



Scottish Information
Commissioner

**Decision 049/2006 Mr Gordon Ross, Managing
Director of Western Ferries (Clyde) Limited and
Caledonian MacBrayne Limited**

*Refusal to release various information relating to Caledonian
MacBrayne's Gourock to Dunoon ferry service*

**Applicant: Gordon Ross, Managing Director of Western
Ferries (Clyde) Limited
Authority: Caledonian MacBrayne Limited
Case No: 200501161 (Part 2)
Decision Date: 24 March 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 049/2006 - Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited

Various requests for information about Caledonian MacBrayne's ferry service between Gourock and Dunoon – whether release would be likely to substantially prejudice Caledonian MacBrayne's commercial interests – section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) – consideration of the public interest – whether release would breach any of the Data Protection Principles – section 38(1)(b) of FOISA – whether release would entail an actionable breach of confidence – section 36(2) of FOISA – whether information is held – section 17 of FOISA - refusal notice as required by section 16 of FOISA

Facts

Mr Ross submitted several requests for information relating to Caledonian MacBrayne's Gourock to Dunoon ferry service in January 2005. Four of these requests are considered in this decision. These sought:

1. The amount of deficit funding allocated to the Gourock to Dunoon route over the last five financial years.
2. The most recent charter agreement for the MV Ali Cat.
3. The number of walk-on foot passengers, not vehicle (car, commercial or coach) drivers or their occupants, on the Gourock to Dunoon route over the last five financial years.
4. Disposal value of the MV Pioneer.

Caledonian MacBrayne refused each of these requests on the grounds that the information was exempt from release, or that the information was not held. The company then upheld its decisions following separate internal reviews. Mr Ross then submitted an application for a decision by me in relation to 10 distinct requests for information. This decision is concerned only with the four requests detailed above.



Outcome

The Commissioner found that Caledonian MacBrayne had acted in accordance with Part 1 of FOISA in its responses to requests 1 and 3, by advising Mr Ross that the information he had requested was not held, as required by section 17 of FOISA.

The Commissioner found that Caledonian MacBrayne had acted in breach of Part 1 of FOISA in its response to request 2, by applying the exemption in section 33(1) of FOISA to the entire charter agreement. However, the Commissioner concluded that certain parts of this document were exempt from release under section 33(1)(b), and that the public interest in maintaining this exemption outweighed that in disclosure in this case. He also found that the exemption in section 38(1)(b) applied to some information contained in this document. The Commissioner required a copy of this document to be supplied to Mr Ross with these exempt parts redacted.

The Commissioner found that Caledonian MacBrayne had acted in breach of Part 1 of FOISA by applying the exemptions in section 36(2) and 33(1)(b) of FOISA to the information comprised in request 4. The Commissioner required Caledonian MacBrayne to supply the disposal value of the MV Pioneer to Mr Ross.

The Commissioner also found that Caledonian MacBrayne had failed to comply fully with the requirements of section 16 of FOISA by failing to explain its consideration of the public interest in the refusal notices issued in response to requests 2 and 4.

Appeal

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

1. This decision is concerned with a number of requests for information relating to Caledonian MacBrayne, and particularly its ferry service between Gourock and Dunoon. The issues raised by this case require some understanding of Caledonian MacBrayne's current funding arrangements and the up-coming competitive tendering of the Clyde and Hebrides ferry network. I briefly set out some background information below, before setting out the details of Mr Ross's requests.

Caledonian MacBrayne's status and funding

2. Caledonian MacBrayne is a company wholly owned by the Scottish Ministers which currently operates lifeline ferry services to 22 islands and four peninsulas on the West Coast of Scotland. These 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.



6. 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.
7. The Caledonian MacBrayne service between Gourock and Dunoon currently carries both vehicles and foot passengers. The vehicle service is operated on an "Out of Undertaking", commercial basis. Guidelines issued by the Scottish Executive in 1995 state that the pricing of any Out of Undertaking activity should cover at least the full cost of supply. In simple terms, such activity should not be loss-making.

Tendering of the Clyde and Hebrides ferry services

8. 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.
9. 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.
10. 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

11. 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.



12. In October 2005, the Scottish Executive placed a notice in the European Journal inviting expressions of interest from across the EU to bid to operate an unsubsidised commercial ferry service (with no timetabling restrictions) 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. The tendering process for an unsubsidised service will also take place during 2006, and any such service would then commence in Spring 2007.
13. If no operator is able to provide a suitable service without subsidy, the Scottish Executive will take forward plans for a tendering process in which bidders will be invited to compete for the contract to operate a restricted subsidised service. In this process, the winning bidder will be the one that can offer the specified service level for the lowest subsidy requirement.

Mr Ross's requests for information

14. Mr Ross wrote to Caledonian MacBrayne on 3 January 2005, making 19 separate requests for information concerning its ferry service between Gourock and Dunoon. Ten of these 19 requests were ultimately referred to me in a single application for decision. However, this decision is concerned with just four of these, which sought the following information:

Request 1: The amount of deficit funding allocated to the Gourock to Dunoon route over the last five financial years.

Request 2: The most recent charter agreement for the MV Ali Cat

Request 3: The number of walk-on foot passengers, not vehicle (car, commercial or coach) drivers or their occupants, on the Gourock to Dunoon route over the last five financial years.

Request 4: Disposal value of the MV Pioneer.

I will refer to these requests as request 1, request 2, request 3 and request 4 throughout this decision.

15. Caledonian MacBrayne responded to each of these requests in separate notices dated 28 January 2005. The contents of these notices are described in my consideration of each request below. Mr Ross requested reviews in relation to each of these in a single letter dated 8 February 2005. Caledonian MacBrayne then provided separate notices stating the outcome of its reviews of each request in letters dated 28 February 2005.
16. Mr Ross then made a single application for decision to me in relation to 10 of the requests for information first submitted on 3 January. This application (dated 18 March 2005) was received by my office on 23 March 2005.



17. The case was allocated to an investigating officer and the appeal 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 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.
18. The investigating officer wrote to Caledonian MacBrayne on 4 April 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 in terms of section 49(3) of FOISA. This letter also asked Caledonian MacBrayne to provide copies of information withheld and further background on the reasons for its decisions, including its consideration of the public interest.
19. The investigating officer visited Caledonian MacBrayne's offices in Gourock on 8 September 2005 to discuss a number of ongoing investigations, and to gain a better understanding of the company and its operations. The discussions with a range of staff during this visit, and follow-up correspondence with both Mr Ross and Caledonian MacBrayne have also supported the findings set out below.
20. The 10 requests submitted to me by Mr Ross in his application of 18 March were investigated as a single case. However, to avoid confusion, I have set out my findings in more than one decision notice. Other requests are considered in my decisions 027/2006 and 048/2006.
21. This decision is concerned only with request 1, request 2, request 3 and request 4. As different issues are raised in relation to each of the four requests, I summarise the details of the investigation and my findings in relation to each in turn below.

Request 1 – Deficit funding allocated to the Gourock to Dunoon route

22. This request sought detail of the amount of deficit funding that was allocated to the Gourock to Dunoon service over the previous 5 financial years.



23. Caledonian MacBrayne's initial response to this request informed Mr Ross that the information was exempt from release under section 33(1)(b) of FOISA, which applies where release would or would be likely to prejudice substantially the commercial interests of any person. The refusal notice stated that this exemption applied because release would prejudice Caledonian MacBrayne's commercial interests and its ability to tender competitively for the Gourock to Dunoon route.
24. Following a review of Mr Ross's request, Caledonian MacBrayne advised Mr Ross that it actually could not provide the information he sought, because its deficit funding was network-based, and allocation to individual routes was not possible. Caledonian MacBrayne noted also that had the information been available, it would have been exempt from release under section 33(1)(b) of FOISA.
25. In his application to me, Mr Ross drew my attention to a table from page 13 of Caledonian MacBrayne's annual report for 2003-2004. He suggested that this table showed deficit funding allocated on a region/area basis.
26. However, inspection of this table confirmed that it actually set out operating losses (rather than deficit funding) on a region/area basis, and the combined operating loss on the approved services. The table contains details of profits from other activities, and then provides a total operating loss for the year.
27. The total deficit grant is specified on this table, but not route-by-route or regional allocations. It should be noted that the sum shown for the deficit grant is not the same as either the total operating losses on the approved services, or Caledonian MacBrayne's total operating loss before this grant.
28. It is clear from this table that although the deficit grant received by Caledonian MacBrayne broadly reflects the losses on the approved services, it should not be assumed that losses on a particular route are the same as the deficit grant allocated to it. It is also clear that Caledonian MacBrayne does not currently publish details of the deficit funding on anything other than a network-wide basis.

Request 1 – The Commissioner's analysis and findings

29. In his application to me, Mr Ross appears to have made a common sense assumption that operating losses on a route are the same as the deficit funding allocated to it. However, while there may be a close approximation between the two, they are not the same thing.



30. In my previous decision 061/2005, I concluded that Caledonian MacBrayne's losses on an individual route basis should be made available in response to a request under FOISA. In this case, however, the primary question for me to answer is whether Caledonian MacBrayne holds any recorded information that would reveal a route-by-route allocation of the overall deficit grant provided by the Scottish Ministers.
31. During discussions with the investigating officer, Caledonian MacBrayne explained that the deficit grant available to it is set out each year in a letter from the Scottish Executive. Caledonian MacBrayne has provided me with a copy of the letter detailing the grant for the financial year 2004-05. This letter confirms the total grant available to the network of approved services as a whole, and does not allocate portions of the grant to specific services. Therefore, I am satisfied that the Scottish Ministers do not allocate the deficit grant on a route-by-route basis, and so Caledonian MacBrayne does not hold recorded information showing such allocation.
32. Caledonian MacBrayne has also advised me that it does not itself at any stage allocate the overall grant on a route by route basis after it has been confirmed by the Scottish Executive. Caledonian MacBrayne pointed out that to do this would be misleading as it would fail to take into consideration the network-wide costs such as ticketing and administration, and so internal reporting is not done on this basis.

Conclusions on request 1

33. I am satisfied that Caledonian MacBrayne does not hold recorded information that would reveal deficit funding allocated to the Gourock to Dunoon service. I find that neither the Scottish Executive nor Caledonian MacBrayne itself allocates deficit grant funding on a route-by-route basis.
34. Caledonian MacBrayne does hold information that would show losses on each of its routes. However, the operating losses attributed to a specific service and any deficit funding allocated that service would not be the same thing.
35. Therefore, I conclude that Caledonian MacBrayne's initial response to Mr Ross, in which it informed him that the information he had requested was exempt from release, was inappropriate. In these circumstances, an authority under FOISA should issue a notice as required by section 17, informing the requestor that the information is not held.
36. However, following its review of this request, Caledonian MacBrayne did advise Mr Ross that it did not hold the information he had requested. I find that in providing this response, Caledonian MacBrayne acted in accordance with Part 1 of FOISA.



Request 2 – The most recent Charter Agreement for the MV Ali Cat

37. Caledonian MacBrayne's Gourock to Dunoon service is currently operated by three roll-on roll-off vessels that are owned by the company, and the MV Ali Cat, a passenger-only charter vessel.
38. Caledonian MacBrayne's response to Mr Ross's request for the most recent charter agreement for the Ali Cat informed him that the information was exempt from release under section 33(1)(b) of FOISA. The refusal notice explained that the information comprised details of the commercial operations of Caledonian MacBrayne, and that release would prejudice the company's commercial interests and its ability to tender competitively for the Gourock to Dunoon route.
39. This refusal notice made no reference to Caledonian MacBrayne's consideration of the public interest as it related to the request.
40. Caledonian MacBrayne later upheld its initial decision following an internal review.

Caledonian MacBrayne's submissions on request 2

41. In the course of the investigation, Caledonian MacBrayne provided a copy of the charter agreement. The investigating officer then asked for confirmation of whether the entire document was considered to be exempt from release under section 33(1)(b) of FOISA.
42. In a letter dated 5 October 2005, Caledonian MacBrayne confirmed that a further review of the document had been carried out, and that it would be willing to release it, subject to the redaction of "sensitive" content, particularly financial information. A further copy of the charter agreement was provided showing the redactions that Caledonian MacBrayne proposed to make.
43. This new copy of the agreement sent to my office included a letter dated 24 February 2005, setting out terms for the extension of the agreement. I have not considered this letter in this decision, as it would not have been held by Caledonian MacBrayne at the time of Mr Ross's request at the beginning of January 2005, and so it falls outside the scope of his request. However, the conclusions I draw below will be relevant to the considering any future request for access to this letter.
44. Caledonian MacBrayne's proposed redactions to the main agreement were:
 - a) Paragraph 5.1 and 5.2 - Removal of all financial sums.



- b) Paragraph 16.2 – removal of name and contact details for Red Funnel's Deputy Managing Director
 - c) Page 10 – Removal of names and signatures of witnesses for both parties to the agreement, the address of the witness on behalf of Red Funnel, and the name and signature of the Deputy Managing Director of Red Funnel.
 - d) Schedule, Part 4 (adjustment of consideration)– removal of all financial sums
 - e) Schedule, Part 8 (Schedule of payments) – removal of basis of calculation and payment sums.
45. As b) and c) above appear to concern personal rather than commercial information, Caledonian MacBrayne was asked to confirm which exemption was judged to apply. Its response confirmed that while financial information was considered exempt under section 33(1)(b), these other parts had been considered exempt under section 38 of FOISA.
46. However, the company later withdrew its reliance upon this exemption in relation to the identity of the Deputy Managing Director of Red Funnel. It maintained, however, that there was justification for withholding the details of the witnesses to the two directors' signatures because both were secretaries and as such not highly placed individuals in the companies in question.

Request 2 – the Commissioner's analysis and findings

47. I will consider the application of the two exemptions cited by Caledonian MacBrayne in relation to its proposed redactions of the charter agreement in turn.

Section 38 of FOISA

48. Following the exchange described above that Caledonian MacBrayne no longer seeks to withhold the information about Red Funnel's director referred to in paragraph 44 b) and c) above.
49. The outstanding information for me to consider here includes the names and signatures of two secretaries, one working for Caledonian MacBrayne, and the other for Red Funnel, and an address provided by the witness for Red Funnel. This is not the company address, and I understand it to be her home address.



50. Caledonian MacBrayne did not specify which part of section 38 of FOISA it considered to be relevant to this information, but I understand this to be section 38(1)(b), read in conjunction with section 38(2)(a)(i). These sections create an absolute exemption from release where information is personal data (for the purposes of the Data Protection Act 1998 (DPA)), and where release would breach any of the Data Protection Principles.
51. In the case of the address of the witness for Red Funnel, I am satisfied that this exemption is engaged. A home address is clearly personal information about a person. I find that its release in this context would breach the first Data Protection Principle, which requires that personal data be processed fairly and lawfully.
52. The inclusion of this individual's address on the agreement was for a specific legal purpose. Furthermore, I think it would be reasonable to expect that had the witness for Red Funnel anticipated that the agreement would be publicly available in future, she would have cited her work rather than home address, as did the witness for Caledonian MacBrayne. Given that this individual was employed by a private sector organisation not covered by freedom of information law, it is unlikely that in March 2004 she would have been thinking ahead towards the future implications of FOISA for her witnessing the signing of this agreement. Therefore, I think it would be unfair for her home address details to be released along with other parts of the charter agreement.
53. I do not accept, however, that release of the names and signatures of the two witnesses would entail a breach of any of the Data Protection Principles. In the decision in *Durant v the Financial Services Authority* [2003] EWCA Civ 1746, the Court of Appeal held that if information is to be viewed as personal data for the purposes of DPA, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual's involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information concerned. The Court of Appeal summarised these two aspects as information affecting a person's privacy whether in his personal or family life, business or professional capacity.
54. The witnesses' names and signatures on the charter agreement simply record the fact that they had, in the course of their work, witnessed the signing of an agreement between their two organisations. It tells us nothing more about these individuals' private lives than that they are connected with their respective employers. Therefore, I do not find that their names and signatures in these circumstances are personal data for the purposes of the DPA, interpreted in line with the *Durant* decision. Therefore, I do not accept that the exemption in section 38(1)(b) applies to this part of the document.



Conclusion on section 38 of FOISA

55. I have accepted that the address of the witness for Red Funnel should be redacted from the charter agreement before being provided to Mr Ross because release of this information would entail a breach of the first Data Protection Principle, and therefore this information is exempt under section 38(1)(b) of FOISA.
56. I do not accept that any further information within the charter agreement is exempt under section 38(1)(b). In particular, the names and signatures of the witnesses to the agreement, as well as the name, signature and contact details of the Deputy Managing Director of Red Funnel, are not exempt from release.

Section 33(1)(b) of FOISA

57. Caledonian MacBrayne has submitted to me that release of the financial figures contained in Paragraphs 5.1 and 5.2 of the charter agreement, and in its Schedule Parts 4 and 8 would be likely to prejudice substantially its own commercial interests by harming its ability to tender competitively to operate the Gourock to Dunoon service.
58. I accept that this information would be of significant value to a competitor seeking to make a rival bid to operate this service. In considering this request, 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>.
59. Paragraphs 2.12.1 to 2.12.4 of the draft ITT make clear that any company bidding to operate the Gourock to Dunoon service will be responsible for identifying and providing suitable vessels to operate the service. The costs associated with operating such vessels will be a central factor in determining whether a service could be operated on a commercial basis, or establishing the overall level of subsidy that would be required.
60. The financial sums contained in the charter agreement for the MV Ali Cat set out in detail the costs involved with operating this vessel. Public release of these costs (and so release to Caledonian MacBrayne's competitors in the tendering) would provide valuable insights into Caledonian MacBrayne's current running costs on this service, and likely content of Caledonian MacBrayne's bid for this service.



61. I accept Caledonian MacBrayne's argument that release of this financial information is exempt from release under section 33(1)(b), because release would be likely to substantially prejudice the company's commercial interests by harming its ability to tender successfully to operate the Gourrock to Dunoon service.

Consideration of the public interest

62. 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 requirements of section 16 of FOISA. Section 33(1)(b) of FOISA is a qualified exemption, and so before reaching a final conclusion on whether information should be withheld or not, a public authority should first consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
63. In subsequent communications with my office, Caledonian MacBrayne has highlighted a number of public interest considerations that it believes favour the maintenance of the exemption in relation to the financial information in the charter agreement (alongside a range of other information).
64. These included:
- a) the public interest in ensuring that the tendering process should proceed in a manner that is fair to all parties.
 - b) the public interest in avoiding the need for increased public subsidy of lifeline ferry services.
 - c) the public interest in ensuring the continuity and protection of lifeline ferry services
 - d) the public interest in protecting the economic interests of the communities served by lifeline ferry services.
65. Mr Ross was also invited to comment upon the public interest in relation to this case. His response informed me that his organisation believed that Caledonian MacBrayne's service between Gourrock and Dunoon was over-subsidised.
66. Mr Ross noted that the vehicle service on this route is conducted outwith the Undertaking, and as such, should not be in receipt of public funding. He pointed out that if the losses incurred in the provision of a combined vehicle and passenger service exceeded those that would be incurred by the passenger service alone, then this would provide evidence that the vehicle service was in receipt of subsidy.



67. Mr Ross indicated that his various requests for information about the Gourrock to Dunoon service were prompted by the belief that this was the case. He argued that it was in the public interest that such information was released for the purposes of transparency and accountability, given the likelihood (in his view) that public funds had been misused. He argued further that if there was over-subsidisation, removal of this would lead to a reduction of the burden on the public purse.
68. Given the nature of Mr Ross's allegations, both Caledonian MacBrayne and Mr Ross were invited to comment further on this matter in letters dated 18 November 2005. Caledonian MacBrayne was invited to comment on Mr Ross's arguments in relation to the public interest, and asked to provide further information in relation to the vehicle service between Gourrock and Dunoon. Mr Ross was asked to provide reasons for his belief that the vehicle service between Gourrock and Dunoon was in receipt of subsidy despite being operated on an out of undertaking basis. Responses were received to both of these requests, and these have been taken into consideration when reaching the conclusions below.

Conclusions on the public interest

69. I have addressed some of the public interest concerns raised by Mr Ross and Caledonian MacBrayne in my previous decision 027/2005 and my conclusions here are similar. Both parties to this case have raised matters of public interest in arguing for the disclosure and withholding of the requested information.
70. In favour of release, there is significant public interest in allowing effective scrutiny and oversight of the use of public funds. As a recipient of considerable public subsidy, this is an important consideration for Caledonian MacBrayne when responding to requests for financial information about its operations.
71. On the other hand, I am mindful of the fact that Caledonian MacBrayne operates in a competitive environment, and there will be circumstances where it would be contrary to the public interest to require a level of disclosure that would be likely to substantially prejudice its own interests (and ultimately the interests of the public that owns it), while going significantly beyond the level required of its private sector counterparts.
72. In this case, my consideration of the public interest has rested on the balancing of two key issues.



73. Mr Ross has suggested that Caledonian MacBrayne's Gourock to Dunoon service is over-subsidised, in that the losses incurred in providing a combined passenger and vehicle service are greater than those that would be incurred on a vehicle service alone. If this was the case, it would be contrary to the "Out of Undertaking" status and arrangements of the vehicle part of this service.
74. If release would demonstrate that there had or had not been misuse of public funds, this is a significant consideration weighing in favour of release. Having considered the arguments put to me by Mr Ross, I agree that the information he has requested could (in conjunction with other information) be used to help either allay or substantiate concerns regarding over-subsidisation.
75. However, I must weigh this possibility against the clear value of this information to any organisation considering making a bid to operate the Gourock to Dunoon ferry service. I am aware that it is in the public interest that the tendering process should be able to proceed in a manner that is fair to all parties. In the course of the tendering process, I understand that the Scottish Executive will make information that it considers to be necessary for bidders to prepare their submissions via a secure information room.
76. I believe that the fairness of the tendering process could be undermined if Caledonian MacBrayne were required to the various financial sums contained in the charter agreement for the MV Ali Cat at this point in time. I have concluded therefore that the public interest in disclosing this information is outweighed by that in maintaining the exemption from release.

Overall conclusions on request 2

77. I have concluded that Caledonian MacBrayne acted in breach of Part 1 of FOISA by refusing to provide the most recent charter agreement for the MV Ali Cat in response to Mr Ross's request. The vast majority of this document is not exempt from release under any exemption contained in Part 2 of FOISA, and so should have been released. Caledonian MacBrayne acted in breach of section 1(1) of FOISA by failing to do so.
78. I also note that Caledonian MacBrayne failed to comply in full with the requirements of section 16 of FOSIA by failing to explain its consideration of the public interest in the refusal notice issued in response to this request.
79. However, I do find that the financial sums contained in Paragraphs 5.1 and 5.2 of the agreement and in Parts 4 and 8 of the Schedule to the charter agreement are exempt from release under section 33(1)(b) of FOISA, and that the public interest in maintaining this exemption outweighs that in release.
80. I also find that the address of the witness to the signing of the contract by Red Funnel is exempt from release under section 38(1)(b) of FOISA.



81. I now require Caledonian MacBrayne to provide a copy of the charter agreement to Mr Ross, with the information detailed in paragraphs 79 and 80 redacted.

Request 3 – The number of walk on passengers between Gourock and Dunoon

82. This request sought the number of foot passengers (as opposed to passengers who were vehicle drivers or passengers) using the Gourock to Dunoon service over the previous five financial years.
83. Caledonian MacBrayne's initial response stated that it was unable to provide the information requested as details of different passenger categories were not recorded. I understand this response to have been a notice that the information requested was not held, under the terms of section 17 of FOISA.
84. Following Mr Ross's request for review, Caledonian MacBrayne's response advised that details of separate passenger categories were not recorded for the full period requested. Caledonian MacBrayne's letter did advise Mr Ross that since December 2004, it had started to separately record foot passenger numbers.
85. Caledonian MacBrayne went on to indicate that the details held were exempt from release under section 33(1)(b) of FOISA because release would prejudice substantially its commercial interests.

Request 3 - The Commissioner's analysis and findings

86. In this case, I find that Caledonian MacBrayne acted in accordance with Part 1 of FOISA when it advised Mr Ross that the company did not hold records showing the number of walk on passengers on the Gourock to Dunoon service over the previous five financial years.
87. The period covered by Mr Ross's request, made in January 2005, comprises the financial years, 1999-2000, 2000-2001, 2001-2002, 2002-2003, and 2003-2004. Caledonian MacBrayne has confirmed that it did not record the number of foot passenger numbers on the Gourock to Dunoon service until the end of the 2004 calendar year.



88. As the 2003-04 financial year ended in April 2004, and Caledonian MacBrayne did not begin to record foot passenger numbers until December 2004, the walk on passenger figures that are held by the company do not fall within the scope of this request.
89. Therefore, it has not been necessary for me to consider whether this information is exempt from release under section 33(1)(b) of FOISA.

Request 4 – the disposal value of the MV Pioneer

90. The MV Pioneer is a vessel which formerly operated on Caledonian MacBrayne's Gourock to Dunoon service. It was sold by the company in 2004.
91. Mr Ross's request for the disposal value of the vessel was refused by Caledonian MacBrayne on the grounds that the exemptions in section 33(1)(b) and 36(2) of FOISA applied, on the basis that confidentiality provisions within the contract of sale could lead to a court action against it. Section 36(2) applies where information has been provided by a third party and its disclosure would constitute an actionable breach of confidence.
92. Caledonian MacBrayne upheld this decision following a review.

Submissions from Caledonian MacBrayne on request 4

93. Caledonian MacBrayne has provided me with a copy of the Memorandum of Agreement between Caledonian MacBrayne and the buyer of the MV Pioneer that sets out the terms of the sale. This confirms the disposal value of the vessel. It also contains a clause which states that the details of the sale, including the price, shall be kept confidential.
94. In further correspondence with the investigating officer, Caledonian MacBrayne provided further background information on the sale, which confirmed that the sale price of the vessel could be considered information provided to Caledonian MacBrayne by a third party.
95. The company also submitted during the investigating officer's visit to Caledonian MacBrayne's office that release of the sale price would be prejudicial to both Caledonian MacBrayne's commercial interests and those of the purchaser.



Request 4 – the Commissioner’s analysis and findings

96. Section 36(2) of FOISA states that information is exempt if:
- a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.
97. In guidance I have published on the section 36 exemption, I point out that public authorities relying on this exemption must be satisfied that any breach of confidence in releasing information must be actionable, i.e. that an aggrieved party would have the right to take the authority to court as a result of the disclosure. Therefore, in order to find whether Caledonian MacBrayne applied the exemption contained in section 36(2) correctly, I first considered whether if by releasing the information Caledonian MacBrayne could be sued for breach of confidence.
98. Section 36(2) can only be relied on if the information in question has been received from another party. In this case, the information was received by Caledonian MacBrayne from the purchaser of the Pioneer as part of the sale process.
99. The information must also have the necessary quality of confidence and have been received in circumstances which imposed an obligation of confidentiality. The agreement between Caledonian MacBrayne and the purchaser of the Pioneer contains a clause which states that details of the transaction, including the sale price shall be kept confidential by both parties.
100. I am satisfied that the information in question was received in circumstances which imposed an obligation of confidentiality on Caledonian MacBrayne, and that it still held the necessary quality of confidence at the time when Caledonian MacBrayne received and responded to Mr Ross’s request.
101. For a breach of confidence to be actionable, however, a party bringing the action (in this case the purchaser of the Pioneer) would have to prove not only that there has been an unauthorised disclosure of information, but that the disclosure of the information had caused some damage. At the time when Caledonian MacBrayne responded to Mr Ross’s request, it might well have felt justified in refusing Mr Ross’s request on the grounds of section 36(2) of FOISA.



102. However, I am not satisfied that release of the disposal value would have caused damage to the purchaser in this instance. In reaching this view, I have considered the information that has come into the public domain since Mr Ross made his request for this information.
103. The investigation into this case established that the sale price of the Pioneer could now be accurately determined from information that is in the public domain, or available through a request under FOISA.
104. Following a separate request for information under FOISA, Caledonian MacBrayne supplied Mr Ross with the independent valuation of the MV Pioneer in October 2005. As this release was made under FOISA, it must be presumed that it would be made available to any further requestors, and so this information is now effectively publicly available.
105. The release of the valuation figure came after the Minister for Transport made the following response to a series of Scottish Parliamentary Questions in May 2005:

Nicol Stephen: The disposal of the MV Pioneer by Caledonian MacBrayne Ltd was carried out in accordance with the provisions of the Scottish Public Finance Manual, which states that "holdings of assets should be kept under constant review with a view to disposing of surplus assets as quickly as possible" and "the best possible price should be obtained for surplus assets. Assets should therefore normally be sold on the open market."

It is important to note that these instructions do not require that in all cases assets must be sold on the open market.

In this case, I understand that Caledonian MacBrayne Ltd obtained an independent valuation of the vessel last year and placed it in the hands of ship brokers for disposal. Following four expressions of interest and a firm offer to purchase the vessel, the CalMac Board took the collective decision to accept that offer, which was 22.2% in excess of the independent valuation that had been obtained. The board also took into account savings in lay up costs from an early disposal.

(Scottish Parliament Written Answers, Thursday 12 May 2005)

106. With access to both the valuation of the vessel, and the information provided by the Transport Minister, any person could easily calculate the disposal value of the vessel.



107. This information was not in the public domain when Caledonian MacBrayne first considered Mr Ross's request for the disposal value, and so it can be maintained that at that point the disposal value held the necessary quality of confidence. However, these subsequent disclosures mean that as I now consider my decision, the necessary quality of confidence is no longer apparent.
108. I am not aware of any changes in the circumstances of the two companies or their contractual agreement in the period between Mr Ross's first request for the disposal value of the Pioneer, and the release of its valuation price. It is, therefore, not apparent why the information should have been treated as confidential at the time of the request but not subsequently, on the release of the information referred to in paragraphs 104 and 105.
109. Further, as these subsequent disclosures have not led to any apparent damage to the purchasing company, or any court action against Caledonian MacBrayne, I conclude that *had* the disposal price been released in response to Mr Ross's initial request, the "damage" test for an actionable breach of confidence would not have been satisfied. In all the circumstances, I find that the exemption in section 36(2) was therefore wrongly applied in this case.
110. For the same reasons, I find that Caledonian MacBrayne has not demonstrated that the impact of release of this information would justify the application of the exemption in section 33(1)(b) to the disposal value of the Pioneer.

Conclusions on request 4

111. I find that Caledonian MacBrayne acted in breach of Part 1 of FOISA in withholding the disposal value of the MV Pioneer under the exemptions in section 36(2) and section 33(1)(b) of FOISA. I now require that Caledonian MacBrayne supply Mr Ross with the disposal value of the MV Pioneer



Decision

Request 1

I find that Caledonian MacBrayne Limited acted in accordance with Part 1 of FOISA when, following a review of its initial response to his request, it advised Mr Ross (in terms of section 17 of FOISA) that it did not hold information showing the deficit funding allocated to the Gourock to Dunoon service.

Request 2

I find that Caledonian MacBrayne Limited acted in breach of Part 1 of FOISA in refusing to supply Mr Ross with a copy of the most recent charter agreement for the MV Ali Cat.

However, I do find that the financial sums contained in paragraphs 5.1 and 5.2 of the agreement and in Parts 4 and 8 of the schedule to the charter agreement are exempt from release under section 33(1)(b) of FOISA, and that the public interest in maintaining this exemption outweighs that in release.

I also find that the address of the witness to the signing of the contract by Red Funnel is exempt from release under section 38(1)(b) of FOISA. I do not, however, find that the names and signatures of the witnesses are exempt from release.

I also find that Caledonian MacBrayne failed to comply in full with the requirements of section 16 of FOSIA by failing to explain its consideration of the public interest in the refusal notice issued in response to this request.

I now require Caledonian MacBrayne to provide a copy of the charter agreement to Mr Ross, with the information detailed in paragraphs 79 and 80 above redacted, within six weeks of the receipt of this notice.

Request 3

I find that Caledonian MacBrayne Limited acted in accordance with Part 1 of FOISA in notifying Mr Ross (in terms of section 17 of FOISA) that information about the number of walk on foot passengers on the Gourock to Dunoon service, over the previous five financial years was not held. As this information was not recorded by Caledonian MacBrayne before December 2004, no relevant records are held for the period covered by Mr Ross's request.



Request 4

I find that Caledonian MacBrayne Limited acted in breach of Part 1 of FOISA in refusing to provide Mr Ross with the disposal value of the MV Pioneer. I do not accept that release of this information would have entailed an actionable breach of confidence and so do not find that it is exempt under section 36(2) of FOISA. I also do not accept that this information is exempt from release under section 33(1)(b) of FOISA.

I now require Caledonian MacBrayne to supply the disposal value of the Pioneer within 6 weeks of the receipt of this notice.

I also find that Caledonian MacBrayne failed to comply in full with the requirements of section 16 of FOSIA by failing to explain its consideration of the public interest in the refusal notice issued in response to this request.

Kevin Dunion
Scottish Information Commissioner
24 March 2006