



Scottish Information
Commissioner

**Decision 179/2006 Mr Gordon Ross, Managing
Director of Western Ferries (Clyde) Limited and
Caledonian MacBrayne Limited**

Information relating to the departures of three employees

**Applicant: Mr Gordon Ross, Managing Director of Western
Ferries (Clyde) Limited**

Authority: Caledonian MacBrayne Ltd

Case No: 200501995

Decision Date: 03 October 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 179/2006 Mr Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited

Request for information about the departure of three directors – information withheld – whether information held by Caledonian MacBrayne for the purposes of the Freedom of Information (Scotland) Act 2002 – Commissioner upheld the authority’s decision to withhold information but identified breaches of technical provisions of FOISA

Relevant statutory provisions and other sources

Freedom of Information Scotland Act 2002 (FOISA) sections 1(1) (General entitlement), 3(2)(b) (Scottish Public Authorities), 16 (refusal of request), 38(1)(b), read in conjunction with 38(2)(a)(i) (personal data).

Data Protection Act 1998 (DPA) section 1 (Basic interpretative provisions), Schedule 1, Part 1, paragraph 1 (the first data protection principle), Schedule 2 (Conditions relevant for the first principle: processing of personal data).

Law Society of Scotland Guidelines on the Ownership and destruction of files 2001 (amended 2003)

Facts

Mr Ross asked Caledonian MacBrayne to provide all information and documentation with regard to the departure of three named directors. In response, Caledonian MacBrayne directed Mr Ross to annual reports on its website, which, it stated contained all information available for release. Caledonian MacBrayne stated that other relevant information was subject to legal privilege. Mr Ross asked for a review of this decision, noting that legal privilege extended only to information exchanged between a solicitor and client. Following a review, Caledonian MacBrayne advised Mr Ross that exemptions in sections 30, 36 and 38 of FOISA applied to the information requested. Caledonian MacBrayne also maintained that the information was legally privileged, and there was no obligation to supply this. Mr Ross then made an application to the Commissioner in relation to his request.



The Commissioner found that Caledonian MacBrayne had acted in accordance with Part 1 of FOISA in withholding the information requested by Mr Ross. He found all relevant information to be exempt from disclosure under the terms of section 38(1)(b) of FOISA. Having found all relevant information to be exempt under section 38(1)(b), the Commissioner did not go on to consider the application of further exemptions relied upon by Caledonian MacBrayne in this case.

The Commissioner found that in responding to Mr Ross's request for information, Caledonian MacBrayne had failed to provide a refusal notice in line with the requirements of section 16 of FOISA. The Commissioner did not require any remedial steps to be taken in response to this decision.

Background

1. Mr Ross, Managing Director of Western Ferries (Clyde) Ltd, wrote to Caledonian MacBrayne Ltd (Caledonian MacBrayne) on 31 March 2005 requesting all information and documentation with regard to the departure of three directors from Caledonian MacBrayne. Two of the directors in question had left the company in 2002, and the third in 2003.
2. 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.
3. Caledonian MacBrayne's response provided a link to the company's website, where annual reports could be viewed. Mr Ross was advised that information available for release was contained in the reports for the years 2001/02, 2002/03, and 2003/04. Caledonian MacBrayne informed Mr Ross that all other information was "subject to legal privilege".
4. Mr Ross asked Caledonian MacBrayne to review its response to his request in a letter dated 9 May 2005. He suggested that the justification of legal privilege would not extend to all information relating to the departures of the three directors. Mr Ross noted further that he considered it to be in the public interest to clarify the circumstances of these departures.



5. Caledonian MacBrayne notified Mr Ross of the outcome of its review in a letter dated 3 June 2005. This modified the initial decision, but maintained that the information under consideration was exempt from disclosure. Mr Ross was informed that the information was legally privileged, and that the company was under no obligation to disclose this. Furthermore, Caledonian MacBrayne stated that the information was exempt from release under the terms of sections 30, 36 and 38 of FOISA. However, this notice did not make clear which of the four exemptions contained in section 30 of FOISA were considered to apply to the information.
6. Mr Ross then made an application for a decision in relation to this matter in a letter dated 6 June 2006, which was received by my Office on 9 June 2006. In his application, Mr Ross expressed the view it was in the public interest to clarify the circumstances surrounding the departures of these directors.
7. Mr Ross's application for decision was allocated to an investigating officer and then validated by establishing that Mr Ross had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking Caledonian MacBrayne to review its response to his request.

Investigation

8. The investigating officer wrote to Caledonian MacBrayne on 27 June 2005, informing it that Mr Ross's application had been received and an investigation into the matters raised had begun. Caledonian MacBrayne was invited to comment on the case in terms of section 49(3)(a) of FOISA. Caledonian MacBrayne was also asked to provide:
 - a) copies of all information falling under the scope of Mr Ross's request;
 - b) confirmation of which exemption(s) were judged to apply to each item or part thereof and details of the reasons for the application of each exemption;
 - c) details of Caledonian MacBrayne's consideration of the public interest in relation to this case.



9. The investigating officer also noted that Caledonian MacBrayne had referred to legal privilege in the course of its correspondence with Mr Ross, but had not cited any exemption in FOISA in relation to the information that was considered to be privileged. She observed that no exemption in FOISA refers specifically to legally privileged information, but asked Caledonian MacBrayne to confirm whether it wished to rely upon the exemption in section 36(1). This exemption applies to information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings.
10. The investigating officer also noted that the exemption in section 36(1) of FOISA is a qualified exemption, and as such it is subject to the public interest test set out in section 2(1)(b). She asked Caledonian MacBrayne to provide comments on its consideration of the public interest in relation to any information that was judged to be exempt under section 36(1).
11. Caledonian MacBrayne's response to my Office's requests was received on 20 July 2005. Further information and comments were sought in an email dated 6 December 2005, and a response to this further request was received on 13 January 2006. In the course of this investigation, Caledonian MacBrayne's solicitors responded on the company's behalf to the requests from my Office.
12. A total of 94 items were identified as relevant to Mr Ross's request and provided to my Office. When referring to specific items in this decision, I will identify these by their number within the two schedules of documents supplied to my Office. For example, document 2 in the first schedule is referred to as 1.2. Document two in the second schedule is referred to as 2.2. A number of these documents have one or more attachments, which were not separately numbered. For ease of reference, I have labelled attachments a, b, c etc. For example, I have labelled the two attachments provided alongside the primary document in item 2.2, as 2.2a and 2.2b. This labelling of attachments follows the order in which these items were listed separately in the schedules.
13. The schedules provided by Caledonian MacBrayne confirmed which exemptions were considered to apply to each document, and the reasons for this judgement.
14. At this stage, it was submitted that some of the information under consideration was exempt from disclosure under the terms of section 33(1)(b) of FOISA. This section states that information is exempt information if its disclosure under FOISA would, or would be likely to prejudice substantially the commercial interests of any person. This exemption had not previously been cited in Caledonian MacBrayne's correspondence with Mr Ross.



15. Caledonian MacBrayne's submissions also confirmed that the company did consider section 36(1) to apply to information that was legally privileged, and specified that the exemptions within sections 30(b)(i), 30(b)(ii) and 30(c) had been judged to apply to information in relation to which section 30 had been cited.
16. I will consider Caledonian MacBrayne's submissions in my findings below. Although I do not summarise all submissions received, I have taken all of these into consideration (insofar as relevant) when reaching my decision in this case.

The Commissioner's analysis and findings

17. Before going on to consider the application of exemptions to the information requested by Mr Ross, I will first consider the extent to which the information provided to my Office is relevant to this case.

Is information held by a public authority's solicitors "held" for the purposes of FOISA?

18. A number of documents that were relevant to Mr Ross's request were not provided to my Office from Caledonian MacBrayne's own files, but had been located within Caledonian MacBrayne's solicitors' client files. Caledonian MacBrayne's submissions noted that clarification would be welcomed as to whether this information was required to be provided under the terms of FOISA.
19. Under section 3(2)(b) of FOISA, information is deemed to be "held" by a public authority where it is held by a person other than that authority, on behalf of that authority. This case therefore raises the question of whether information that is held by a solicitor in its capacity as agent for a public authority should be judged to be held by that solicitor on behalf of its client, the public authority.
20. In considering this matter, I have consulted the Law Society of Scotland's *Guidelines on the ownership and destruction of files* 2001 (amended 2003). These guidelines (referred to below as the Guidelines) can be viewed online here:

www.lawscot.org.uk/members_information/rules_and_guidance/guides/rules/files/destruction_files.aspx



21. The Guidelines note that the answer to the question “who owns what in [solicitors’] files?” is not entirely straightforward. However, they provide a helpful breakdown of the types of documents that will ordinarily be owned by the client, and which will be ordinarily be owned by the solicitor. The relevant part of the Guidelines is reproduced in the appendix to this decision.
22. I am of the view that documents of the types listed in the Guidelines as those ordinarily owned by a client, are held by the solicitor on behalf of the client. Therefore, where the client is a Scottish public authority, the information is “held” by that public authority for the purposes of section 3(2)(b) of FOISA. If a request for this information is received by the relevant public authority, the information will need to be considered in terms of FOISA in the same way as had the information been held within the authority’s own files.
23. I do not consider documents of the types listed as ordinarily owned by the solicitor to be held on behalf of a client. Such information would therefore not be held by a public authority for the purposes of FOISA.
24. In this case, I am satisfied that all documents provided from the solicitors’ client files were held on behalf of Caledonian MacBrayne, and so were held by Caledonian MacBrayne for the purposes of FOISA. Therefore, I have considered these items fully below.

Information falling outside the scope of the request

25. I have also considered whether all documents that were identified were actually relevant to Mr Ross’s request for all information and documentation with regard to the departure of three directors from the company. I have concluded that a number of these did not fall under the scope of the request. These are: 1.20, 1.22, 1.36, 2.31, 2.32, 2.40, 2.51, 2.53, 2.57 and 2.58. I have not considered these items further in this decision.
26. A number of documents were also duplicated within the schedules. Where this is the case, I have only considered one version, and I have disregarded the other. The items that I have disregarded on these grounds are 1.26, 1.33, 2.3, 2.31a and 2.53a.

Section 38(1)(b) – personal data

27. I turn now to consider whether the information requested by Mr Ross was correctly withheld. Under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)), information is exempt information if it constitutes personal data and the disclosure of the information would contravene any of the data protection principles contained in the Data Protection Act 1998 (DPA).



28. In considering this exemption, I am therefore required to consider two separate matters: firstly, whether the information under consideration is personal data and, if so, whether the release of the information to Mr Ross would breach any data protection principles.
29. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1) of FOISA.
30. “Personal data” is defined in section 1(1) of the DPA as “data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”
31. The definition of what amounts to “personal data” for the purposes of the DPA was considered in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In that case, the Court of Appeal decided that whether or not data constituted “personal data” for the purposes of the legislation depended on the relevance or proximity of the data to the data subject. The Court considered that the information required to be biographical in a significant sense and that the information should have the subject as its focus. In other words, it should affect the subject’s privacy.
32. Having considered the information that falls under the scope of Mr Ross’s request, I am satisfied that all of that information (in its entirety) should be considered personal data relating to one or more of the three directors to whom Mr Ross’s request relates. The exemption in section 38(1)(b) was claimed by Caledonian MacBrayne in relation to most, but not all, of the information. However, given the nature and context of Mr Ross’s information request, I am satisfied that all of the information requested can legitimately be regarded as personal data.
33. Mr Ross’s request was for all information relating to the departures of three members of staff from employment with Caledonian MacBrayne and service as directors of the company. The information concerned relates in a significant sense to the lives of these former employees and their personal circumstances. Some of the information requested by Mr Ross also contains personal data relating to other third parties.
34. Having concluded that the information under consideration is personal data, I must now go on to consider whether the disclosure of this information would breach any of the data protection principles. In this case, Caledonian MacBrayne has argued that release of the information would breach the first data protection principle.



Would release of the information breach the first data protection principle?

35. Caledonian MacBrayne has indicated that it considers most of the information under consideration to be personal data. It has submitted that release of this information would breach the first data protection principle, which states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. Having concluded that all of the information withheld and falling within the scope of Mr Ross's request is personal data, I have considered the application of the first principle (and in particular Caledonian MacBrayne's arguments on its application) to all of it.
36. I have considered the definition of "sensitive personal data" in section 2 of the DPA and do not consider that any of the information sought by Mr Ross falls into this category.
37. According to guidance from the Information Commissioner ("Freedom of Information Awareness Guidance 1", which can be viewed at <http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
38. A number of items under consideration are marked "private and confidential" and I am satisfied that in each case (including those where there is no such explicit indication) that the relevant data subject(s) would have a reasonable expectation that the information therein would be kept private.
39. Mr Ross has indicated that he believes that it would be in the public interest to release information that would clarify the circumstances surrounding the departures of the three directors concerned.
40. I have considered whether disclosure to Mr Ross would satisfy condition 6 in Schedule 2 of the DPA. This condition applies to processing (in this case by disclosure) which is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the information is disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
41. Like any other citizen and tax payer, Mr Ross has a legitimate interest in the governance of Caledonian MacBrayne, a publicly owned and funded company. In certain circumstances, this will mean that personal information about Caledonian MacBrayne employees, particularly those holding senior positions, could be disclosed without any breach of the first data protection principle.



42. However, I have concluded that disclosure of the type of detailed personal data under consideration in this case would entail an unwarranted intrusion into the personal lives of the individuals concerned. I accept that disclosure is likely to impinge on their rights under Article 8 (private and family life) of the European Convention on Human Rights. For that reason, given the prejudice to the rights, freedoms and legitimate interests of those individuals that would follow from disclosure, I do not consider condition 6 in Schedule 2 of the DPA to be met in this case. I do not regard any other condition in Schedule 2 as being relevant to the circumstances of Mr Ross's request.
43. I have concluded that disclosure of any of the information requested by Mr Ross in this case would entail a breach of the first data protection principle. I have therefore concluded that all information under consideration is exempt from disclosure under section 38(1)(b) of FOISA.
44. In reaching this conclusion, I have found that section 38(1)(b) applies more widely to the information under consideration than Caledonian MacBrayne's submissions had indicated to my Office. In particular, I have found that the exemption applies to all relevant items listed the second schedule, as well as those in the first schedule.
45. Although Caledonian MacBrayne had only applied section 38(1)(b) to some of the items in the second schedule, I noted some inconsistencies in the application of this exemption and considered it both prudent and appropriate to consider the application of this exemption in relation to each item in this case.

Further exemptions

46. Having concluded that all information under consideration in this case is exempt by virtue of the absolute exemption contained in section 38(1)(b) of FOISA, I have not gone on to consider the application of the other exemptions relied upon by Caledonian MacBrayne in relation to this information.

Content of refusal notice

47. I want to finally comment on the content of the refusal notice issued to Mr Ross by Caledonian MacBrayne in response to his request. When refusing provide information requested under the terms of FOISA and held by the authority in question, section 16(1) requires that a formal notice be issued specifying (amongst other things) which exemption(s) have been judged to apply to the information.



48. In its response to Mr Ross, Caledonian MacBrayne indicated simply that information he had requested was privileged, and so was not to be provided. This notice did not specify any exemption that had been judged to apply to information. It also did not set out its reasons for any judgement that the public interest favoured the maintenance of any relevant exemption, as would have been required had section 36(1) been explicitly relied upon in this case.
49. By failing to specify which exemption(s) had been judged to apply to the information requested and the reasons why it considered the public interest to favour maintaining the exemption (given that it appeared to be section 36(1), Caledonian MacBrayne failed to comply with the requirements of section 16 of FOISA.

Decision

I find that Caledonian MacBrayne Ltd acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the information requested by Mr Ross.

I have concluded that all of the information requested is exempt from disclosure under the terms of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i).

Having reached this conclusion, I have not gone onto consider the application of the exemptions in sections 30(b)(i), 30(b)(ii), 30(c), 33(1)(b), 36(1) or 36(2) in relation to this information within this decision.

I have found that Caledonian MacBrayne failed to provide a refusal notice in line with section 16 of FOISA in its response to Mr Ross's request. I do not require any remedial steps to be taken in response to this technical breach of the requirements of Part 1 of FOISA.

Appeal

Should either Caledonian MacBrayne or Mr Ross 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.



Kevin Dunion

Scottish Information Commissioner

03 October 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

3 Scottish public authorities

(2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-

[...]

(b) by a person other than the authority, on behalf of the authority

16 Refusal of request

(1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

(2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

(3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.

[...]



38 Personal information

(1) Information is exempt information if it constitutes-

[...]

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

[...]

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

[...]

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

Data Protection Act 1998:

1. - (1) In this Act, unless the context otherwise requires

[...]

"personal data" means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;



SCHEDULE 1

THE DATA PROTECTION PRINCIPLES PART I THE PRINCIPLES

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

[...]

6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.



Extract from the Law Society's Guidelines on the Ownership and destruction of files 2001 (amended 2003)

Who Owns What in Files?

The answer is not entirely straightforward and drawing on the opinion of Counsel the Society has produced this note which we hope will deal with the main queries which arise:

Finished Documents or Drafts/Notes

Material Ordinarily Owned by Client

Documents produced by the client or produced by the solicitor for the client.

Written Opinions (whether principals or copies) but not preparatory personal notes prepared for the solicitor's benefit.

Draft formal documents and deeds. (These may be of evidential importance to the client in the event of the loss or destruction of the principals.)

Written submissions tendered in Court, but not detailed research notes and other documents generated for the solicitor's own personal use. Precognitions taken by the solicitor or obtained from other parties but see No. 11 of the Code of Conduct for Criminal Work where they may contain sensitive material and where it might be inappropriate to pass this information to clients. See *Swift v. Bannigan* 1991 S.C.L.R. 604, although the Dean had reservations about this case.

Original letters received from and copy letters to third parties.

Copies of letters written to the client, although if these have been retained by the solicitor as part of a private record or if the contents relate exclusively to the contractual relationship between the solicitor and the client, the solicitor may own them.

Notes of meetings and telephone calls, which constitute the solicitor's work on behalf of the client.

Files and documents received under a mandate.

Material Ordinarily Owned by Solicitor:

Original letters received by the solicitor from the client.

Notes of meetings and telephone calls, which form part of the solicitor's preparatory work.

Inter-office memoranda.

Sensitive material and precognitions in criminal cases should be dealt with in accordance with No. 11 of the Code of Conduct for Criminal Work.