



Decision Notice 175/2024

Communications relating to Ferguson Marine ferry contract

Authority: Caledonian Maritime Assets Ltd
Case Ref: 202200611

Summary

The Applicant asked the Authority for all communications between February 2015 and August 2015 between it and any official from the Scottish Government (and any of its quangos and public corporations) relating to the decision to give a £100m ferry contract to Ferguson Marine. The Authority informed the Applicant it did not hold the information. The Commissioner investigated and was satisfied the Authority did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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

1. On 7 April 2022, the Applicant made a request for information to the Authority. The Applicant asked for all communications between February 2015 and August 2015 between the Authority and any official from the Scottish Government (and any of its quangos and public corporations), including emails and messaging on private channels such as WhatsApp, Signal, Telegram and Facebook Messenger, relating to the decision to give a £100m ferry contract to Ferguson Marine.

2. The Authority responded on 2 May 2022 with a notice, under section 17(1) of FOISA, that it did not hold the information requested. The Authority explained that the Scottish Government proactively released documents relating to the ferry contract to Ferguson Marine and provided links to those documents and to submissions it had made to the Rural Economy and Connectivity Committee.
3. On 5 May 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the information the Authority had signposted him to related only to key documents and his request asked for all relevant communications.
4. The Authority notified the Applicant of the outcome of its review on 26 May 2022, fully upholding its original decision. The Authority explained that the information it had provided to the Applicant was the only information it held and that staff members involved over the period covered by the request had since left the organisation, meaning any information that might have been held on the communication mediums referenced was not held.
5. On 26 May 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he found it impossible to believe it did not hold further information that it should have disclosed to him.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 21 June 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to how the Authority established what information it held and whether it would be expected to hold the information requested.

Commissioner's analysis and findings

9. 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

10. 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.
11. 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 it to give the applicant notice in writing to that effect.

12. The standard of proof to determine whether a Scottish public authority holds information is the civil standard on the balance of probabilities. In determining where the balance lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant information was held by the public authority at the time it received the request.

The Authority's submissions

13. The Authority confirmed that it wishes to continue to rely on section 17 of FOISA.
14. The Authority explained that all of the key individuals involved in the decision to award a ferry contract to Ferguson Marine had since left the organisation, meaning their individual mailboxes have been decommissioned. This was as a result of:
 - Email system migration: it underwent an email system migration in 2017, where a decision was taken not to migrate inactive email accounts (i.e. the accounts of former employees) onto its new cloud-based system. To retrieve information from those inactive accounts, it needs to rely on external IT specialists; and
 - Annual reviews: since 2019, it has conducted an annual review of inactive email accounts of former employees to identify accounts which can be decommissioned (with accounts belonging to employees who left more than three months prior to the annual review and where a line manager or the Board confirms the account is no longer required being decommissioned).
15. The Authority confirmed that it would be possible to retrieve information from the decommissioned mailboxes but to do so would require external IT specialists and incur significant costs. The Authority noted the following guidance from the Commissioner:
 - "Where a public authority has deleted an e-mail or an electronic file and it can only be retrieved by an IT specialist, the Commissioner takes the view that the information is no longer held by the public authority."¹
 - "Information which has been deleted but which can be restored is held by a Scottish public authority for the purposes of FOISA. Searches should therefore include folders for deleted emails, or the "recycling bin" on the computer. However, the excessive costs provisions may come into play if, for example, IT support is needed to restore the information."²
16. The Authority stated that it therefore did not consider it held, for the purposes of FOISA, any information that could be retrieved except through use of external IT specialists.
17. The Authority also provided evidence to support that instructing external IT specialists to recover the information would significantly exceed the upper cost limit under FOISA (e.g., an initial outlay of around £1,300 alone to recover mailboxes for relevant former staff members).

¹ <https://www.foi.scot/public-authorities-faqs>

² <https://www.foi.scot/sites/default/files/2022-03/BriefingSection17Informationnoheld.pdf>

18. The Authority confirmed that it did not conduct any searches at initial response or review stage because the information requested dated back to 2015, the key individuals involved had since left the organisation and the Commissioner's guidance stated that where information can only be retrieved by external IT specialists public authorities are entitled to treat such information as not held for the purposes of FOISA.
19. The Authority explained that it could not conduct searches for private message correspondence because none of the systems referred to in the Applicant's request were used in 2015 and it does not, in any case, have access or authority to search the personal devices of former employees.
20. The Authority stated that it did not consider it would be expected to hold the information requested (which dated back to 2015) because it had been deleted in line with regulation 83 of the Public Contracts (Scotland) Regulations 2015/445³:
 - regulation 83(7) provides that "[a] contracting authority must document the progress of all procurement procedures, whether or not those are conducted by electronic means."
 - regulation 83(8) provides that "[t]o that end, a contracting authority must ensure that the authority keeps sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on—
 - (a) communications with economic operators and internal deliberations;
 - (b) preparation of the procurement documents;
 - (c) dialogue or negotiation (if any); and
 - (d) selection and award of the contract"
 - regulation 83(9) provides that "[t]he documentation must be kept for a period of at least three years from the date of the award of the contract."
21. The Authority stated it therefore considered it was only legally obligated to retain emails relating to the award of the contract for three years from the date of the award of the contract (i.e., until October 2018) and explained that information was otherwise destroyed in line with its standard procedure.

The Applicant's submissions

22. The Applicant explained he found it impossible to believe that there are virtually no communications explaining what the Authority felt after the Scottish Government intervened to effectively insist a ferry contract be given to Ferguson Marine.
23. The Applicant stated he was concerned by the Authority's explanation that key staff members involved over the period in question had left the organisation and therefore information was not retained, as it indicates there is no proper tracking of important decisions because of staff turnover.
24. The Applicant also expressed his opinion that efforts should be made to trace the information he requested, as had been done previously by the Scottish Government (which had located a document previously thought lost).

³ <https://www.legislation.gov.uk/ssi/2015/446/regulation/83>

The Commissioner's view

25. The Authority gave the Applicant notice, in terms of section 17 of FOISA, that it did not hold the information requested. The question for the Commissioner is whether the Authority complied with FOISA in responding in this way to the Applicant's request, or whether the Authority held any recorded information that fell within the request.
26. Having considered in detail the Authority's submissions, and all the circumstances of the case, the Commissioner is satisfied on the balance of probabilities that the Authority did not, at the time of the request, hold the information requested by the Applicant because it had been destroyed in line with regulation 83 of the Public Contracts (Scotland) Regulations 2015/445 and otherwise in line with its standard procedure.
27. While the Commissioner notes that information falling within the scope of the Applicant's request could be recovered by external IT specialists, his view – in line with his guidance on the matter – is that such information is, for the purposes of FOISA, no longer held by the Authority. He is also satisfied that it would exceed the upper cost limit under FOISA for the Authority instruct external IT specialists to recover the information.
28. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the requested information.
29. However, while the Commissioner notes that it could be argued that there was a procedural correctness in the way the Authority handled (and destroyed) the information, his view is that it is reasonable to expect that information likely to be of future relevance to the public will be retained elsewhere. He also considers that the Authority should have exercised some judgement on whether some of the procurement information should have been retained, as being of clear public interest, even after any strict requirement to do so under the relevant regulations has passed.
30. The Commissioner cannot therefore consider the Authority's handling of the information as good practice and, in the interests of transparency and accountability, he recommends that it take greater care in future before deciding to destroy information that is likely to be of future relevance to the public.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002.

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.

Euan McCulloch
Head of Enforcement

27 August 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

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.

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).