



Scottish Information  
Commissioner

**Decision 019/2006 Mr Gordon Ross, Managing  
Director of Western Ferries (Clyde) Limited and  
Caledonian MacBrayne Limited**

*Refusal to provide various information relating to Caledonian  
MacBrayne's activities*

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

**Authority: Caledonian MacBrayne Limited**

**Case No: 200501636 (Part 1)**

**Decision Date: 20 February 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
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KY16 9DS



**Decision 019/2006 - Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited**

***Various requests for information relating to Caledonian MacBrayne's ferry services and fleet – whether release would prejudice substantially Caledonian MacBrayne's commercial interests – section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) – whether the release of information would be prejudicial to the effective conduct of public affairs – section 30 of FOISA – consideration of the public interest - whether all information relevant to a request was provided to the applicant – whether information is reasonably accessible other than via a request under FOISA – section 25***

## **Facts**

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Mr Ross made several requests for information from Caledonian MacBrayne Limited (Caledonian MacBrayne) in February 2005. Caledonian MacBrayne responded to each of these separately; in some cases judging that the information was exempt from release, and in one case by providing a document that it considered to contain the information sought. Mr Ross was dissatisfied with these responses and requested that Caledonian MacBrayne review each of these decisions. Caledonian MacBrayne upheld its decision in relation to each of the requests and then Mr Ross applied for a decision by the Scottish Information Commissioner on these.

## **Outcome**

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The Commissioner found that Caledonian MacBrayne had breached Part 1 of FOISA in its responses to Mr Ross's requests for information. The Commissioner now requires that information be provided to Mr Ross in response to two of the requests under consideration in this case.

In relation to the third request, the Commissioner found that Caledonian MacBrayne had acted in accordance with FOISA by judging that the information sought was exempt from release under section 33(1)(b) because release would be likely to substantially prejudice Caledonian MacBrayne's commercial interests, and the public interest in withholding this information outweighed that in release.



## Appeal

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Should either Mr Ross or Caledonian MacBrayne Limited wish to appeal against my decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

## Background

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1. This decision is concerned with a number of distinct requests for information that were put to Caledonian MacBrayne by Mr Ross in February 2005. The specific issues these raise will require each to be considered in turn. However, in considering them all, it is helpful to understand Caledonian MacBrayne's status and funding arrangements, as well as the up-coming competitive tendering of the services that it currently operates.

### **Caledonian MacBrayne's status and funding**

2. Caledonian MacBrayne is a company wholly owned by the Scottish Ministers which currently operates lifeline ferry services 22 islands and four peninsulas on the West Coast of Scotland. As these services are loss making, Caledonian MacBrayne's operations are subsidised by an annual deficit grant from the Scottish Executive. The deficit grant in the financial year 2004-05 was £25.9m.
3. Caledonian MacBrayne's obligations are set out in the "Undertaking", a 1995 document (available to view online here: <http://www.calmac.co.uk/undertakingbysecretaryofstate.pdf>) which commits the Scottish Ministers (previously the Secretary of State for Scotland) to providing grants or loans for the purposes of supporting sea transport services serving the Highlands and Islands. A revenue grant is made to cover the deficit estimated as likely to be incurred in the course of providing "approved services" each year and capital grants or loans can be provided for the acquisition or improvement of facilities.
4. In return for this funding, Caledonian MacBrayne must provide the approved services, and cannot discontinue these or amend the places served without the consent of the Scottish Ministers. Caledonian MacBrayne is obliged to provide a specified level of service and to follow timetabling and other requirements.



5. Caledonian MacBrayne is also entitled to identify and exploit commercial opportunities to develop other services alongside its core functions under the Undertaking. However, any “Out of Undertaking” activities are not liable for subsidisation, and so should be profit making to ensure that the public subsidy does not “leak” to support these other activities.

### **Tendering of the Clyde and Hebrides ferry services**

6. In order to comply with EU rules on state aids, the Scottish Executive is in the process of putting a contract to operate the services under the Undertaking and the associated funding out to competitive tender. The winning bidder in this process will be the one that is able to provide the service level required with the minimum public subsidy.
7. In the period since Mr Ross first made his requests for information, the need for such tendering has been confirmed by the Scottish Executive, and the process has commenced. In October 2005, a notice was placed in the European Journal inviting expressions of interest from across the EU in tendering for the contract to operate the network of services. The full tendering for the network contract will take place during 2006, with the winning provider commencing its service in Autumn 2007.
8. As part of this process, Caledonian MacBrayne will be split into two distinct companies. A vessel owning company (VesCo) will continue to own the Caledonian MacBrayne fleet (and other facilities such as terminals), and lease these to the operator that wins the contract to operate the network. A separate operating company (OpsCo) will be formed, and will bid for the right to operate the services.
9. All but one of the current Caledonian MacBrayne services in the Clyde and Hebrides will be tendered as a bundle, ensuring that a single operator will continue to operate the network as a whole. The Gourock to Dunoon route (for reasons that it is not necessary to detail) will be subject to different arrangements.

### **The Gourock to Dunoon service**

10. The future status of the Gourock to Dunoon service operated by Caledonian MacBrayne is currently unclear. Before a contract to operate a subsidised service is put out to tender, a process is first ongoing to establish whether any operator is willing and able to operate a suitable service on a commercial, unsubsidised basis.



11. In October 2005, the Scottish Executive placed a notice in the European Journal inviting companies from across the EU to bid to operate an unsubsidised commercial ferry service between Gourock and Dunoon. If an operator is found that is able to offer the level of service required without any subsidy, the subsidised Caledonian MacBrayne service will be withdrawn.
12. If no operator is able to provide a service without subsidy, a tendering process will take place in which bidders will be invited to compete for the contract to operate a subsidised service. In this process, the winning bidder will again be the one that can offer the specified service level for the lowest level of subsidy.

### **Structure of this decision**

13. This decision is concerned with a number of distinct requests which I have designated Request 1, Request 2 and Request 3 (the last of which in turn contains five parts). Mr Ross submitted a single application for decision by me (in a letter dated 2 May 2005) in relation to these requests, alongside two others that will be the subject of the separate decision 021/2006.
14. Mr Ross's application for decision was received on 5 May 2005 and allocated to an investigating officer. The appeal was then validated by establishing that Mr Ross had made valid information requests to a Scottish public authority under FOISA and had appealed to me only after asking the Caledonian MacBrayne to review the responses to his requests. Caledonian MacBrayne is a company wholly owned by the Scottish Ministers and as such is a publicly owned company (and therefore a public authority) for the purposes of section 3(1)(b) of FOISA.
15. The investigating officer wrote to Caledonian MacBrayne on 6 May 2005 informing it that Mr Ross's appeal had been received and that an investigation into the matters had begun. Caledonian MacBrayne was invited to comment on the case (including each of the requests considered in this decision) in terms of section 49(3) of FOISA. This letter also asked Caledonian MacBrayne to provide further information in relation to each of the three requests.
16. The three requests considered in this decision were investigated together as part of a single case file. However, different issues are raised in relation to each and so I summarise the investigation and my findings in relation to each in turn below.



## Request 1 –authorisation of peak sailings between Gourock and Dunoon

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17. Caledonian MacBrayne's approved service between Gourock and Dunoon (i.e. the service operated under the auspices of the Undertaking) is restricted to avoid the subsidised service undermining the privately operated Western Ferries service between two points on the outskirts of the respective towns. The service approved within the Undertaking (i.e. for which subsidy is available) is restricted to passengers only, and subject to timetable restrictions.
18. The Caledonian MacBrayne service currently includes a single return crossing per hour plus a number of additional sailings during peak hours. Historically, the service pattern was restricted to include only the hourly return crossing. However, the peak sailings were introduced in 1986 and operated outwith the Undertaking (i.e. without subsidisation, on a commercial basis). The peak sailings were then brought under the Undertaking (thereby making them liable to subsidisation) in 2003.
19. Mr Ross wrote to Caledonian MacBrayne on 21 February 2005 to request "the relevant document that overrides the Scottish Office restriction and permits or instructs Caledonian MacBrayne to provide peak sailings" between Gourock and Dunoon.
20. This request mirrors another made by Mr Ross to the Scottish Executive. This other request is the subject of my decision 067/2005 (available to view online here: <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision067.htm>).
21. Caledonian MacBrayne's response (in a letter dated 21 March 2005) stated that the information requested was enclosed, and provided a copy of a letter dated 18 March 2003, from the Scottish Executive to the Chairman of Caledonian MacBrayne. The enclosed letter confirmed that the Scottish Ministers considered the additional peak sailings as within the Undertaking and noted that Caledonian MacBrayne should do all that it could to ensure their continued operation. It also stated that the Ministers intended to maintain these sailings once the new tendered contract for the operation of the subsidised service came into force.
22. Mr Ross wrote to Caledonian MacBrayne again on 25 March 2005, noting that the letter supplied was dated 2003 whereas peak sailings started in 1986. He asked where was the authority for the sailings peak sailings prior to the 2003 letter. Caledonian MacBrayne construed this letter as a request for review under section 20 of FOISA and I have also.



23. In its response (dated 25 April 2005) Caledonian MacBrayne informed Mr Ross that the document supplied was the one which the company believed answered his request.
24. Mr Ross then applied to me for a decision in his letter dated 2 May 2005. This noted the historical restrictions on the Caledonian MacBrayne service between Gourock to Dunoon, and suggested that, on the basis of the responses he had received, there appeared to be no justification for the introduction of the peak sailings in 1986.
25. Mr Ross called into question whether the additional sailings had been conducted on a commercial (profit-making) basis prior to their inclusion within the Undertaking: if they had not, Caledonian MacBrayne would have been exceeding the terms of the Undertaking by operating them, and public funds would have been misused. Mr Ross suggested that the possibility of misuse of public funds meant that disclosure by the Caledonian MacBrayne would be in the public interest.

### **Request 1 – The Commissioner’s analysis and findings**

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26. In relation to request 1, the key question for me to answer was whether Caledonian MacBrayne had identified all relevant documentation that falls under the scope of the request when it provided the letter of March 2003.
27. The investigating officer’s letter to Caledonian MacBrayne of 6 May asked for further details to be provided on the steps taken to establish whether further relevant information existed or was held.
28. Caledonian MacBrayne’s response of 23 May indicated that it believed that the letter of March 2003 provided to Mr Ross was the one requested by him. The company also informed me, however, that it was aware that in November 1987, the Scottish Office acknowledged that the company had added four scheduled services to the Gourock to Dunoon route on a commercial basis, outwith the Undertaking.
29. This case is unusual in that my office was investigating concurrently two separate cases where the same request for documentation authorising the additional peak sailings had been made to different public authorities. In the investigation concerning Mr Ross’s parallel request to the Scottish Executive, the investigating officer had been provided with a copy of a letter dating from 16 November 1987 that was sent by the Scottish Office Development Department to the Managing Director of Caledonian MacBrayne. The Scottish Executive identified this as the document relevant to this request.



30. Caledonian MacBrayne informed me, as detailed in paragraph 28, of the Scottish Office's acknowledgement of the sailings in 1987, but did not refer to this letter, or provide a copy of it.
31. In subsequent correspondence and discussions, the investigating officer asked Caledonian MacBrayne to confirm whether it held a copy of this 1987 letter. If this letter was held, but was considered not to fall within the scope of Mr Ross's request, the company was asked explain why.
32. Caledonian MacBrayne was also asked whether the letter (if held) would be considered exempt from release (either in response the current request under consideration or one that explicitly requested it), and if so, under which exemption(s).
33. In response to these questions, Caledonian MacBrayne confirmed that it did hold a copy of the letter of November 1987. However, while acknowledging that this was a matter of interpretation, Caledonian MacBrayne reiterated its view that this letter was not relevant to Mr Ross' request. The company indicated that the letter did not explicitly authorise the peak services but merely acknowledged them.
34. Caledonian MacBrayne also confirmed that it considered this letter to be exempt from release under Section 30 of FOISA. It indicated that Caledonian MacBrayne must be in a position to carry out discussions with the Scottish Executive (or in this case the then Scottish Office), in an open and frank manner. It suggested that releasing information like this would hamper the ability to do that.

### **Conclusions on request 1**

35. Having considered the content of the letter of 16 November 1987, I find it to be relevant to Mr Ross's request. It is clearly the culmination of a series of communications between the Scottish Office and Caledonian MacBrayne on the subject of the peak sailings, in which the Scottish Office sets out its position on these. While this acknowledges the peak sailings, it also effectively permits their continuation.
36. I therefore conclude that Caledonian MacBrayne failed to act in accordance with Section 1(1) of FOISA by providing only the letter of March 2003 in response to Mr Ross's request, without referring to any further information existing or being considered exempt from release.
37. I considered the Scottish Executive's application of the exemption in section 30(b)(ii) to this document in my decision 067/2005. Section 30(b)(ii) applies where release of information would or would be likely to prejudice substantially the free and frank exchange of views for the purposes of deliberation.





38. In decision 067/2005 I concluded that given the age of the letter; the fact that the circumstances on the route changed when the peak sailings were brought under the scope of the Undertaking; and the nature of the comments expressed, section 30(b)(ii) did not apply. My conclusion in this case is the same, although I will not repeat my detailed reasoning here.
39. Caledonian MacBrayne did not specify which part of section 30 applied to this document, however, and so I must consider whether the other exemptions that are contained in this section apply to this document.
40. Section 30(a) exempts information from release where release would or would be likely to prejudice substantially the convention of collective responsibility of the Scottish Ministers. As this 1987 communication pre-dates devolution, its release could not have any effect on the principle of collective responsibility within the devolved administration. Therefore I do not consider that this exemption could apply in this instance.
41. Section 30(b)(i) applies where release would or would be likely to prejudice substantially the free and frank provision of advice. As the letter does not contain advice, its release would not, in my view impact on the future ability to do so. I do not consider this exemption to apply.
42. Finally, section 30(c) applies where the release of information would otherwise prejudice substantially the effective conduct of public affairs. Caledonian MacBrayne's reasoning for its reliance upon section 30 in this case was based on the effect release would have on its ability to engage in open and frank discussions with the Scottish Ministers. This argument suggests reliance primarily upon section 30(b)(ii). Given my conclusion that section 30(b)(ii) does not apply, I do not find that there is a case for the application of section 30(c).
43. I therefore conclude that this 1987 letter falls under the scope of Mr Ross's request, and is not exempt from release. I require Caledonian MacBrayne to provide a copy of this letter to Mr Ross.

## **Request 2 – discount on harbour dues**

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44. In a second letter to Caledonian MacBrayne dated 21 February 2005, Mr Ross requested details of any discount on the published rate for harbour dues paid by Caledonian MacBrayne to Argyll and Bute Council for the use of the berthing facilities at Dunoon.



45. Caledonian MacBrayne's response (dated 21 March) informed Mr Ross that the information was exempt under section 33(1)(b) of FOISA, because its release would substantially prejudice its commercial interests. This refusal notice made no reference to Caledonian MacBrayne's consideration of the public interest in relation to this request.
46. Mr Ross sought a review of this decision in a letter dated 25 March 2005. In a letter dated 25 April 2005, Caledonian MacBrayne notified Mr Ross of the outcome of the review, which upheld the original decision.

## **Request 2 - Caledonian MacBrayne's submissions**

47. The investigating officer's letter of 6 May asked Caledonian MacBrayne to provide further background information explaining the reasons for its reliance on the exemption in section 33(1)(b).
48. Caledonian MacBrayne's response informed me that the exemption had been applied because the information could provide an advantage to Western Ferries in the forthcoming tendering process. Caledonian MacBrayne noted that it had to protect its own interests in the bidding process, but must also ensure that no one competitor (including itself) gained an advantage over other bidders. The company suggested that release of this information would affect the competitive relationship already existing between Western Ferries and Caledonian MacBrayne on the Gourrock to Dunoon route, and in any tendering process. The company also suggested that the release would prejudice the financial interests of Caledonian MacBrayne and the Scottish Ministers.
49. In making its final point above, Caledonian MacBrayne did not suggest that the exemption in section 33(2)(b) applied to this information. Section 33(2)(b) applies where release would prejudice substantially the financial interests of the Scottish Administration (which includes the Scottish Ministers). As this exemption was not relied upon by Caledonian MacBrayne, any financial impact on the Scottish Ministers in relation to this information is not relevant to the consideration of this request. However, I think it worth noting that, on the basis of the information available to me, I think it highly unlikely that any financial impact of release would have been sufficient to justify the application of the exemption in section 33(2)(b).
50. Caledonian MacBrayne's argument for the application of section 33(1)(b) appears to be two fold: firstly that release would have a detrimental impact upon Caledonian MacBrayne's competitive position in the upcoming tendering process; and secondly that release would have a detrimental effect upon the fairness and effectiveness of the tendering process overall.



51. The second of these arguments appears to be based not on the assertion that Caledonian MacBrayne's own interests would be harmed, but rather that the public interest would not be served by release since this would harm the integrity of the tendering process. Therefore, I do not consider this a relevant argument when considering whether the exemption in section 33(1)(b) applies in the first instance. It is relevant, however, when considering whether the public interest favours release or otherwise.

## Request 2 – The Commissioner's analysis and findings

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52. Caledonian MacBrayne has argued that release of information about any discount on Argyll and Bute's harbour dues rate would have a detrimental effect on its chances of success in a future tendering process for this route.
53. In considering this case, I have consulted the draft invitation to tender (draft ITT) for the Gourock to Dunoon route that was issued by the Scottish Executive in March 2003. This document is available to view online here: <http://www.scotland.gov.uk/consultations/transport/gdfst-00.asp>.
54. Paragraph 2.13.4 of the draft ITT states the following:
- “2.13.4 Dunoon pier is owned by Argyll & Bute Council. It will be for tenderers to negotiate their own harbour dues, etc. with the Council.”
55. Paragraph 2.30.4 also notes:
- “2.30.4 It will be for the harbour authorities at Dunoon and Gourock to charge harbour dues as appropriate. It will be for tenderers to establish detailed arrangements for the operation of any particular vessel at the harbours involved. [...] Each tenderer will be given the same information from the harbour authorities but it is recognised that there may be differences about specific aspects for handling in relation to any particular vessels. The Executive has emphasised to both authorities that the harbour operator should treat all tenderers equally and fairly. As part of their technical submission, tenderers must set out detailed terms of any proposed agreements with harbour authorities concerned. In particular they should address the issue of responsibility for mooring and marshalling of loading and unloading of passengers, vehicles, freight and livestock, and the manning of ticketing, reservations and other shore based facilities.”



56. Clearly then, any discount that a company negotiates for the use of Dunoon Pier will be of significance in preparing a bid to operate this service. The cost of harbour dues will be one of a number of factors that will determine whether a service can be operated on a commercial basis, or the final subsidy level that would be required by any company bidding to operate a subsidised service.
57. I accept Caledonian MacBrayne's argument that to release of details of any existing discount on harbour dues that it has negotiated with Argyll and Bute Council for the use of Dunoon pier would be likely to have a detrimental effect on its competitive position in the forthcoming tendering process. Therefore, I find that the exemption in section 33(1)(b) has been correctly applied in this instance.

## **Request 2 - Consideration of the public interest**

58. In its response to Mr Ross, Caledonian MacBrayne made no reference to the public interest in relation to its consideration of this request. In failing to do so, it did not provide a refusal notice in line with the full requirements of section 16 of FOISA.
59. In his application to me, Mr Ross advised me that his company believed that Caledonian MacBrayne only paid a fraction of Argyll and Bute Council's published rates for harbour dues. He argued that it was in the public interest to seek assurances that Caledonian MacBrayne did not receive special treatment because of its relationship with the Council.
60. Caledonian MacBrayne is the recipient of significant public subsidy, and it is generally in the public interest that there is transparency in the use of such funds, thereby allowing effective scrutiny.
61. Mr Ross's claim suggests further that the subsidised service is granted special treatment by Argyll and Bute Council. Release of the information Mr Ross has requested would indeed provide some evidence as to whether or not this is the case.
62. While these factors do indeed favour release, in this case, I am persuaded that the public interest in maintaining the exemption outweighs that in release.
63. The information sought by Mr Ross would be of value to any company preparing a bid to operate the Gourock to Dunoon ferry service either on a commercial or subsidised basis. Furthermore, the draft ITT for this service makes clear that each bidding company must negotiate with Argyll and Bute Council to determine the harbour dues that would be payable. These would depend in part on the type of service offered, the sizes of vessels used and so on.



64. To require the incumbent company to provide details of the level of harbour dues it currently pays would be likely, in my view, to undermine the fair operation of the tendering process, and the process by which bidders each negotiate with Argyll and Bute Council.

### **Conclusions on request 2**

65. In relation to request 2, I therefore conclude that Caledonian MacBrayne acted in accordance with Part 1 of FOISA in withholding the information sought under section 33(1)(b) of FOISA. I have concluded that, the public interest in withholding this information outweighs that in release.
66. However, I have found that in its response to request 2, Caledonian MacBrayne breached the requirements of section 16 of FOISA by failing to provide a refusal notice that explained why it had judged that the public interest in maintaining the exemption outweighed that in release.

### **Request 3 – information about the Caledonian MacBrayne fleet**

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67. In the same letter that made request 2, Mr Ross asked for the following information about the Caledonian MacBrayne fleet on a vessel by vessel basis:
- a) Net book value
  - b) Grant funding provided to purchase vessels
  - c) Outstanding loan or grant values attributable to the vessels
  - d) Breakdown of capital sums expensed on all vessels over the last five years and a description of what these sums related to
  - e) Breakdown of repairs and maintenance costs for all vessels over the last five years.
68. Caledonian MacBrayne responded to each of a – e above separately, issuing five refusal notices dated 21 March 2005. Each informed Mr Ross that the information sought was exempt from release under section 33(1)(a) of FOISA, because release would substantially prejudice Caledonian MacBrayne's commercial interests. None of these notices made reference to the consideration of the public interest in relation to the information sought.



69. Mr Ross requested a review of all five of these decisions in a single letter dated 25 March 2005. He noted that the funding for vessels and repairs had come from public grants and loans and he found it difficult to understand why the release of the information could be considered prejudicial or would cause any harm to Caledonian MacBrayne.
70. Caledonian MacBrayne again responded separately to the request for review in relation to a – e in five notices dated 25 April 2005. The notices stating the outcome of the reviews in relation to d and e upheld the initial decisions that the information was exempt from release under section 33(1)(a) of FOISA.
71. With respect to a – c , Caledonian MacBrayne amended its decisions. Its responses to Mr Ross's request for review indicated that the information was exempt from release under section 25 of FOISA, which applies where the information sought is already available to the requestor. Caledonian MacBrayne informed Mr Ross that the total values under each of these headings were available in its annual report, which can be viewed online here: <http://www.calmac.co.uk/ann-rep-2004.pdf>.
72. In his application to me, Mr Ross pointed out that the financial information in the annual report provided totals for the fleet in relation to a - c. It did not provide vessel by vessel breakdowns as he had requested.
73. Mr Ross also questioned the application of section 33(1)(b) to the information in d and e. He suggested that the costs requested were historical and had no effect on how Caledonian MacBrayne operated its services at the time of writing or in the future.

### **Request 3 - The Commissioner's analysis and findings**

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74. I will consider the various parts of request three in two groups, to reflect Caledonian MacBrayne's different responses to these following its reviews.
75. However, I note first that in respect of each of these I have found that Caledonian MacBrayne failed to comply fully with the technical requirements of section 16 of FOISA. This is because all of the refusal notices issued in response to these requests failed to refer to any consideration of the public interest in relation to the information.



### Request 3 a – c

76. The investigating officer's letter to Caledonian MacBrayne of 6 May sought confirmation of whether the annual report did provide a vessel by vessel breakdown of the information sought by request 3 a – c.
77. Caledonian MacBrayne's response confirmed that vessel by vessel information was not in the public domain. The information requested by Mr Ross was therefore not reasonably accessible to him, and Caledonian MacBrayne acted in breach of section 1(1) of by relying upon the exemption in section 25 when responding to his request for review.
78. Caledonian MacBrayne has advised me that it was seeking to be helpful by directing Mr Ross to the information about the whole fleet in the annual report. In doing so, however, it failed to actually respond on the substance of Mr Ross's request.
79. In its initial submission on this case, Caledonian MacBrayne indicated that it believed that release of information on a vessel by vessel basis would be open to misinterpretation and prejudicial to the tendering process to be conducted.
80. However, following further discussions, Caledonian MacBrayne confirmed that it no longer considered the information sought by a – c to be exempt from release. It proposed to release to Mr Ross the information he had requested in a - c as at 31 March 2004. Since Mr Ross's request was made in February 2005, this information would have been nearly a year old at the time of his request.
81. When questioned further on this proposal, Caledonian MacBrayne confirmed that it held monthly figures showing more up to date values at the time of Mr Ross's request. However, it noted that the year end figures were independently audited and so the most accurate. Caledonian MacBrayne informed me that it did not consider it helpful or in the spirit of FOISA to release these monthly figures as they might contain inaccuracies. It suggested that the audited figures were those most relevant and accurate from the time of the request. Caledonian MacBrayne suggested that to release inaccurate information could lead to negative publicity for the company.
82. The investigating officer advised Caledonian MacBrayne that as Mr Ross's request had specified simply the various values for each vessel in the fleet, it did not require that these should be audited figures. She suggested that his request was (in the absence of clarification from the requestor) most naturally interpreted as including the most recent figures held at the time of the request.



83. The investigating officer sought Mr Ross's views on whether he would be satisfied with provision of the audited figures, or whether his preference was for the most recent available at the time of his request. In conversations and correspondence, he indicated that he would prefer to receive the most recent figures available, despite the potential for inaccuracies in the unaudited figures.

### **Conclusion on request 3 a – c**

84. The fact that information might be incorrect or misleading is not in itself a reason for withholding information under FOISA, and I am of the view that such concerns should not prevent release in this case. When releasing this information to Mr Ross, Caledonian MacBrayne could easily alleviate its concerns by checking the values against audited figures to identify any inaccuracies. If it chose, it could then advise Mr Ross of these to avoid any misunderstanding.
85. I find that Caledonian MacBrayne acted in breach of section 1(1) of FOISA in failing to provide Mr Ross with the information he sought in requests 3 a – c.
86. I now require Caledonian MacBrayne to provide Mr Ross with this information, on a vessel by vessel basis, reflecting the most up to date values that the company held, at the time of his request on 21 February 2005.

### **Request 3 parts d and e**

87. Caledonian MacBrayne's position on these final two parts of this request remains that the information is exempt under section 33(1)(b) of FOISA because release would prejudice substantially its commercial interests.
88. On a number of occasions, the investigating officer asked Caledonian MacBrayne for further information explaining the reasons for its reliance on section 33(1)(b).
89. Caledonian MacBrayne's responses have emphasised that information involved is likely form part of the information to be provided to bidders tendering for the contract to operate the network of Clyde and Hebrides lifeline ferry services. Caledonian MacBrayne noted that the format in which such information should be provided had still to be determined by the Scottish Executive and that the release of the information it held might conflict with information to be published as part of the tender documentation by the Scottish Executive. As a result, it suggested that release of this information would be prejudicial to the Company and the Scottish Executive, who were required to preserve a level playing field for all bidders.
90. A draft service specification for the network tendering was published by the Scottish Executive in 2004. This notes in paragraph 3.4.3 and 3.4.4:





“3.4.3 The successful tenderer shall be responsible for the operational management of the vessels, including manning, repairs, running maintenance (including annual overhauls), insurance, etc., for the duration of the contract. [...]

3.4.4 The terms and conditions of the vessel leases will also delineate the responsibilities and the process required for capital investment i.e. where statutory changes/improvements are required or where the successful tenderer wishes to effect alterations/additions to upgrade vessels which will provide improved revenue streams for periods beyond the term of the contract. “

91. The status of the information sought by Mr Ross in relation to the tendering process is therefore different in relation to d and e. Capital expenditure on the vessels (d) will in future be the responsibility of the vessel owning successor company to Caledonian MacBrayne (VesCo) in some instances, but the responsibility of the operating company in others. Maintenance costs (e), however, will be the sole responsibility of the operating company.

**Would release substantially prejudice Caledonian MacBrayne’s commercial interests?**

92. Having considered the brief submissions from Caledonian MacBrayne on these two requests, and the context of the tendering process, I am unable to conclude that the information requested in 3 d and e is exempt from release.
93. Information about expenditure on the fleet will clearly be relevant to the tendering process, and will need to be provided to bidding parties by the Scottish Executive to allow them to make their bid. The type and format of information that is provided to bidders is a matter for the Scottish Executive to determine.
94. However, on the basis of the information that Caledonian MacBrayne has provided to me, I cannot see that the public release of the information requested by Mr Ross, outwith the tendering process, would harm its commercial interests, either by affecting its chances of bidding successfully, or by risking its commercial activities more generally.
95. Caledonian MacBrayne’s reasoning for withholding this information has been based on the premise that it might contradict or be misinterpreted alongside the information that will be provided by the Scottish Executive in the tendering process. It suggests that this would threaten the level playing field for all parties on which the tendering should proceed.



96. I have pointed out in this and other decisions, that public authorities can take action to avoid misinterpretation of information provided under FOISA by providing additional contextual or explanatory details. The danger of misinterpretation would only be a valid reason for withholding information if the effect of this misinterpretation would be such that it would lead to the application of one of the exemptions in FOISA. In this case, Caledonian MacBrayne has not made a case that suggests that release of this information would be likely to substantially prejudice its commercial interests, or lead to the application of any other exemption in FOISA.

### **Conclusion on request 3 d and e**

97. I have found that Caledonian MacBrayne did not have sufficient reason to withhold information the information requested in Mr Ross's request 3 parts d and e under the exemption in section 33(1)(b) of FOISA.
98. I now require Caledonian MacBrayne to provide Mr Ross with the following information on a vessel by vessel basis, as held at the time of Me Ross' s request:
- d) Breakdown of capital sums expensed on all vessels over the last five years and a description of what these sums related to
  - e) Breakdown of repairs and maintenance costs for all vessels over the last five years.

### **Decision**

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I find that Caledonian MacBrayne has failed to act in accordance with the provisions of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in the way it responded to the requests (designated 1, 2 and 3 a –e) considered in this decision.

#### **Request 1**

In relation to request 1, I have found that Caledonian MacBrayne should have identified the letter of 16 November 1987 described in paragraph 29 above as falling under the scope of Mr Ross's request. I have also concluded that there is no justification for withholding this letter under any exemption contained in section 30 of FOISA. Therefore, I conclude that the Caledonian MacBrayne failed to comply with section 1(1) of FOISA in response to this request.

I now require that Caledonian MacBrayne provides a copy of this letter to Mr Ross.



## **Request 2**

In relation to request 2, I have found that Caledonian MacBrayne acted in accordance with section 1(1) of FOISA in withholding information about any discount on Argyll and Bute Council's harbour dues rates under the exemption in section 33(1)(b) of FOISA. I have found that the public interest in maintaining this information outweighs that in its release. I do not require Caledonian MacBrayne to provide any information to Mr Ross in response to this request.

## **Request 3**

In relation to the five parts (a – e) of request 3, I have found that Caledonian MacBrayne failed to act in accordance with section 1(1) of FOISA in withholding information about its fleet.

I have found that Caledonian MacBrayne has not provided sufficient justification for the application of the exemption in section 33(1)(b) to any of the types of information requested. Therefore, I conclude that the Caledonian MacBrayne failed to comply with section 1(1) of FOISA in respect of these requests.

I now require Caledonian MacBrayne to provide Mr Ross with the following information on a vessel by vessel basis, in the most up to date form that was held at the date of his request (21 February 2005):

- a) Net book value
- b) Grant funding provided to purchase vessels
- c) Outstanding loan or grant values attributable to the vessels
- d) Breakdown of capital sums expensed on all vessels over the last five years and a description of what these sums related to
- e) Breakdown of repairs and maintenance costs for all vessels over the last five years.

## **Technical breaches**

In relation to request 2 and the five parts of request 3, I have found that Caledonian MacBrayne's refusal notices failed to state why, in all the circumstances of the case, it had judged that the public interest in maintaining the exemptions relied upon outweighed that in release. In failing to include this explanation, Caledonian MacBrayne failed to fully comply with the requirements of section 16 of FOISA.



I am obliged to give Caledonian MacBrayne at least 42 calendar days in which to supply Mr Ross with the information as set out above. In this case, I require Caledonian MacBrayne to take the steps detailed above within 2 months of the date of receipt of this notice.

**Kevin Dunion**

**Scottish Information Commissioner**

**20 February 2006**