondence with the Commissioner, Transport Scotland apologised for the confusion that its response of 11 April 2018 might have caused. It confirmed its position that it did not hold the information requested by Mr D in his requests of 13 September 2018.
30. Transport Scotland advised that it did not hold any recorded information which focused specifically on value for money or community needs analysis. Where it could extract any information relating to value for money or community needs, officials with the appropriate specialist knowledge would still have to complete the analysis in order to provide the information requested by Mr D.
31. Transport Scotland provided submissions to the effect that the Gourock to Dunoon ferry service contract is administered by a small team of individuals with specialist knowledge of the contract and of the information held in relation to the contract. It advised that, at the time it issued the section 17(1) review outcome, it had done so as officials with responsibility for the administration of the contract were aware that no relevant analysis had been completed at the time of Mr D's request.
32. During this investigation, Transport Scotland advised that if it held information falling within the scope of either of Mr D's requests, it would be held within its electronic information management system, within specified files. Transport Scotland confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of Mr D's requests. Transport Scotland provided supporting evidence confirming the outcomes of its searches. The conclusion of the searches and enquiries was that it did not hold any information falling within the scope of Mr D's requests.
33. Mr D's requests are quite clear and it is apparent that he is seeking the analyses undertaken, if any; he has not requested information that may be held and which may inform such analyses.
34. Taking account of all of the submissions provided by Transport Scotland, it is clear to the Commissioner that, while Transport Scotland may hold information regarding value for money and community needs, which could inform analyses of the kind requested by Mr D, Transport Scotland does not hold any information to show that it has conducted such analyses, as requested by Mr D.
35. Given the explanations provided, the Commissioner is satisfied, on the balance of probabilities that Transport Scotland held no information falling within the scope of Mr D's requests of 13 September 2017.

36. The Commissioner is therefore satisfied that Transport Scotland was correct to give Mr D notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope his requests of 13 September 2017.
37. The Commissioner is, however, concerned that it appears to have taken Transport Scotland until a further application was made to the Commissioner before it took the appropriate steps to determine whether it held the requested information (including forming a clear understanding of what Mr D was actually looking for). For whatever reason, Transport Scotland appears to have given the impression of a reluctance to inform Mr D clearly that it did not hold the information that he had requested. Even after Mr D raised his suspicion that the information did not exist, as outlined in his requirement for review of 11 October 2017, Transport Scotland continued (for example, in its review outcome of 11 April 2018) to address the question of what it held ambiguously. If it had not carried out the relevant analyses, it should have been readily apparent that it could not hold the information requested – and no amount of skill and complex judgement could rectify that for the purposes of FOISA.
38. While no useful purpose would be served by requiring Transport Scotland to take any specific action in this case, the Commissioner would urge Transport Scotland to ensure that, in response to future information requests, it takes reasonable steps to establish whether it actually holds any relevant information before purporting to withhold that information from requesters. In all cases, it should address the question of whether it holds information clearly, with clear and relevant explanations, where necessary, if it does not.
39. Had Transport Scotland provided Mr D with clear notices in terms of section 17(1) of FOISA when it responded to his requests, without the ambiguities raised even at the point of its eventual section 17 response of 11 April 2018, it is likely that the need for lengthy further process on Mr D's part could have been avoided.

## Decision

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The Commissioner finds that, in relation to the points raised in Mr D's application, Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by Mr D.

## Appeal

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Should either Mr D 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**

**27 July 2018**

### 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.

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#### 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.

...

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