



Scottish Information
Commissioner

**Decision 027/2006 Mr Gordon Ross, Managing
Director of Western Ferries (Clyde) Limited and
Caledonian MacBrayne Limited**

*Refusal to provide copies of vessel log sheets for the Gourock to
Dunoon route*

**Applicant: Gordon Ross, Managing Director of Western
Ferries (Clyde) Limited
Authority: Caledonian MacBrayne Limited
Case No: 200501993
Decision Date: 20 February 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 027/2006 Mr Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited

Request for copies of vessel log sheets for Caledonian MacBrayne's Gourock to Dunoon service – excessive cost of compliance – section 12 of the Freedom of Information (Scotland) Act 2002 (FOISA) – whether release would prejudice substantially the commercial interests of Caledonian MacBrayne – section 33(1)(b) of FOISA – consideration of the public interest

Facts

Mr Ross initially requested copies of Caledonian MacBrayne's vessel log sheets (those contained in the Deck Log Books) for the Gourock to Dunoon route over a 12 month period. This request was refused on the grounds of excessive cost, because Caledonian MacBrayne concluded that the cost of responding to the request would exceed the £600 prescribed limit. The company also informed Mr Ross that the log sheets were exempt from release under section 33(1)(b) of FOISA, which applies where release of information would or would be likely to prejudice substantially the commercial interests of any organisation.

After Caledonian MacBrayne upheld its initial decision on this request at internal review Mr Ross applied for a decision by the Commissioner on 18 March 2005.

Mr Ross later made 12 separate requests, each for copies of vessel log sheets covering a period of one month. Caledonian MacBrayne informed Mr Ross that its position on these requests was the same as in response to the previous single request. Caledonian MacBrayne refused these twelve requests on the grounds that the combined cost of responding would exceed £600.

After Caledonian MacBrayne upheld its initial decisions on these requests at internal review Mr Ross again applied for a decision by the Commissioner on 6 June 2005.

The applications were conjoined for the purposes of investigation.

Outcome

The Commissioner found that the cost of compliance with Mr Ross's initial request would exceed the prescribed limit.



However, the Commissioner found that Caledonian MacBrayne had failed to comply with Part 1 of FOISA by refusing his subsequent requests on the grounds of excessive cost. He found that the 12 subsequent requests for vessel log sheets should have been considered individually, and the cost of compliance with each would not exceed the £600 cost limit.

The Commissioner agreed that the passenger numbers contained on these sheets were exempt from release under section 33(1)(b) because their release would be likely to prejudice substantially Caledonian MacBrayne's commercial interests. The Commissioner also found that in all the circumstances of the case, the public interest in maintaining this exemption outweighed that in release.

The Commissioner also found that Caledonian MacBrayne had failed to fully comply with section 16 of FOISA by failing to refer to its consideration of the public interest in its refusal notice of 14 February 2005.

The Commissioner now requires Caledonian MacBrayne to provide Mr Ross with copies of the front side of the log sheets, with passenger figures redacted, for each of the months to which his twelve individual requests relate.

Appeal

Should either Mr Ross or Caledonian MacBrayne wish to appeal against my 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 of receipt of this notice.

Background

1. This decision is prompted by two separate applications for a decision by me. These follow from two separate sets of requests for the same type of information relating to Caledonian MacBrayne's ferry service between Gourock and Dunoon. Before outlining the case and the arguments put to me by the parties, it is useful to set out some background information on this service, which has relevance to my decision.



Caledonian MacBrayne's Gourock to Dunoon service

2. Caledonian MacBrayne currently operates lifeline ferry services to 22 islands and four peninsulas on the West Coast of Scotland. As these services are loss making, Caledonian MacBrayne's operations are subsidised by an annual deficit grant from the Scottish Executive. The deficit grant in the financial year 2004-05 was £25.9m.
3. Caledonian MacBrayne's obligations are set out in the "Undertaking", a 1995 document (available to view online here: <http://www.calmac.co.uk/undertakingbysecretaryofstate.pdf>) which commits the Scottish Ministers (previously the Secretary of State for Scotland) to providing grants or loans for the purposes of supporting sea transport services serving the Highlands and Islands. A revenue grant is made to cover the deficit estimated as likely to be incurred in the course of providing "approved services" each year and capital grants or loans can be provided for the acquisition or improvement of facilities.
4. In return for this funding, Caledonian MacBrayne must provide the approved services, and cannot discontinue these or amend the places served without the consent of the Scottish Ministers. Caledonian MacBrayne is obliged to provide a specified level of service and to follow timetabling and other requirements.
5. Caledonian MacBrayne's approved service between Gourock and Dunoon (i.e. the service operated under the auspices of the Undertaking) is restricted to avoid the subsidised service undermining the privately operated Western Ferries service between two points on the outskirts of the respective towns. The service approved within the Undertaking (i.e. for which subsidy is available) is restricted to passengers only, and subject to timetable restrictions.
6. The Caledonian MacBrayne service between Gourock and Dunoon currently carries both vehicles and foot passengers. The vehicle service is operated on an "out of undertaking", commercial basis. Guidelines issued by the Scottish Executive in 1995 state that the pricing of any Out of Undertaking activity should cover at least the full cost of supply. In simple terms, such activity should not be loss-making.

Tendering of the Clyde and Hebrides ferry services

7. In order to comply with EU rules on state aids, the Scottish Executive is in the process of putting the contract to operate the services under the Undertaking and the associated funding out to competitive tender. All but one of the existing services will be tendered as a single bundle. However, the particular arrangements on the Gourock to Dunoon route have led to this service being subject to different arrangements.



8. The future status of the Gourock to Dunoon service operated by Caledonian MacBrayne is currently unclear. Before a contract to operate a subsidised service is put out to tender, a process is first ongoing to establish whether any operator is willing and able to operate a suitable service on a commercial, unsubsidised basis.
9. In October 2005, the Scottish Executive placed a notice in the European Journal inviting companies from across the EU to bid to operate an unsubsidised commercial ferry service between Gourock and Dunoon. If an operator is found that is able to offer the level of service required without any subsidy, the subsidised service will be withdrawn.
10. If no operator is able to provide an appropriate service without subsidy, a tendering process will take place in which bidders will be invited to compete for the contract to operate a subsidised service

Mr Ross's initial request for vessel log sheets covering a 12 month period

11. Mr Ross wrote to Caledonian MacBrayne on 3 January 2005. His letter contained numerous requests for information, including one for "copies of vessel log sheets operating on the Dunoon service over the last 12 months".
12. The relevant log sheets are contained in "deck log books". The deck log book contains a number of two-sided sheets, one of which (both sides) must be filled out on each day that a vessel sails. The sheet records the time of each sailing, passenger and crew numbers and various other pieces of information about the day's sailings. As a number of Caledonian MacBrayne vessels operate on the Gourock to Dunoon route, the log sheets requested by Mr Ross would be contained in a number of log books, which are stored on the vessels themselves.
13. Caledonian MacBrayne responded to Mr Ross's request in a letter of 28 January 2005. This letter advised him that Caledonian MacBrayne estimated that it would not be able to comply with the request within the upper cost limit of £600 set within the Fees Regulations made under section 12 of FOISA. The letter noted that if Mr Ross were to provide more specific information on his requirements, Caledonian MacBrayne would do all it could to accommodate the request.
14. Mr Ross wrote to Caledonian MacBrayne again on 8 February 2005 to request reviews of its decisions in relation to a number of his requests for information. This letter reiterated the request for access to copies of the daily log sheets compiled on a sailing by sailing basis.



15. Caledonian MacBrayne notified Mr Ross of the outcome of its review in a letter dated 14 February 2005. This stated that the information sought was exempt from release under section 33(1)(b) of FOISA, on the grounds that release would be likely to prejudice the commercial interests of the company and its ability to tender competitively for the Gourock to Dunoon route.
16. On 18 March, Mr Ross applied to me for a decision on this request. His application also related to various other requests, but these will be considered in separate decisions.
17. Mr Ross suggested in his application that because Caledonian MacBrayne received subsidy for the operation of its services, release of the information he had requested should not be prejudicial to its interests or ability to tender. He noted that passenger numbers were published in Caledonian MacBrayne's annual report and accounts, and so there was already a pattern of sharing the information contained on the log sheets.

Mr Ross's subsequent requests for vessel log sheets over periods of one month

18. Following his initial request's refusal, Mr Ross made a further series of 12 requests in letters dated 18 March 2005. These each requested copies of the vessel log sheets operating on the Gourock to Dunoon route during a single month period. The months covered by these requests were April 2004 through to March 2005. (Mr Ross's initial request in January 2005 had sought log sheets for January to December 2004).
19. Although these new requests together sought broadly the same information as the initial one, they were not repeated requests for the purposes of section 14 of FOISA. Section 14(2) states that a public authority need not comply with a request for information where it has complied with a previous request that is identical or substantially similar, and a reasonable period of time has not passed in the interim. This section would not apply in this case because
 - a) Caledonian MacBrayne had not complied with the previous request, having informed Mr Ross that it was not required to do so on the grounds of excessive cost.
 - b) In some cases these new requests relate to specific months not included in the initial request and so these cannot be regarded as either identical or substantially similar to the previous single request.
20. Caledonian MacBrayne notified Mr Ross on 18 April 2005 that the aggregated cost of responding to the 12 new requests would exceed the £600 upper cost limit set in the Fees Regulations. The letter provided an estimate of the time that would be taken to respond to the request and the consequent costs involved in providing copies of the documents.



21. Mr Ross requested a review of Caledonian MacBrayne's decision in relation to these requests on 25 April 2005. He suggested that since he had submitted his 12 requests individually, it was inappropriate for Caledonian MacBrayne to aggregate the costs of responding.
22. Caledonian MacBrayne's response, dated 24 May 2005, noted that the information requested was of a similar type and scale relative to the initial request described in paragraph 11 above. It noted that this request had already been referred to me and the company awaited my decision. On these new requests, Caledonian MacBrayne maintained its original position set out in paragraph 20.
23. Mr Ross then made a second application to my office in relation to these 12 requests for vessel log sheets in a letter dated 6 June 2005.
24. The applications were allocated to an investigating officer and conjoined for the purposes of investigation.

Investigation

25. The appeals were validated by establishing that Mr Ross had made valid information requests to a Scottish public authority under FOISA and had appealed to me only after asking Caledonian MacBrayne to review the responses to his requests. Caledonian MacBrayne is a company wholly owned by the Scottish Ministers and as such is a publicly owned company (and therefore a public authority) for the purposes of section 3(1)(b) of FOISA.
26. Following Mr Ross's first application to me (on the single request for log sheets covering a full year), the investigating officer wrote to Caledonian MacBrayne on 4 April 2005 requesting
 - a) copies of the information withheld in response to this and other requests;
 - b) information about the application of the exemption in section 33(1)(b); and
 - c) information on Caledonian MacBrayne's consideration of the public interest.
27. Caledonian MacBrayne's response provided a sample copy of a vessel log sheet. This sheet contains the following information:

front of log sheet

- i. date
- ii. sailing start and end points



- iii. sailing times
- iv. passenger numbers for each sailing
- v. crew numbers for each sailing
- vi. tide times and height
- vii. weather details
- viii. times when key actions taken (e.g. startup checklist)
- ix. names and signatures of key staff

rear of log sheet

- x. date (as on front of the sheet)
- xi. "additional comments" (which might record anything out of ordinary on the day's sailing – examples include details of passenger accidents, call to assist vessels in difficulty etc)

28. Caledonian MacBrayne also explained that
- a) these sheets would have to be copied on the vessels to which they relate as sheets for the time period requested are stored on the vessels.
 - b) it estimated that it would take two minutes to copy each two-sided log sheet on board the vessels.
 - c) as sensitive information was recorded on the sheet time would also be involved in preparing the documents for release (not including any time taken in determining whether exemptions applied).
 - d) several vessels operate on the Gourock to Dunoon route, so time would be involved in determining the periods during which each vessel operated on the route.

Caledonian MacBrayne therefore concluded that the overall costs of complying with the single request for log sheets over a year period would be substantially more than the prescribed fees limit of £600.

29. No estimate of the total cost of responding to this request was provided however. It was also not clear which parts of the log sheet were considered by Caledonian MacBrayne to contain sensitive information.
30. Following receipt of Mr Ross's second application (concerning the 12 distinct requests for log sheets over a month), the investigating officer wrote again to Caledonian MacBrayne. Further details were requested on:



- a) The calculation of costs involved in responding to the requests for log sheets. A breakdown was requested showing how the costs were calculated for providing sheets for each month, and the year as a whole.
 - b) The reasoning for the application of the exemption in section 33(1)(b) to these documents, and any supporting evidence for this judgement.
 - c) The consideration of the public interest in relation to these specific documents.
31. In response to this letter, Caledonian MacBrayne estimated the total cost of providing log sheets for a full year at £2844. This figure comprised:
- a) Photocopying: £144. Copies of both sides of 360 days log sheets (one for each day on which the vessel operates) would require 720 copies to be made. Charging at 20 pence per sheet (the company's standard copying charge), this would be £144.
 - b) Staff costs: £225 per month, £2700 for the year. This figure is based upon an assumption that it would take 30 minutes to prepare each log sheet for release (copying, redacting any exempt information and copying again). On the basis of 30 sailing days per month, this would require 15 hours of staff time, charged at the maximum allowable £15 per hour.
- By dividing Caledonian MacBrayne's annual estimated total by 12, we can infer that its estimated cost of responding to each monthly request would be, on average, £237.
32. Caledonian MacBrayne confirmed that it considered the exemption in section 33(1)(b) to apply to the passenger numbers which are listed on a sailing by sailing basis. It advised me that access to these figures would allow competitor companies to "cherry-pick" the most profitable times to operate services, to the detriment of Caledonian MacBrayne's.
33. Caledonian MacBrayne also noted that the log sheets contained personal information about crew members, and that this would have to be removed under section 38 of FOISA. Although not explicit, I understand this point to refer to section 38(1)(b) of FOISA, which applies where the information under consideration is personal data for the purposes of the Data Protection Act 1998 (the DPA) and where release would breach any of the Data Protection Principles.
34. The investigating officer then visited Caledonian MacBrayne's headquarters in Gourock to discuss this and other cases in September 2005. During this visit, she was able to discuss in more depth the content of the vessel log sheets, the reasons for the application of exemptions to them, and the process that would be involved in preparing copies of the log sheets for release.



35. In the course of these discussions, Caledonian MacBrayne clarified which parts of the log sheets were considered to be exempt. This was primarily the passenger numbers, under section 33(1)(b). Following discussions, Caledonian MacBrayne no longer sought to withhold the names of crew members.
36. Caledonian MacBrayne also pointed out that the 'additional comments' box on the rear of the sheet might contain any ad hoc information relating to the day's sailings. Each would need to be checked to establish whether such information was exempt from release. The primary concern expressed to investigating officer was that passenger information might be present and that release of this would breach the Data Protection Principles.

Clarification of the request with Mr Ross

37. In both applications to me, Mr Ross had wrongly asserted that the vessel log sheets record carrying figures for all types of traffic, and that copies of the sheets would allow Western Ferries to verify the levels of traffic carried on the service. Although the sheets do show passenger numbers for each sailing, they do not record the carryings by type of traffic.
38. Mr Ross was advised of the nature of the contents of the log sheets by the investigating officer, and was asked whether he would still want to be provided with copies of the rest of the log sheets if the passenger numbers were judged to be exempt from release. Again Mr Ross confirmed that he would still want access to the vessel logs to enable him to view crew numbers on these original records.
39. Mr Ross did indicate however, that he did not require copies of the rear side of the sheet, containing the additional comments box.

The Commissioner's analysis and findings

40. In order to determine these applications, two questions must be answered:
 - a) Is any of the information requested by Mr Ross exempt from release?
 - b) Would the cost of responding to any of Mr Ross's requests exceed the prescribed limit of £600?I will address each of these in turn.



Is the information requested exempt from release?

41. Since Mr Ross has confirmed in the course of this investigation that he only wishes to be provided with the front side of each log sheet, my consideration of this first question will be restricted to the information contained on this side. This includes:

front of log sheet

- i. Date of sailings
 - ii. sailing start and end points
 - iii. sailing times
 - iv. passenger numbers for each sailing
 - v. crew numbers for each sailing
 - vi. tide times and height
 - vii. weather details
 - viii. times when key actions taken (e.g. startup checklist)
 - ix. names and signatures of key staff
42. In the early stage of this investigation, Caledonian MacBrayne indicated that it believed that the information about crew members was exempt from release under section 38 of FOISA. However, after discussions with the investigating officer, Caledonian MacBrayne no longer sought to withhold this information (ix).
43. Caledonian MacBrayne does still maintain that passenger numbers (iv) are exempt information under section 33(1)(b) of FOISA because their release would be likely to prejudice substantially its commercial interests.

Commercial interests

44. Caledonian MacBrayne has suggested that release of the passenger numbers contained in the log sheets would prejudice substantially its own commercial interests in two ways:
- a) By providing competitors with information that would enable them to “cherry pick” the most attractive periods to operate a service within the day, week, month or year.
 - b) By reducing Caledonian MacBrayne’s ability to tender successfully for the continued operation of its service between Gourock and Dunoon.
45. In his application to me, Mr Ross has argued that, as Caledonian MacBrayne’s operations are subsidised, the company does not have commercial interests that can be harmed by the release of information.



46. I have addressed this point previously in my decision 061/2005. Mr Ross's argument appears to correlate the term "commercial" with "profit making". I consider "commercial" to have wider meaning in the context of section 33 of FOISA, however. Commercial interests relate to a person's ability to successfully participate in a commercial activity, e.g. the sale and purchase of goods or services. There is no requirement that these activities are profit making before this exemption can be engaged.
47. Caledonian MacBrayne engages in the sale and purchase of services by operating the Clyde and Hebrides ferry network. Furthermore, it does so in a competitive environment where any organisation may choose to establish a rival service. In addition, Caledonian MacBrayne operates as a limited company, subject to the same requirements of company law (including requirements as to competition and solvency) as any of its competitors.
48. Therefore, I conclude that Caledonian MacBrayne does have commercial interests, and the exemption in section 33(1)(b) can be appropriately invoked in circumstances where the release of information would be likely to prejudice these interests substantially.

Cherry picking

49. In decision 061/2005, I considered Caledonian MacBrayne's arguments about the threat of cherry picking by competitors in relation to the potential release of information showing yearly losses on a single route. There, I concluded that the release of broad information about losses on individual routes would not significantly increase the likelihood of competitors targeting particular routes over others. I also concluded that release of this information would not significantly increase the likelihood of the success of any competitor.
50. In this case, the passenger numbers contained in the log sheets would reveal significantly more detailed information about the operations of a particular route. With access to the number of passengers carried on each sailing, a competitor would be able to identify which times, days, weeks and months were the most valuable to Caledonian MacBrayne on this route.
51. Following such an analysis, a (new or existing) competitor could then model their own timetable to offer services during these busiest periods, avoiding those where passenger numbers were lowest.
52. I accept that the introduction or enhancement of competition on any of Caledonian MacBrayne's routes would be likely to have an impact on its commercial interests. I also accept that increased losses would be a likely outcome of this as such competition, particularly in the short term in which Caledonian MacBrayne's obligations to provide a specified level of service would prevent a swift response to the changed environment.



53. I am satisfied that the passenger numbers contained in the vessel log sheets are exempt from release under section 33(1)(b) of FOISA because their release would provide significant assistance to any existing or potential competitor in competing (more) effectively with Caledonian MacBrayne on the Gourock to Dunoon route. I agree that it is likely that Caledonian MacBrayne's commercial interests would be substantially prejudiced as a result of their release.
54. Mr Ross has suggested that there is a precedent for Caledonian MacBrayne's sharing of information about passenger numbers through publication in its annual report and website. However, the published figures show only annual total passenger numbers. This publication does not suggest that Caledonian MacBrayne, or any other similar organisation, would routinely share the type of detailed passenger information contained in the individual log sheets.

Caledonian MacBrayne's ability to tender competitively

55. Caledonian MacBrayne has also argued that release of the passenger numbers in the log sheets would prejudice its ability to tender competitively for the contract to operate the Gourock to Dunoon service in any up-coming tender process.
56. I do not find that the application of the exemption in section 33(1)(b) has been demonstrated in this respect. Although Caledonian MacBrayne has argued that release of various types of information would harm its competitive position in the tendering process, this has not been demonstrated to me in relation to the effect of release of this particular information. In this case, the submissions on the contents of the log sheets have focussed on the effects of release on Caledonian MacBrayne's commercial interests resulting the context of more general competition on this route.
57. However, I am aware that this information would be of relevance to parties bidding in any forthcoming tendering process and this factor is of significance to my consideration of the public interest in this case.

Consideration of the public interest

58. I have found that the passenger numbers contained in the vessel log sheets are exempt information for the reasons outlined in paragraph 53 above. However, section 33(1)(b) of FOISA is a qualified exemption, and so before concluding that this information should be withheld, the public interest must first be considered.
59. Caledonian MacBrayne has identified a number of factors that it believes favour withholding the passenger numbers contained on the log sheets:
- a) The likelihood of increased subsidy requirement should Caledonian MacBrayne's commercial interests be harmed by release.



- b) A possible diminution of lifeline service provision, which would have a detrimental effect on the communities involved and staff.
 - c) The need for any upcoming tendering process to proceed fairly to all parties.
60. Mr Ross was also invited to comment on the public interest in relation to this and other information he had requested concerning the Gourock to Dunoon service.
61. In response, he informed me that his organisation believed that Caledonian MacBrayne's service between Gourock and Dunoon was over-subsidised.
62. He pointed out that the vehicle service on the Gourock to Dunoon route was conducted outwith the undertaking, and as such, this part of the operation should not be in receipt of public funding. He noted that if the losses incurred in the provision of a combined vehicle and passenger service exceeded those that would be incurred by the passenger service alone, then this would provide evidence that the vehicle service was in receipt of subsidy.
63. Mr Ross indicated that his requests for information about the Gourock to Dunoon service were prompted by the belief that this was the case. He argued that it was in the public interest that such information was released for the purposes of transparency and accountability, given the likelihood (in his view) that public funds had been misused. He argued further that if there was over-subsidisation, removal of this would lead to a reduction of the burden on the public purse.
64. Given the nature of Mr Ross's allegations, both Caledonian MacBrayne and Mr Ross were invited to comment further on this matter in letters dated 18 November 2005. Caledonian MacBrayne was invited to comment on Mr Ross's arguments in relation to the public interest, and asked to provide further information in relation to the vehicle service between Gourock and Dunoon. Mr Ross was asked to provide reasons for his belief that the vehicle service between Gourock and Dunoon was in receipt of subsidy despite being operated on an out of undertaking basis. Responses were received to both of these requests, and these have been taken into consideration when reaching the conclusions below.

Conclusions on the public interest

65. In this case, I have found significant reasons for withholding the passenger numbers contained on the vessel log sheets. I have concluded that the exemption in section 33(1)(b) applies, and so I have accepted that release would be likely to have a real and significant detrimental effect on Caledonian MacBrayne's commercial interests.



66. Both the applicant and the public authority have raised in this case matters of public interest in arguing for the disclosure and withholding of the requested information. What I must consider is whether in all the circumstances of the case, the public interest in disclosing the information is outweighed by maintaining the exemption.
67. Caledonian MacBrayne is a publicly-owned asset which provides lifeline ferry services to some of Scotland's remotest communities. In doing so, it currently holds a secure and privileged position as a result of its funding arrangements. Caledonian MacBrayne's status and its consequent obligations under FOISA bring expectations of transparency that go considerably beyond those of private sector companies.
68. However, I am also mindful that Caledonian MacBrayne operates in a competitive environment. I think it would be contrary to the public interest to require a level of disclosure by Caledonian MacBrayne that would be likely to substantially prejudice its own interests (and ultimately the interests of the public that owns it), while going significantly beyond the level required of its private sector counterparts.
69. Loss of income to Caledonian MacBrayne could bring a consequent requirement for additional subsidy if the existing service level were to be maintained. If increasing costs of providing lifeline services led to a reduction in service levels, this could have consequences for the communities served.
70. Mr Ross's comments on the possibility of over-subsidisation of the Caledonian MacBrayne service do raise questions of significant public interest. A general public interest consideration in relation to financial information is that release can contribute to the effective oversight of public funds. If release would demonstrate that there has been misuse of public funds, this is a significant consideration weighing in favour of release.
71. Mr Ross's arguments for over-subsidisation depend upon demonstration of the relative losses incurred in providing a passenger only service and a combined vehicle and passenger service. However, the passenger information on the log sheets does not break down vehicle and foot passenger numbers, or differentiate vehicle types. Indeed, it does not identify vehicle numbers at all.
72. Whilst I cannot rule out that this information, particularly in conjunction with other information, might still be useful either to help allay or substantiate concerns regarding over-subsidisation, I have to set this possibility against the fact that the information would certainly be useful to any current competitor or one minded to set up a rival service on the same route.



73. Furthermore, with tendering of the Caledonian MacBrayne service set to take place in the near future, I am aware that it is in the public interest that this process is able to proceed in a manner that is fair to all parties. In the course of the tendering process, the Scottish Executive will make information that it considers to be necessary for bidders to prepare their submissions via a secure information room.
74. I believe that the fairness of the tendering process could be undermined if Caledonian MacBrayne were required to release passenger numbers at the level of detail contained in the log sheets at this point in time.
75. I have concluded therefore that the public interest in disclosing the information in relation to the passenger numbers contained in the log sheets is outweighed by the public interest in maintaining the exemption from release. .

Would the cost of responding to Mr Ross's requests exceed the £600 limit?

76. Having determined what information should not be provided in response to Mr Ross's request, I must now address the question of whether Caledonian MacBrayne was correct to assert that the costs involved in doing so would exceed the £600 limit set out in the Fees Regulations.
77. Mr Ross has confirmed in the course of this investigation that he only requires copies of the front side of log sheets. However, Caledonian MacBrayne's responses to the requests were based on the consideration of the full log sheets. My decision must assess whether this was correct under FOISA, irrespective of the later narrowing of the requests.
78. Section 12 of FOISA says that a public authority is not required to comply with a request for information where the cost of doing so would exceed the amount prescribed in regulations made by the Scottish Ministers. Regulation 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations), specifies this prescribed limit as £600. Public authorities have the discretion to comply with requests where the cost exceeds this amount, but they are not required to do so.

The single request for one year's log sheets

79. This first request sought access to log sheets for a full year and, according to Caledonian MacBrayne's estimate of £2844, the cost of responding would clearly exceed the prescribed limit. I am prepared to accept that the overall costs of responding to this request would exceed the prescribed limit, although there are aspects of the calculation with which I take issue.
80. For example, I find it unlikely that it would take 30 minutes to prepare each log sheet for release. This process would be largely mechanical, requiring
 - a) copying of the front sheet,



- b) redaction of the passenger numbers with a single line of pen or correction fluid on this copy,
- c) copying again to create the version to be provided.

The rear of each log sheet would need to be checked for any ad hoc information that required redaction, but the need for this would be rare. In most instances, the copying of the rear sheet would be straightforward. I understand that the facilities for copying on the vessels are basic, but once original copies had been taken, the task of redaction and recopying could be carried out in Caledonian MacBrayne's offices.

- 81. However, even if the task was reduced to 10 minutes per sheet, the costs according to Caledonian MacBrayne's estimate would amount to £900. Given that allowance must be made for the fact that the material would have to be copied at several sites and then collated for the purposes of redaction I am satisfied that the cost of responding to this request would exceed the upper limit.
- 82. I also want to briefly note that a charge of 20p per sheet is relatively high, given that costs calculated under the Fees Regulations should reflect the actual costs to the public authority. Paragraph 6 of the Scottish Executive's Guidance to Scottish Public Authorities on Charging Fees for Providing Information notes that it is not acceptable for public authorities to include a greater charge than it actually incurs when calculating costs under the Fees Regulations.
- 83. I am aware that 20p per sheet is the fee charged under Caledonian MacBrayne's publication scheme for printed copies of information, but note that different considerations apply when calculating charges under the Fees Regulations.

The 12 requests for one month's log sheets

- 84. The Fees Regulations do not include any provision for the aggregation of fees in relation to multiple requests by one person. This means that where one person makes several requests, the cost of each must be considered separately, and each request must be complied with unless the cost of doing so would exceed £600.
- 85. Caledonian MacBrayne's decision to aggregate the costs of complying with Mr Ross's 12 requests for log sheets over a month was therefore not in accordance with section 12 of FOISA. The costs of complying with each of these requests should have been calculated individually.



86. Caledonian MacBrayne has estimated that the cost of providing log sheets for a year period is £2844. The cost of providing one month's log sheets would therefore be on average £237 on its figures. As this cost is below the prescribed limit of £600, Caledonian MacBrayne is obliged to comply with each of these 12 requests.
87. As I have indicated, however, I believe that the 12 month figure proposed by Caledonian MacBrayne is likely to be overstated. If the time taken was, say, 10 minutes per log sheet rather than 30, then the average cost would be only £87 to comply with each of these requests which is not only below the upper limit, but is below the threshold for charging a fee at all.

Conclusions on the application of fees

88. I conclude that Caledonian MacBrayne acted correctly in refusing Mr Ross's initial request for log sheets over the previous year on the grounds that the cost of compliance would exceed the £600 prescribed limit.
89. I conclude that Caledonian MacBrayne acted in breach of FOISA by refusing Mr Ross's subsequent 12 requests on the same grounds. These requests should have each been considered independently, and distinctly.
90. I am aware that in responding to each of these requests now, Caledonian MacBrayne may incur costs that exceed the £100 threshold at which the Fees Regulations would have allowed a fees notice to be issued to the applicant, although as I indicate above, I believe the costs to be overstated and so the final cost of responding to each request may be below the fee threshold.
91. In any event Caledonian MacBrayne cannot now issue a fee notice. Section 9 of FOISA allows a fees notice to be issued only within the time for compliance set out in section 10; i.e. within the 20 working day period during which the public authority must first respond to a request for information. As no fees notice was issued in this time, none may be issued now. I must require Caledonian MacBrayne to provide the information that Mr Ross still wishes to access, and to which he is entitled, at no charge.
92. In the course of this investigation, Caledonian MacBrayne has expressed concerns about the inconvenience and disruption that responding to these requests will cause, both to the staff engaged in that task, and on the vessels that hold the log sheets. It has suggested that it is not in the public interest for such disruption to be caused.
93. Where an exemption has not been maintained, there are no grounds for arguing that nevertheless it is not in the public interest to recover and provide the information. There is no basis for maintaining that the application is vexatious.



Technical Breach: refusal notice

94. Finally, I want to note one technical breach of FOISA in Caledonian MacBrayne's response to Mr Ross's initial request for log sheets covering a full year period. The refusal notice in this case noted that the exemption in section 33(1)(b) was judged to apply to the information. However, no reference was made to the reasons for Caledonian MacBrayne's judgement that in all the circumstances of the case, the public interest in maintaining this exemption outweighed that in release.
95. In failing to explain its consideration of the public interest in refusal notice Caledonian MacBrayne failed to fully comply with the requirements set out in section 16 of FOISA.

Decision

I find that Caledonian MacBrayne has acted in accordance with Part 1 of FOISA in relying upon the exemption in section 33(1)(b) when withholding the passenger numbers recorded on the log sheets requested by Mr Ross. I find that no other information contained on the front of these sheets is exempt from release.

I find that Caledonian MacBrayne Ltd acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to respond to Mr Ross's initial request for copies of vessel log sheets operating on the Dunoon service over the previous 12 month period because the cost of doing so would exceed the prescribed limit set out in Regulation 5 of the Fees Regulations.

However, I also find that Caledonian MacBrayne failed to fully comply with the requirements of section 16 of FOISA by failing to explain the reasons for its decision that the public interest in maintaining the exemption in section 33(1)(b) outweighed that in release in its refusal notice dated 14 February 2005.

I find that Caledonian MacBrayne Ltd did not act in accordance with Part 1 of FOISA in refusing to respond to Mr Ross's 12 subsequent requests (each requesting copies of log sheets for a one month period) on the grounds that the combined costs of responding would exceed the prescribed limit. In doing so, it misapplied section 12 and consequently was in breach of section 1(1).

I now require Caledonian MacBrayne to provide Mr Ross with the following information in response to each of these 12 requests:



Copies of the front side of each vessel log sheet for the Gourock to Dunoon route for the period specified in the request. Passenger numbers should be removed from each sheet before release.

As Mr Ross's 12 requests for log sheets were received on 23 March 2005, the request relating to that month can only be construed as seeking access to information held at that point. Therefore, the response to this request need only provide log sheets up to and including 22 March 2005.

Caledonian MacBrayne may not charge Mr Ross for the provision of this information.

I am obliged to give the Caledonian MacBrayne at least 42 days in which to supply Mr Ross with the information as set out above. In this case, I require the Caledonian MacBrayne to take these steps within two months of the date of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
20 February 2006