



Decision Notice 163/2024

Correspondence relating to the MV Glen Sannox and hulls 801 and 802

Authority: Caledonian Maritime Assets Ltd
Case Ref: 202200961

Summary

The Applicant asked the Authority for information relating to correspondence between the Scottish Government and the Authority relating to the launching of Glen Sannox and the naming of Ferguson Marine Engineering Ltd as the preferred bidder for hulls 801 and 802. The Authority stated that it did not hold the information requested. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. He required the Authority to carry out a fresh review and to provide the Applicant with a revised review outcome.

Background

1. On 4 July 2022, the Applicant made a request for information to the Authority. They asked for:
 - (i) Internal and external correspondence between the Scottish Government and the Authority about launching the Glen Sannox
 - (ii) Internal and external correspondence between the Scottish Government and the Authority about naming Ferguson Marine Engineering Ltd (FMEL) the preferred bidder for hulls 801 and 802.
2. The Authority responded on 26 July 2022 with a notice, under section 17(1) of FOISA, that it did not hold the information requested. Regarding the first part of the request, the Authority explained that the launch of MV Glen Sannox was planned and conducted by FMEL and it therefore did not hold any relevant information. Regarding the second part of the request, the Authority explained that the staff members involved over the relevant period had subsequently left the Authority and it therefore did not hold any relevant information.

3. As part of its duty, under section 15 of FOISA, to provide advice and assistance, the Authority included in its response links to a number of webpages containing “extensive information” regarding hulls 801 and 802, including information on the preferred bidder.
4. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they believed the Authority held information relevant to both parts of their request. Specifically, the Applicant commented that:
 - employees leaving the Authority did not mean that the information requested is not held by the Authority
 - the Authority had an interest in the announcement of FMEL as the preferred bidder, which was highlighted by evidence given by the Authority to the Scottish Parliament’s Public Audit Committee.
5. The Authority notified the Applicant of the outcome of its review on 16 August 2022. The Authority explained that it was content that its initial response “covered all aspects” of the Applicant’s request. The Authority also stated that its initial response was supported by links to various documents available in the public domain, so section 25(1) (information otherwise accessible) of FOISA “also applies”.
6. On 29 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority’s review because they believed it did hold information relevant to both parts of their request.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 4 October 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority provided its comments.
9. The case was subsequently allocated to an investigating officer.

Commissioner’s analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 17(1) – Notice that information is not held

11. 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 qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.

12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. 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 it to give the applicant notice in writing to that effect.
13. The Authority claims that it does not hold the requested information.
14. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances. He will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not reasonably be expected to, hold the information.
15. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information requested. In this case, notwithstanding the opportunity given to provide comments, the Commissioner is not satisfied that the Authority has achieved this. Specifically, the Commissioner finds that the Authority's submissions on searches fall short in the following key respects:
 - they failed to describe the searches it carried out or provide any detail or evidence of those searches
 - they otherwise failed to adequately explain why the information requested by the Applicant was not held.
16. When the Commissioner requested comments from the Authority, he asked it to read his guidance on what is needed from public authorities in order for him to come to a decision. In respect of "information not held" responses, the Commissioner's guidance specifically states that he requires the following information:
 - Which searches were carried out, including:
 - search terms used and timeframe searched against; why these were considered likely to retrieve the information
 - who carried out the searches and why were they the people best placed to carry out the searches
 - which sets of records or data were searched (information may be held on WhatsApp, mobile phones, etc.)
 - If no searches were carried out, why did you consider no searches were needed?
17. In all the circumstances, therefore, the Commissioner cannot uphold the Authority's claim that it does not hold the requested information. He requires the Authority to carry out fresh searches for the information, giving particular attention to:
 - the specific terms of the request
 - all locations and mediums where relevant information might be held

- [the Commissioner's guidance on deleted information](#)¹, which states (at paragraph 55) that information which has been deleted but which can be restored is held by a Scottish public authority for the purposes of FOISA.

18. The Commissioner cannot, therefore, find that the Authority was entitled to rely on section 17(1) of FOISA in this case

Handling of the request

19. In its initial response, the Authority stated that it held no information relevant to the request. However, it provided the Applicant with links to publicly available information as part of its duty, under section 15 of FOISA, to provide advice and assistance.

20. In its review outcome, the Authority stated that it was content the initial response “covered all aspects” of the original requests. It also referred to the links it had provided in its initial response to publicly available information and stated that section 25 of FOISA (information otherwise accessible) therefore “also applies”.

21. It is not clear to the Commissioner whether the Authority means section 25 of FOISA applies in addition to section 15 or in addition to section 17. Neither is correct:

- if the information provided by the Authority in its initial response does not fall within the scope of the request, section 25 of FOISA should not be applied to it
- if the information provided by the Authority in its initial response does fall within the scope of the request, section 25 of FOISA cannot also apply to information that the Authority is stating that it does not hold.

21. In addition to the steps set out at paragraph 17, the Commissioner therefore requires the Authority to consider whether any of the information requested by the Applicant is otherwise accessible to them. If it is, the Authority should, as part of its duty under section 15 of FOISA, tell the Applicant how they can access the information and provide adequate signposting (e.g. by giving them direct links to online information).

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Specifically, the Authority has failed to satisfy the Commissioner that it does not hold information relevant to the Applicant's request. As a result, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to carry out adequate, proportionate searches for the information requested, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of section 21 of FOISA), by **20 September 2024**.

¹ <https://www.foi.scot/sites/default/files/2022-03/BriefingSection17Informationnoheld.pdf>

Appeal

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

Cal Richardson
Deputy Head of Enforcement

6 August 2024