Decision 063/2005 Macroberts and Caledonian MacBrayne Limited

Information requests refused on the ground that the requests were vexatious

Applicant: Macroberts
Authority: Caledonian MacBrayne Limited
Case No: 200501613
Decision Date: 29 November 2005

Kevin Dunion
Scottish Information Commissioner

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Applicant made 722 requests to a Scottish public authority – public authority failed to reply to the requests or subsequent requests for review – public authority then refused to respond to the requests on the basis that the requests were vexatious under section 14(1) of the Freedom of Information (Scotland) Act 2002 – Commissioner upheld the decision of the public authority

Facts

Macroberts, a firm of solicitors, made 722 requests for information to Caledonian MacBrayne Limited (Caledonian MacBrayne) on 24 February 2005. (Macroberts made a similar number of requests to the Scottish Executive for information which it held about Caledonian MacBrayne on the same day. Those requests are dealt with in decision number 062/2005.)

Macroberts received no response from Caledonian MacBrayne to these requests and sent 722 requests for review to Caledonian MacBrayne on 29 March 2005.

As Macroberts still did not receive a response, they asked the Commissioner to make a ruling in relation to the manner in which Caledonian MacBrayne had dealt with their requests on 27 April 2005.

At the start of the investigation, it became clear that the email address to which the requests and requests for review had been sent had not been checked. However, the Commissioner was satisfied that both the requests and the requests for review had been received by Caledonian MacBrayne in terms of the Freedom of Information (Scotland) Act 2002 (FOISA) and that the application to him was valid.

Caledonian MacBrayne subsequently advised the Commissioner that they would not deal with the requests on the basis that they were vexatious under section 14(1) of FOISA.

Outcome

The Commissioner found that Caledonian MacBrayne had applied section 14(1) of FOISA correctly by refusing to deal with the information requests by Macroberts on the basis that the requests were vexatious.

However, the Commissioner found that Caledonian MacBrayne had failed to comply with Part 1 of FOISA in failing to respond to the information requests or to the requests for review.

Appeal

Should either Macroberts or Caledonian MacBrayne wish to appeal against this decision, there is a right to 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

1. On 24 February 2005, Macroberts sent 722 requests for information to Caledonian MacBrayne under section 1(1) of FOISA by email.

2. Caledonian MacBrayne is wholly owned by the Scottish Ministers. It is a publicly owned company as defined by section 6 of FOISA and is therefore considered to be a Scottish public authority for the purposes of FOISA in terms of section 3(1)(b) of FOISA.

3. Macroberts sent the email requests to the following address: information.act@calmac.co.uk. According to Caledonian MacBrayne's publication scheme, this is an email address which can be used to contact the member of Caledonian MacBrayne's staff who is responsible for its publication scheme under FOISA.

4. Macroberts did not receive a response to their requests and sent 722 requests for review to the same email address on 29 March 2005.

5. Macroberts did not receive a response from Caledonian MacBrayne and, on 27 April 2005, Macroberts asked me to make a ruling in relation to the manner in which Caledonian MacBrayne had dealt with their information requests.

6. I am permitted to investigate a matter under section 47(1) of FOISA only when the application to me is valid. To be valid, an information request and a subsequent request for review must have been made to a Scottish public authority. If the request and the request for review have not been received by a public authority, then the application to me is not valid. As a result, I had to ascertain whether the emails sent by Macroberts had been received by Caledonian MacBrayne.

7. My Office contacted Caledonian MacBrayne on 4 May 2005 to ask for its comments under section 49(3) of FOISA.

8. In response, Caledonian MacBrayne advised that the emails had been sent to a remote email address, which had been established in the summer of 2004. Although the email address works and although the email address appears in Caledonian MacBrayne's publication scheme, the address was never checked due to an oversight on behalf of Caledonian MacBrayne. Basically, it would appear that Caledonian MacBrayne simply forgot that the email address had been set up.

9. However, when the email address was brought to the attention of Caledonian MacBrayne, they immediately located all 722 of the information requests submitted by Macroberts together with all 722 requests for review.

10. Section 74(2)(b) of FOISA states that a thing transmitted by electronic means is presumed to be received on the day of transmission. Caledonian MacBrayne has confirmed that it received the information requests and the requests for review on the dates on which they were sent. Despite the fact that Caledonian MacBrayne were not aware that these emails had been received by them until my Office brought them to their attention, I am satisfied that the emails were received, for the purposes of FOISA, on the day on which they were sent by Macroberts.

11. Accordingly, I am satisfied that the application made to me by Macroberts was valid under section 47(1) of FOISA.

Investigation

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12. When Caledonian MacBrayne provided comments to my Office on the application made by Macroberts, it stated that, in all the circumstances, the requests from Macroberts are collectively of a vexatious nature and that, as such, there is no obligation on them to respond to any of the requests.

13. The remainder of the investigation therefore concentrated on whether Caledonian MacBrayne was correct to decide that the requests were vexatious.

Submissions from Caledonian MacBrayne

14. In correspondence with my Office, Caledonian MacBrayne provided reasons why they considered that the requests which they had made were vexatious. According to Caledonian MacBrayne, their decision was based on the sheer volume of the requests submitted at one time; the manner in which the emails were sent and the fact that there was nothing to identify each email individually without opening each email. This led them to believe that the emails were aimed at causing maximum disruption and annoyance to them. Caledonian MacBrayne also commented that it took them two days simply to identify the types of information being requested by Macroberts as the emails were, according to Caledonian MacBrayne, sent in no particular order.

15. Caledonian MacBrayne also commented that the type of information requested is not readily available to them and that in most cases there would be considerable work involved in amassing it all into coherent responses.

Submissions from Macroberts

16. In response, Macroberts made submissions to my Office on why the information requests made by them should not be considered to be vexatious. These are summarised below.

17. Macroberts are of the opinion that the number of requests cannot be regarded as excessive on the basis that the number of requests is irrelevant. Macroberts comment that FOISA does not provide for any maximum threshold for requests and does not absolve a public authority from its fundamental obligation set out in section 1(1) of FOISA on the basis that a large number of requests have been submitted and require to be processed.

18. Macroberts also commented that each request for information was sent individually to make it easy for Caledonian MacBrayne to respond and that by providing Caledonian MacBrayne with clear, focused requests, this should have assisted Caledonian MacBrayne in its dissemination of the requests throughout its organisation.

19. Macroberts do not believe that Caledonian MacBrayne has given any grounds to conclude that the requests were vexatious and state that the requests were not designed to cause disruption or annoyance to Caledonian MacBrayne. Finally, Macroberts submit that a ruling which provides that asking for a lot of information is vexatious goes against the very nature of the freedom of information legislation.

The Commissioner's analysis and findings

20. Section 14(1) of FOISA states that section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

21. There is no definition of "vexatious" contained in FOISA. However, paragraphs 23 and 24 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code) provide some guidance to public authorities on what the term means.

22. The Section 60 Code makes it clear that irritation or nuisance caused by the applicant or by receipt of the request should play no part in an authority's consideration of whether or not an application is vexatious. However, the Section 60 Code goes on to state that factors which an authority might take into account could include:

- Whether the request has already been rejected on appeal to the Commissioner and the applicant knows this.
- Whether there has been unreasonable refusal or failure to identify sufficiently clearly the information required.
- Whether there has been unreasonable refusal or failure to accept documented evidence that the information is not held.
- Whether the request can be shown to be clearly intended to disrupt the authority's work rather than for the purpose of obtaining information.

23. As mentioned earlier, Caledonian MacBrayne has argued that the requests were aimed at causing maximum disruption and annoyance to them.

24. The Section 60 Code also makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious and that the power to refuse to respond to a request on the grounds contained in section 14(1) of FOISA should be used sparingly and should not be abused simply to avoid dealing with a request for information.

25. In decision 062/2005 (which relates to 720 requests for information made by Macroberts to the Scottish Executive for information concerning Caledonian MacBrayne on the same day as the requests were made to Caledonian MacBrayne), I provide additional guidance in relation to the meaning of vexatious. In that decision, I comment that I am likely to be sympathetic to public authorities which refuse a request if responding to that request would impose a significant burden on the public authority and would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or manifestly disproportionate. Neither FOISA nor the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) limit the number of requests which can be made in one day. (Although there is provision in FOISA whereby costs for dealing with separate information requests can be aggregated, thereby limiting the number of requests which could be submitted at any time, this provision has not been introduced by Parliament.) However, this cannot and does not mean that applicants should be able to make an unlimited number of information requests to a public authority at any one time.

26. In considering what is manifestly unreasonable or manifestly disproportionate, it will sometimes be necessary to consider the effect of dealing with the request on a public authority. I have always made it clear that public authorities wishing to rely on the provision contained in section 14(1) must be able to show that the request – and not the person making the request – is vexatious. Even if an applicant does not intend a request to be vexatious, it is possible that dealing with that request will impose a significant burden on a public authority and will be considered to be manifestly unreasonable or manifestly disproportionate. The nature and effect of the request, rather than the intentions of the applicant, must therefore be taken into account.

27. In this particular case, I am not considering a single request, but a large volume of requests. Macroberts submitted 722 separate requests for information to one public authority on the same day on the same subject matter. While it is clear that each of these requests on its own would not be considered vexatious, I am satisfied that requests from the same applicant can be considered collectively in deciding whether each of those requests is vexatious. I must therefore now consider whether the 722 requests submitted by Macroberts would impose a significant burden on Caledonian MacBrayne and are manifestly unreasonable.

28. Although Caledonian MacBrayne employs a relatively large number of staff, the number of staff who deal with freedom of information requests is relatively small. Most of the freedom of information related work is carried out by a records manager and the finance director.

29. In many cases, particularly where responding to information requests is simply a matter of collating information, there will be a wide range of employees whom a public authority can call on to deal with the requests. However, given that the routes operated by Caledonian MacBrayne are about to go out to tender (this was well known at the time the requests were made), responding to these requests will not simply be a matter of collating information.

30. The information which has been requested by Macroberts will be of interest to a third party interested in tendering for any of the routes. As a result, only an employee with knowledge of the current status of the tendering processes involving Caledonian MacBrayne is likely to be qualified to respond to the information requests, particularly given the technical exemptions which are likely to be relied on in considering the release of information in response to the requests.

31. The number of staff within Caledonian MacBrayne with such technical knowledge is very limited. As a result, it is clear that responding to 722 requests would impose a significant burden on Caledonian MacBrayne.

The Commissioner's findings

32. This case turns on the question of whether 722 requests made to a single public authority by the same applicant on the same subject on the same day can be considered to be vexatious in terms of section 14(1) of FOISA.

33. In coming to this decision I have looked to the practice of other freedom of information Commissioner worldwide. In New Zealand, an information request may be refused if it is frivolous or vexatious. Guidance issued by the New Zealand Commissioner states that in order for a request to be vexatious, the requester must be believed to be patently abusing the rights granted by the legislation rather than exercising those rights in a bona fide manner.

34. In both Western Australia and Queensland, an information request does not have to be dealt with if dealing with that request would divert a substantial and unreasonable portion of the body's resources away from its other operations or its functions. Both the Western Australia and Queensland Commissioners have issued a relatively small number of decisions on this matter. In a Western Australia case, *Kean and the Department of Environmental Protection* (10 March 2000), the Commissioner considered, amongst other things, the number of documents involved, the resources available to the Department to deal with the application and the limited number of staff with the necessary knowledge to make an informed judgement about the granting of access to the information (in the Kean case the information dealt with complex technical issues relating the business and commercial interests of third parties) and agreed that responding to the requests would divert a substantial and unreasonable portion of the Department's resources away from its other operations.

35. Closer to home, I have considered guidance published by the Information Commissioner under the Freedom of Information Act 2000. Although the Information Commissioner has not yet published any decisions on this matter, guidance published by him (*Freedom of Information Act Awareness Guidance No 22: Vexatious and Repeated Requests*) supports my view that public authorities are entitled to consider the effect of dealing with information requests, not just the intention. According to the Information Commissioner, "Even though it may not have been the explicit intention of the applicant to cause inconvenience or expense, if a reasonable person would conclude that the main effect of the request would be disproportionate inconvenience or expense, then it will be appropriate to treat the request as being vexatious."

36. Having considered the practice in other jurisdictions and the arguments advanced by both Macroberts and the Caledonian MacBrayne, I have come to the conclusion that dealing with the 722 requests would impose a significant burden on Caledonian MacBrayne and would be considered by a reasonable person to be manifestly unreasonable. I am also satisfied that Macroberts could not have been unaware that the volume of requests made by them would impose a significant burden on Caledonian MacBrayne. As such, I consider the requests to be vexatious.

37. Macroberts and Caledonian MacBrayne both have conflicting views as to whether the manner in which the requests were made (i.e. 722 separate requests) was designed to help or hinder Caledonian MacBrayne. Whereas Macroberts have stated that the reason for sending each request individually was to provide Caledonian MacBrayne with clear, focused requests, which would assist them to disseminate the requests throughout the organisation, Caledonian MacBrayne believed that the manner in which the emails were sent was aimed at causing maximum disruption and annoyance. What is clear is that if the requests had all been dealt with as one, the cost of dealing with the requests would very quickly have exceeded the limit set down by the Fees Regulations. Macroberts will have known that this was the case, hence the wish that the requests be dealt with separately.

38. I wish to impress on public authorities that, although I am willing to consider the effect on public authorities of dealing with information requests when deciding whether a particular request is or requests are vexatious, I will only consider the effect on a public authority where the effect of dealing with the requests is manifestly unreasonable. From time to time it is possible that public authorities will receive a number of information requests which stretch their resources. While I am likely to be sympathetic where the volume of requests from an applicant is overwhelming, I will not be sympathetic to public authorities which have simply failed to prepare for freedom of information or which have failed to make reasonably adequate provision for the handling of information requests.

Technical aspects of FOISA

39. As mentioned above, I am satisfied that the information requests made by Macroberts were received by Caledonian MacBrayne on 24 February 2005 and that the requests for review were received on 29 March 2005. Caledonian MacBrayne has confirmed that they were unaware of that these emails had been received by them until my Office had contacted them to advise them that an application had been made to me by Macroberts.

40. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days to respond to a request for information from receipt of the request.

41. Additionally, section 21(5) of FOISA states that authorities must give notice to the applicant of the action that it has taken no later than 20 days after receiving a requirement for review.

42. I find that Caledonian MacBrayne did not respond to either Macroberts' initial requests or requests for review. However, in the circumstances, I do not require Caledonian MacBrayne to take any remedial steps in relation to these failures.

43. I also note the comment from Caledonian MacBrayne that since the requests are of a vexatious nature, there is no obligation to respond to any of the requests. However, public authorities should note that section 16(5) of FOISA provides that if a public authority decides that a request is vexatious, it must issue a refusal notice saying that the request is vexatious unless they had already given the applicant such a notice or it would be unreasonable to expect the public authority to serve a further notice.

44. Clearly, in this case, Caledonian MacBrayne did have an obligation to respond to the requests.

Decision

I am satisfied that the 722 information requests submitted by Macroberts were vexatious. Consequently, I find that the Caledonian MacBrayne did not breach Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to respond to the requests made by Macroberts on the basis that the requests were vexatious under section 14(1) of FOISA.

However, I find that Caledonian MacBrayne breached section 10(1) and section 21(5) of FOISA by failing to respond either to the initial requests or subsequent requests for review by Macroberts. As mentioned above, I do not require Caledonian MacBrayne to take any remedial steps in connection with these breaches.

Kevin Dunion
Scottish Information Commissioner
29 November 2005