



# Decision Notice 185/2024

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## Responses to a public engagement exercise

**Authority: Caledonian Maritime Assets Ltd**  
**Case Ref: 202200460**

### Summary

The Applicant asked the Authority for details of responses to a public engagement exercise relating to designs for the proposed new vessel for the Gourock to Dunoon ferry service. The Authority told the Applicant it had published some of the information, but that it was withholding the remainder. It argued that disclosure of the withheld information would substantially prejudice the free and frank exchange of views.

During the investigation, having carried out some analysis of the responses to the engagement exercise, the Authority disclosed some more information. The Commissioner investigated and found that the Authority was entitled to withhold some information under section 38(1)(b) of FOISA, but was not entitled to withhold other information.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 3(2)(a)(i) (Information held on behalf of another person); 30(b)(ii) (Prejudice to effective conduct of public affairs); 38(1)(b) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of “personal data”) (Definitions); 5(1)(a) (Principles relating to processing of personal data); 6(1) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

## **Background**

1. The Authority carried out a public engagement exercise related to the Gourock-Dunoon Concept Passenger Vessel Project; a project about modernising the ferry service between Gourock, Dunoon and Kilcreggan. The exercise sought the views of members of the public through a series of questions in an online survey.
2. On 22 February 2022, the Applicant made a request for information to the Authority. He asked for details of the responses to the public engagement exercise which closed on 10 January 2022, relating to designs of the proposed new vessel for the Gourock-Dunoon ferry service. In his request, the Applicant acknowledged that some personal data would need to be withheld, but he asked for as much detail as possible, including the number of respondents and the answer to each question in the survey.
3. The Authority responded on 21 March 2022. It told the Applicant it was withholding the information under the exemptions in section 30(b)(i) and (ii), and section 38(1)(b) of FOISA.
4. On 21 March 2022, the Applicant wrote to the Authority requesting a review of its decision, arguing that it was a publicly funded survey, seeking the views of members of the public, and withholding the information ran contrary to natural justice. The Applicant also suggested that the information could be redacted to protect personal data.
5. The Authority notified the Applicant of the outcome of its review on 4 April 2022. It notified him that it was no longer relying on the exemption contained in section 30(b)(i) of FOISA, but it was continuing to withhold information under section 30(b)(ii) and 38(1)(b) of FOISA.
6. On 22 April 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he had not received any of the information he had requested.

## **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 18 May 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
9. 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 regarding the exemptions it had applied, as well as its views on whether it had complied with its duty to offer the Applicant advice and assistance.

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

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

## **Withheld information**

11. During the investigation, the Authority said it had been able to carry out analysis of the survey responses (for its own purposes) and that this meant it could disclose some information to the Applicant.
12. The Authority disclosed a summary of the responses given for questions 3, 5, 6 and 9. However, it said it was unable to disclose any information regarding individual responses to questions 1, 2, 4, 7, 8 and 10 of the survey, and that it was continuing to apply the exemptions available under sections 30(b)(ii) and 38(1)(b) of FOISA.
13. The Authority also withheld responses given by individuals who identified as Kilcreggan ferry service users. It said this was because it was retaining these for the Kilcreggan Concept Vessel survey and that this information had been captured on behalf of another authority.
14. As the Authority disclosed information to the Applicant subsequent to its review response and, in the absence of any submissions to the contrary, the Commissioner considers that the Authority wrongly applied the exemptions in 30(b)(ii) and 38(1)(b) of FOISA to the information it later disclosed. In doing so, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA.
15. During the investigation, the Applicant confirmed that he was seeking all of the consultation responses to questions 2 to 10, but that he was not seeking the responses to question 1 (the respondents email addresses). He also confirmed that he required the responses from Kilcreggan residents and ferry users (which had been withheld by the Authority). A copy of the questions (1 to 10) contained in the consultation exercise are provided in Appendix 1.
16. The Commissioner will now consider the information that the Authority is continuing to withhold.

## **Section 38(1)(b) – Personal information**

17. Section 38(1)(b), read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is “personal data”, as defined in section 3(2) of the DPA 2018 and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the GDPR.
18. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
19. In order to rely on this exemption, the Authority must show that the information being withheld is personal data for the purposes of the DPA 2018 and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Article 5(1) of the GDPR.

## **Is the withheld information personal data?**

20. The first question the Commissioner must address is whether the information is personal data for the purposes of section 3(2) of the DPA 2018. (The definition of “personal data” is set out in full in Appendix 1.)
21. The two main elements of personal data are that:
  - (i) the information must “relate to” a living person; and

- (ii) the living individual must be identifiable.
22. Information will “relate to” a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
  23. An “identifiable living individual” is one who can be identified, directly or indirectly, by reference to an identifier (such as a name) or one or more factors specific to the individual (see section 3(3) of the DPA 2018).
  24. The Commissioner is satisfied that most of the information being withheld under section 38(1)(b) is personal data: it comprises the personal opinions of living individuals obtained via public consultation, some of which is biographical, as well as four full post-codes belonging to consultation respondents and, as such, it is information that clearly relates to those individuals.
  25. The Commissioner has also considered whether information that reveals how often an individual uses the ferries would identify a living individual.
  26. According to [guidance](#)<sup>1</sup> issued by the (UK) Information Commissioner (who is responsible for enforcing the DPA throughout the UK), in considering whether a person can be identified, you must carefully consider all of the means that any party is reasonably likely to use to identify that individual. The ICO explains that this is important because otherwise you could inadvertently release or disclose information that could be linked with other information and (inappropriately) identify an individual. The ICO guidance goes on to note that the key point of indirect identifiability is when information is combined with other information that then distinguishes and allows for the identification of an individual.
  27. In this case, while it may appear that simply disclosing how often an individual uses the ferry would not identify an individual, the Commissioner is satisfied that, when this is considered along with other information in the public domain, particularly in a small community, the identification of the survey respondents is a real possibility. The Commissioner notes that respondents have selected whether they use the ferry every day, 4-6 times a week, 2-3 times a week, once a month, etc. This information relates to the ongoing travel habits of the survey respondents.
  28. In his view, there are a number of individuals who would be able to identify ferry users from this information, including the staff working on the ferries and other ferry passengers. Furthermore, a determined individual could monitor those embarking on the ferries, and use the frequency of such use to identify the individuals concerned. As the ferries serve rural communities, where commuters and residents are relatively small in numbers, the Commissioner considers that information that identifies how often a survey respondent travels by ferry is personal information and the respondents could, or would be likely to, be identified if information about their travel frequency was disclosed.
  29. The Commissioner is not convinced that the partial post-codes withheld by the Authority are personal data, as they identify residential areas with multiple households. The Commissioner notes that, according to the 2011 census, only four of the partial postcodes cover residential areas with less than 1,000 households, with the majority relating to areas with between 2,000 and 21,000 households. He further notes that the smallest residential

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<sup>1</sup> <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/personal-information-what-is-it/what-is-personal-data/can-we-identify-an-individual-indirectly/>

area identified by a partial postcode has around 133 households. The Commissioner does not consider that the individuals who have responded to the consultation could be identified by disclosure of the partial post-codes (even taking into account other information that is in the public domain) and he therefore concludes that the partial post-codes are not personal data. He will later consider whether the partial post-codes were correctly withheld under section 30(b)(ii) of FOISA.

### **Would disclosure contravene one of the data protection principles?**

30. "Processing" of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. Disclosing information into the public domain in response to a FOISA request is therefore "processing" for the purposes of section 3(4) of the DPA 2018.
31. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
32. The Commissioner considers that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.
33. The Authority submitted that respondents were given assurances that the findings of the public consultation would be reported anonymously and that individuals would not be identified. It says that consent was not obtained at the time people provided their views, and that there was no expectation that the responses to the consultation would be processed by publication. It considers therefore, that the first principle of Article 5(1) would be contravened by publication in that it would be unlawful.

### **Condition (f) – legitimate interests**

34. Condition (f) states that processing shall be lawful if it is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.
35. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
36. The three tests which must be met before Article 6(1)(f) can be engaged are as follows:
  - (i) Does the Applicant have a legitimate interest in the personal data?
  - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
  - (iii) Even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects which require protection of personal data (in particular where the data subject is a child)?
37. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of the Applicant must outweigh the rights and freedoms or legitimate interests of the data subjects before condition (f) will permit the data to be disclosed. If the two are evenly balanced, the

Commissioner must find that the Authority was correct to refuse to disclose the personal data to the Applicant.

### **Does the Applicant have a legitimate interest?**

38. The Applicant has argued that disclosure of the survey responses is in the public interest. He referred to CMAL's latest annual corporate plan (in 2022) which indicated that the estimated cost for the vessels alone had risen to £28 million, almost double the estimate of two years ago. The Applicant argued that this demonstrated that there was a clear public interest in the survey results being disclosed in full, and he commented that,

"...it appears that the public, having been given a chance to comment on the proposals, has rejected them; this should not have been kept secret by a public body".

39. The Authority recognised that the Applicant had a legitimate journalistic interest in the information on the whole, although it was not convinced that he had a legitimate interest in the individual responses. The Authority commented that the Applicant has argued that the legitimate interest lies in disclosure because it is information held by a public authority. It argued that this was not sufficient rationale for disclosure. The Authority submitted that the public interest is in the analysis and findings of the consultation, and it argued that it had addressed this by disclosing some of the information gathered in the survey in a summarised, anonymised format.

40. Having considered the submissions from both parties, the Commissioner accepts that there is significant public interest in the Authority's decision making around the design and procurement of ferry services, and that the information being withheld is a part of that decision making process. The Commissioner is therefore satisfied that the Applicant has a legitimate interest in the information.

### **Is disclosure necessary to achieve that legitimate interest?**

41. The Commissioner will now consider whether disclosure of the personal data requested is necessary for the Applicant's identified legitimate interest. In doing so, he must consider whether these interests might reasonably be met by any alternative means.

42. The Commissioner has considered this carefully in light of the decision of the Supreme Court in [South Lanarkshire Council v Scottish Information Commissioner \[2013\] UKSC 55](#)<sup>2</sup>. In this case, the Supreme Court stated (at paragraph 27):

*A measure which interferes with a right protected by Community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less.*

43. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subjects.

44. The Applicant argued that the remaining withheld information could be anonymised or redacted suitably to protect the rights and privacy of individuals. He states that the Authority

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<sup>2</sup> <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

has made some information, for example respondents post codes, available after previous surveys.

45. The Authority argued that disclosure of the remaining withheld information (the individual responses) was not necessary to fulfil the Applicant's legitimate interest. It submitted that anonymised data had been published on the Authority's website and that it had disclosed further bespoke anonymised data to him directly.
46. The Commissioner has carefully considered the submissions, the information that has been disclosed and the remaining withheld information. He is satisfied that disclosure of some of the remaining withheld information is necessary to meet the legitimate interest of the Applicant.

### **The data subject's interests of fundamental rights and freedoms**

47. Having found that disclosure of some of the remaining withheld information is necessary for the purposes of the Applicant's legitimate interests, the Commissioner must now balance the legitimate interests in disclosure against the survey respondents' interests or fundamental rights and freedoms.
48. The Commissioner's [guidance on section 38 of FOISA](#)<sup>3</sup> lists certain factors that should be taken into account in balancing the interests of the parties. He makes it clear that, in line with Recital (47) of the General Data Protection Regulation, much will depend on the reasonable expectations of the data subjects and that these are some of the factors public authorities should consider:
  - (i) Does the information relate to an individual's public life (their work as a public official or employee) or their private life (their home, family, social life or finances)?
  - (ii) Would disclosure cause harm or distress?
  - (iii) Whether the individual has objected to the disclosure.
49. As noted above, disclosure under FOISA is public disclosure; information disclosed under FOISA is effectively placed into the public domain.
50. The Commissioner's has carefully considered the submissions of both parties. He acknowledges that the Authority included an informative statement for respondents at the beginning of the survey, in which it advised that *the identity of people providing feedback will not be revealed and will remain confidential*. Having considered the withheld information the Commissioner notes that there is information contained within the opinions of respondents that does carry some risk of leading to the identification of individual respondents, such as the particular use of language, experiences of having used other vessels, their frequency of travel, their personal reasons for travel – all of these might associate an individual with a given view. He acknowledges that the respondents, the individuals under considerations here, are members of the public who provided their views on a personal basis.
51. The Authority has submitted that sharing the survey responses would lead to identification of respondents and potential reprisals within their communities for holding those views. The Commissioner considers this argument to be hypothetical, at best. He accepts that the subject of new vessel procurement is of vital importance to the communities involved, and that there will be a wide range of views within those communities. However, he cannot

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<sup>3</sup> <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

accept that there would be a significant likelihood of harm, to those individuals, arising from the disclosure of those views. The Authority has provided no evidence to support its submission on this point.

52. The Commissioner considers that disclosure of some of the remaining withheld information would improve transparency around the decision making undertaken by the Authority in the procurement of new ferry services, and he agrees with the Applicant that the very substantial sums of public money involved mean that there are strong legitimate arguments for disclosure.

53. The processing of personal data must be fair as well as lawful. The Commissioner has considered the statement given by the Authority to respondents at the beginning of the questionnaire:

“What is the first part of your postcode? For example, PA19 (note: this will not be passed to any other organisation and will not be used for marketing). Your address will be redacted when the feedback is published on our project site and your address will also be deleted from our system upon completion of this review.”

The Commissioner notes that, in making this statement, the Authority informed respondents that certain aspects of their responses would be withheld, but that by omitting similar statements for the remaining questions of the survey the respondents might reasonably expect that other aspects of their responses would be disclosed. He considers that, given the subject matter of the survey, respondents would have understood that responses would be subject to public scrutiny.

54. The Commissioner has reviewed the information that has been disclosed by the Authority, in the [updated Q&A](#)<sup>4</sup> on its website, and the summary of responses given to the Applicant. He acknowledges that some of the personal data requires to be withheld in order to protect the privacy of the data subjects, but he also considers that further information could be disclosed. He agrees with the Applicant that the information could be suitably redacted to preserve the privacy rights of individual respondents.

55. After balancing the legitimate interests of the Applicant against the interests or fundamental rights or freedoms of the data subjects, the Commissioner finds that the legitimate interests served by disclosure of the more general comments and partial post-codes of the data subjects would not be outweighed by any unwarranted prejudice that would result to the rights, freedoms or legitimate interests of those individuals.

56. Therefore, in all the circumstances of this particular case, the Commissioner concludes that condition (f) in Article 6(1) of the UK GDPR could be met in relation to this personal data which has been withheld.

57. However, in relation to the biographical information, full postcodes and frequency of travel of the data subjects, the Commissioner concludes that condition (f) in Article 6(1) of the UK GDPR could not be met.

#### *Fairness and transparency*

58. Given that the Commissioner has concluded that the condition of processing in Article 6(1)(f) of the UK GDPR would permit the processing of certain of the personal data in response to

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<sup>4</sup> <https://www.cmassets.co.uk/wp-content/uploads/2021/08/Gourock-Dunoon-Kilcreggan-Programme-Reference-Group-and-Public-Engagement-Q-and-A-Document-vessels-2022.pdf>



the Applicant's request, he has concluded that disclosure of that personal data would also be fair and transparent in relation to the data subjects concerned.

59. As the Commissioner has concluded that the processing of the remaining personal data would be unlawful, he is not required to go on to consider whether disclosure of such personal data would otherwise be fair and transparent in relation to the data subjects.
60. For the personal data found to have been correctly withheld, the Commissioner finds that disclosure of this information would breach the first data protection principle and that this particular information is therefore exempt from disclosure (and was properly withheld) under section 38(1)(b) of FOISA.
61. For the remaining withheld personal data, the Commissioner finds that the legitimate interest in disclosure outweighs the rights of the data subjects. He is satisfied that this information has been wrongly withheld under section 38(1)(b) given that it can be disclosed without breaching the data protection principles in Article 5(1) of the UK GDPR. The Commissioner requires the Authority to disclose this information to the Applicant.
62. Where the Commissioner has concluded that information is not exempt under section 38(1)(b) of FOISA, he will not go on to consider whether it has been correctly withheld under section 30(b)(ii) of FOISA.

### **Section 30(b)(ii) – Prejudice to effective conduct of public affairs**

63. The Authority is withholding all of the information under section 30(b)(ii) of FOISA. To rely on this exemption, it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
64. In applying the exemption in section 30(b)(ii) of FOISA, the chief consideration is not whether the information constitutes opinion or views, but whether disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely there would need to be at least a significant probability of it occurring.
65. The Applicant was concerned that the withholding of the remaining information prevented proper scrutiny of the proposals. He expressed concern that the public's views had been ignored.
66. He also argued that, given the escalating costs of the project, there was a clear public interest in the survey results being disclosed in full. In his view, the survey results [that had been disclosed] demonstrated that the public had rejected the proposals and therefore the remaining information should not be kept secret.
67. The Authority argued that it considered its application of section 30(b)(ii) in this case, to be similar in circumstances to that discussed in [decision 160/2021](#)<sup>5</sup>.
68. The Authority submitted that members of the public who use its essential services should be able to provide feedback, without fear of their comments being put into the public domain. It submitted that the provision of ferry services to and from some rural communities had been

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<sup>5</sup> <https://www.itspublicknowledge.info/decision-1602021>

challenging for various reasons, and that, it was essential that it was able to engage with all members of the community in a space where people could provide free and frank expressions of views.

69. The Authority argued that this particular survey differed from previous surveys (where results had been published) because it sought opinions, rather than asking closed questions which only sought yes, no or numerical answers. It argued that the survey provided an opportunity for people to provide information about their personal circumstances in relation to the ferry services and to provide their own personal views. Because of the personal nature of the opinions being given and the small communities involved, the Authority argued that respondents could be easily identified from their answers.
70. The Authority submitted that publishing these views and opinions would substantially inhibit and deter members of the public from engaging with it in future, and it would damage its relationship with these communities. It noted that it had provided assurances that the information it gathered (via this survey) would be reported anonymously and that people would not be identified. The Authority argued that disclosure would harm the trust between itself and the small rural communities involved, to such an extent that it would be difficult to encourage participation in any future, similar exercise.

#### **The Commissioner's view on section 30(b)(ii)**

71. The Commissioner has considered all of the submissions made by the Applicant and the Authority, along with the withheld information.
72. When assessing whether disclosure would cause substantial inhibition, the Commissioner has considered the following factors;
  - (i) the identity or status of the author and/or the recipient,
  - (ii) the circumstances in which the advice or views were given, and
  - (iii) the sensitivity of the advice or views.
73. The information comprises the views and opinions of members of the public who have chosen to respond to a public consultation about delivery of lifeline passenger ferry services between Gourrock, Dunoon and Kilcreggan. These views and opinions were sought by the Authority for the purposes of informing its decision making. The information also includes the partial postcodes of the respondent's addresses. The Commissioner has already concluded that the four full post-codes were correctly withheld under section 38(1)(b) of FOISA.
74. The Commissioner is clear in his [Briefing](#)<sup>6</sup> that the exemptions in section 30(b) must not be treated as class exemptions and that authorities must consider the content of the information before deciding whether disclosure would, or would be likely to, cause substantial inhibition. Authorities should not apply these exemptions for fear of negative reaction to the release of information.
75. The Commissioner considered his previous [Decision 160/2021](#)<sup>7</sup> in context of the submissions made to him by the Authority. In Decision 160/2021, specific employees of the public authority were sent to an external site for the express purpose of giving their views back to that authority, for the purposes of informing an infrastructure project. Although there

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<sup>6</sup> <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf>

<sup>7</sup> <https://www.itspublicknowledge.info/decision-1602021>

was significant public interest in the project, the Commissioner found that the Authority was entitled to a private space in which to discuss internal projects. Conversely, in the current case, the request relates to responses received by the Authority through a public consultation. The Commissioner is not persuaded that this previous decision is wholly relevant.

76. The Commissioner does not accept that disclosure of the information is likely to harm the Authority's relationship with the respondents or with the communities involved. He considers that respondents would have had an expectation that some elements of their views would likely be published. He cannot foresee circumstances in which a public consultation would be launched by the Authority, about a vital ferry service, that would not receive any interest or responses from the affected communities. Furthermore, he cannot see how disclosure of a partial post-code would, or would be likely to, inhibit substantially, the free and frank exchange of views for the purposes of deliberation.
77. On the contrary, the Commissioner agrees with the Applicant that a lack of transparency around consideration of consultation responses could give rise to distrust and apathy around any future consultations. The Applicant has suggested that the Authority is withholding the comments in an attempt to obscure the fact that the local population has rejected their main proposal. In the circumstances, the Commissioner considers that disclosure of the comments could go some way to reassure the consultation respondents that their comments were received and considered. He does not accept the harm claimed by the Authority and he finds the arguments in favour of transparency to be persuasive.
78. For these reasons, the Commissioner concludes that the Authority was not entitled to withhold the information in this case under the exemption in section 30(b)(ii) of FOISA. Furthermore, the Commissioner considers that even if he had found the exemption to be engaged, it is likely that the strong public interest in the information would favour disclosure. As the Commissioner is satisfied that the exemption in section 30(b)(ii) of FOISA does not apply, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.
79. The Commissioner requires the Authority to provide the Applicant with a copy of the information that it wrongly withheld under section 38(1)(b) and 30(b)(ii) of FOISA.

#### **Other matters – Survey responses related to Kilcreggan**

80. The Authority submitted that the responses collected in relation to services provided at Kilcreggan were captured on behalf of Argyll and Bute Council, and that it would not publish or disclose any information related to routes operated by the Council. It submitted that to do so would undermine its relationship with partners [under the terms of section 30 of FOISA] and the need to share information confidentially.
81. The Commissioner understands from the Authority's submission that it does not hold the survey responses regarding Kilcreggan services, and as such, his understanding is that Authority sought to apply section 3(2)(a)(i) of FOISA – the provision available to public authorities who hold information on behalf of another person (in this case, Argyll and Bute Council).
82. The Commissioner is satisfied that this information was collected by the Authority in the same public consultation that was the subject of the request and he notes that the information is contained within the withheld information provided to him. Therefore, the Commissioner takes the view that this information is held by the Authority and must be

considered in the Authority's response to the request. The Commissioner does not accept that section 3(2)(a)(i) of FOISA applies to the information relating to Kilcreggan ferry users and residents.

83. Given this, the Commissioner requires the Authority to provide the Applicant with a copy of the public consultation responses to questions 2 to 10 from the Kilcreggan residents and ferry users. He requires the Authority to redact this information to withhold personal data that identifies living individuals, as required by section 38(1)(b) of FOISA.
84. The Commissioner will provide the Authority with a marked-up copy of the information that he requires to be disclosed to the Applicant.

## **Decision**

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

The Commissioner finds that by withholding some information under section 38(1)(b) of FOISA the Authority complied with Part 1 of FOISA.

However, by withholding other information (variously) under sections 30(b)(ii) and 38(1)(b) and by failing to consider the public consultation responses to questions 2 to 10 from the Kilcreggan residents and ferry users, the Authority failed to comply with Part 1 of FOISA.

The Commissioner therefore requires the Authority to disclose the remaining information which the Commissioner has found to be wrongly withheld, by 17 October 2024.

## **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**

**2 September 2024**

## Appendix 1: consultation questions 1 to 10

1. To feedback please type in your email address (note: this will not be passed to any other organisation and will not be used for marketing). Your address will be redacted when the feedback is published on our project site and your address will also be deleted from our system upon completion of this review.
2. What is the first part of your postcode? For example, PA19 (note: this will not be passed to any other organisation and will not be used for marketing). Your address will be redacted when the feedback is published on our project site and your address will also be deleted from our system upon completion of this review.
3. What Service do you use the most?
4. Please provide feedback on the Gourock Dunoon Concept Passenger Vessel Project in the box below?
5. Prior to the pandemic (i.e. in calendar year 2019) approximately how often did you typically travel on the service?  
  
2-3 times a week  
Once a week  
Once every two weeks  
Once every month  
Less than once a month  
Rarely/Never
6. Do you agree with the recommendations made in the Concept Vessel Presentation?  
  
Yes  
No
7. Can you please explain your previous answer?
8. Can you please provide an outline of the most important features that this passenger service should provide?
9. How satisfied are you with the features of the recommendations?  
  
Very satisfied  
Somewhat satisfied  
Neither satisfied nor dissatisfied  
Somewhat dissatisfied  
Very dissatisfied
10. If you have any additional comments relating to the Gourock-Dunoon Concept Passenger Vessel Design Project, please note them in the space below