



Scottish Information
Commissioner
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Decision Notice 009/2025

Ferry Procurement: Deliverables to be provided by a specified company

Authority: Caledonian Maritime Assets Ltd
Case Ref: 202400810

Summary

The Applicant asked the Authority for information relating to the procurement of two ferries, held in a contract with a named company that defined the deliverables required by the Authority, particularly in relation to specified systems and equipment. The Authority provided some information, but the Applicant was dissatisfied as he believed the Authority's response did not provide the information he had requested. During the investigation, the Authority confirmed that it did not hold the contract setting out the deliverables, and provided the Applicant with some further information which, it believed, was relevant to his request.

The Commissioner investigated and found that, at review, the Authority had failed to notify the Applicant, in terms of section 17(1) of FOISA, that it did not hold the contract defining the deliverables, and that it had failed to identify other information falling within the scope of the request.

Relevant statutory provisions

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

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

Background

1. On 7 February 2024, the Applicant made a multi-part request for information to the Authority. He referred to the submission² from the Authority to the RECC [Rural Economic and Connectivity Committee] Inquiry into Ferry Procurement, relating to the Authority's task (Submission Page 2 Para 1.3) to generate "the Technical Specification and General Arrangement ("GA") that would be contained in the Invitation to Tender ("ITT") issued by the Authority to the market", where it stated that "[The Authority] ... engaged Wärtsilä to further develop the drawings. Wärtsilä in turn employed a design house called Houlder and it was this output that was used as part of [the Authority]'s documentation provided to the bidders with the ITT."
2. The Applicant requested the parts of the Authority's contract on Wärtsilä that defined the deliverables required by the Authority, particularly in relation to the propulsion and power generation systems and equipment, and the control system [paragraph 2 of the request].
3. The remaining parts of the request do not form part of the Applicant's application to the Commissioner. The Applicant's full request is set out in the Appendix to this Decision Notice. The Appendix forms part of this Decision Notice.
4. The Authority responded on 13 February 2024. It informed the Applicant that the propulsion power and power generation systems and equipment, and the control system, were not deliverables from Wärtsilä to the Authority. It explained that this part was undertaken by CalMac Ferries (CalMac), as represented in the CalMac Statement of Technical Requirements (SoTR) Page 422 – Appendix A Schematic of Propulsion & Power Layout. The Authority commented that it was aware, from a meeting held on 1 February 2024, that the Applicant already held the full SoTR. The Authority further confirmed that a General Arrangement drawing was the deliverable from Wärtsilä to the Authority.
5. On 6 April 2024, the Applicant wrote to the Authority requesting a review of its decision. He referred to the Authority's submission to the RECC Enquiry which stated "[The Authority] ... engaged Wärtsilä to further develop the drawings". He stated that he wished to find [out] what the Authority had asked Wärtsilä to deliver. He believed that the Authority's reply suggested that Wärtsilä answered to the Authority for that part of their deliverables. He asked the Authority to clarify which body [i.e. the Authority or CalMac] asked Wärtsilä for what. He agreed he held the SoTR but argued that he had not asked what Wärtsilä had delivered, rather he had asked what they were asked to do. In particular, if the Authority had contracted Wärtsilä to develop the General Arrangement Drawing, he asked what was meant by "development".
6. The Authority notified the Applicant of the outcome of its review on 25 April 2024. It stated, with explanation, that the Authority had appointed Wärtsilä as the primary concept designer and that Wärtsilä were asked to develop the concept design which included the outline GA.
7. On 9 June 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because, having twice asked it to disclose what it had asked Wärtsilä

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https://webarchive.nrscotland.gov.uk/3/archive2021.parliament.scot/S5_Rural/General%20Documents/REC_C_CMAL_FI.pdf

to do (as set out in the second paragraph of his request), the Authority's response did not provide the information requested.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 5 July 2024, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focused on the searches carried out by the Authority to identify whether it held any information falling within the scope of the part of the Applicant's request under consideration here.
11. In providing its submissions to the Commissioner, the Authority confirmed that it did not hold parts of its contract with Wärtsilä that defined the deliverables, and acknowledged that it should have issued formal confirmation of this to the Applicant in terms of section 17 of FOISA. It informed the Commissioner that it had now identified some further information which, although it did not fall within the description of a "contract", was considered to be information on "what the Authority had asked Wärtsilä to do".
12. On 29 August 2024, the Authority wrote to the Applicant. It informed him, in terms of section 17 of FOISA, that it did not hold a copy of the specific deliverables referenced in paragraph 2 of his request. It explained that it had now identified some pre-contractual information which it disclosed to the Applicant, with some personal data redacted under section 38(1)(b) (Personal information) of FOISA.

Commissioner's analysis and findings

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

Whether the Authority held any information falling within the scope of paragraph 2 of the request

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the public authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
15. The information to be given is that held by the Authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information that an applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.

16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
17. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and his application, in which he provides reasons why he considers the Authority may hold the information requested.

The Authority's submissions

18. In its submissions to the Commissioner, the Authority explained that it had provided substantive information to the Applicant, both in the course of a meeting with him on 1 February 2024 [prior to his information request] and in response to paragraph 2 of his request. It considered its initial response had answered this part of the request; however, following the Applicant's clarification in his request for review, it had provided additional confirmation of what Wärtsilä had been asked to provide. The Authority believed the Applicant's primary concern was to establish the key elements of what Wärtsilä had been asked to deliver, rather than whether or not a contract was held.
19. The Authority confirmed that it did not hold information answering the part of the request regarding the deliverables defined in the contract, on the basis that no contract had been identified. The Authority acknowledged, however, that it ought to have issued formal confirmation under section 17 of FOISA that the information requested (namely the parts of the contract with Wärtsilä that defined the deliverables) was not held. As referenced above the Authority issued the Applicant with such a notice on 29 August 2024, for this particular information.
20. The Authority stated that it had carried out searches at both initial response and review stages, but these did not identify any relevant information. Since the initial searches had been conducted, the Authority explained, it had moved to a new corporate file plan on a new SharePoint system, with a new common folder structure in place. During the investigation, the Authority confirmed that it had repeated these searches to identify any other relevant information, and these identified a single email from August 2012 containing five attachments. The Authority submitted that, while it considered this information to be tentative, exploratory and pre-contractual in nature, as opposed to part of a formal contract with Wärtsilä, it considered it to be relevant to the request in that it related to "what the Authority asked Wärtsilä to do". As referenced above, the Authority disclosed this information to the Applicant on 29 August 2024 with some personal data redacted. The Authority confirmed that no further relevant information had been identified.
21. The Authority submitted that the request related to information which would have been created in 2012 and would likely have been held in the mailboxes of certain Authority staff in senior positions who had since left the Authority's employment. It explained that, as part of a project to migrate its email system to a cloud-based system in 2017, the decision was made not to migrate inactive email accounts (i.e. accounts of former employees) onto the new cloud-based system. This included the email accounts of certain Authority staff employed at

the time of the matter relating to the request, whose email accounts were not migrated to the cloud-based system in 2017. The Authority believed that if any further information relevant to the request existed, it was likely that this information was held in now-inactive accounts that were not migrated and was therefore no longer recoverable.

22. The Authority explained that, since 2019, it had conducted an annual review of inactive email accounts of former employees to identify accounts which could be decommissioned. Its standard approach was that, where the former employee had left more than three months prior to the annual review, and where it was confirmed that the account was no longer required, the email account would be decommissioned.
23. The Authority anticipated that there would be, as a minimum, four former members of staff, who previously held the roles of Director of Vessels, Finance Director, Procurement Manager and Chief Executive Officer, whose mailboxes may have contained relevant information.
24. To retrieve any information from these inactive accounts, the Authority submitted, it would be required to rely on IT specialists, who may be able to deploy specialist tools to recover backups of decommissioned mailboxes. In this regard, the Authority had considered the following guidance taken from the Commissioner's "Public Authorities FAQs" section of his website³, which states:

"Where a public authority has deleted an e-mail or an electronic file and it can only be retrieved by an IT specialist, the Commissioner takes the view that the information is no longer held by the public authority."
25. The Authority submitted it had also considered the Commissioner's guidance⁴ on section 17 of FOISA [at paragraph 55] which states:

"Information which has been deleted but which can be restored is held by a Scottish public authority for the purposes of FOISA. Searches should therefore include folders for deleted emails, or the "recycling bin" on the computer. However, the excessive costs provisions may come into play if, for example, IT support is needed to restore the information."
26. In the Authority's view, to instruct IT specialists to recover the decommissioned mailboxes, the costs involved, in relation to the four most relevant staff mailboxes, were anticipated to be excessive, as per the Commissioner's guidance⁵ on excessive costs.
27. In support of its position, the Authority provided the Commissioner with details and evidence to support its view that instructing IT specialists to restore the decommissioned mailboxes would significantly exceed the upper cost limit of £600 set out in the Fees Regulations. This included an initial outlay of £854.20 to carry out searches to ascertain what information was filed on SharePoint, and the physical restoration of the mailboxes. Once restored, the Authority submitted that further costs, in the form of staff time, would be incurred in order to carry out searches of these restored mailboxes for any relevant information.
28. In conclusion, the Authority maintained that the reconstitution of mailboxes, using IT specialists to identify whether any further relevant historic information was held, would incur costs which would be excessive.

³ <https://www.foi.scot/public-authorities-faqs>

⁴ <https://www.foi.scot/sites/default/files/2022-03/BriefingSection17Informationnotheld.pdf>

⁵ <https://www.foi.scot/sites/default/files/2022-03/FeesandExcessiveCostofComplianceBriefing.pdf>

29. The Authority also noted that, for any information no longer held as a result of the email system migration in 2017, the statutory period of three years to retain contract information, as set out in regulation 83(9)⁶ of the Public Contracts (Scotland) Regulations 2015, had already lapsed prior to the Applicant's request.
30. The Authority noted the Commissioner's comments at paragraphs 29-30 of [Decision 175/2024](#)⁷ relating to retaining information which could be of substantial public interest and acknowledged that improvements to the retention and archiving of such information was recommended. It stated that it was aware of the need to continually improve its practices on information retention to ensure good practice, and was currently reviewing its processes to improve the way in which documentation was retained and catalogued. The Authority explained that its current Director of Vessels, who had been in place since 2016, maintained accurate files relating to all vessel matters and therefore it would not expect this legacy issue to arise in relation to more recently-created information.
31. Noting that the request related to a matter dating back to 2012, the Authority believed that, if current processes had been followed in 2012, a copy of the Wärtsilä contract would have been maintained in a central procurement file, in addition to existing in staff mailboxes.
32. The Authority explained that it had carried out keyword searches of active email accounts and procurement folders using the keywords "Houlder", "Wartsila" and "Wärtsilä". These, the Authority stated, were considered the most appropriate areas to search on, based on the scope of the request. It explained that the key staff member involved in the searches was the Director of Vessels, who was the only member of staff to have been employed at the time of the engagement with Wärtsilä (2012), and who was still employed by the Authority. All other staff members who may have held relevant information had since left and, as set out above, their email accounts were not migrated and so no further information was retrievable.
33. The Authority confirmed that these searches identified only the single email referred to above, which it subsequently disclosed to the Applicant (with some personal data redacted), and that it did not hold any further relevant information relating to the request. As its searches for a contract with Wärtsilä did not identify any such contract, or information evidencing any such contract, the Authority confirmed that it was not possible to confirm that a contract was or was not held, and what it would have included.
34. Following the Authority's disclosure of the newly-identified information to the Applicant, the Applicant remained dissatisfied. He argued that the tender documents for the ferries were issued in December 2015, and the email now disclosed related to a previous phase, carried out and completed around August 2014.
35. The Authority agreed that the tender documents were issued in December 2015. It explained that preparation for any tender of this magnitude takes place over a period of years. As the engagement with Wärtsilä was early in the tender preparation process, the Authority anticipated that any contract or arrangement with Wärtsilä would have been in place in 2012, or early 2013. The Authority submitted that, for the avoidance of doubt, when responding to the request, it had undertaken extensive searches for all relevant documents across all records held, including those dated 2015. It maintained that the newly-identified information now disclosed to the Applicant was all that the Authority held in relation to his specific request.

⁶ <https://www.legislation.gov.uk/ssi/2015/446/regulation/83>

⁷ <https://www.foi.scot/decision-1752024>

36. The Authority explained that the reference to 2012 related to the time it believed to have been the most likely for it to have entered into a contract with Wärtsilä, bearing in mind its knowledge of the tender process. It confirmed that its position in relation to records remained the same in 2015 as it did in 2012, and that a change of staff in 2016 had led to improved records management. The Authority stated that the searches had been conducted on a keyword basis rather than a date range, so the outcome would remain the same in relation to the information held.

The Commissioner's views

37. Having fully considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Authority took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request. He has considered the explanations and supporting evidence provided by the Authority setting out its position in relation to the request and the information held.
38. The Commissioner notes that, since issuing its review outcome, the Authority had moved to a new corporate file plan on a new SharePoint system, with a new common folder structure. He welcomes that, in light of this, the Authority undertook fresh searches during the investigation to identify any further information that might have been held by the Authority.
39. The Commissioner is satisfied that, although somewhat limited given the passage of time and the change of staff, the searches and enquiries carried out by the Authority would have been capable of identifying any information held relevant to the request.
40. The Commissioner has also considered the Authority's submissions in relation to information that might be held in decommissioned mailboxes of relevant former staff, which could be restored, albeit at a cost. In the Commissioner's view, in line with his guidance on section 17 of FOISA, any relevant information held in those mailboxes is no longer held by the Authority for the purposes of FOISA. He is also satisfied that instructing such restoration would, in itself, exceed the upper cost limit set out in the FOISA Fee Regulations, without taking into account any additional staff costs involved in searching those restored mailboxes to identify any relevant information that might be held therein.
41. The Commissioner's conclusions on the above are set out in what follows.

Information relating to the parts of the Authority's contract on Wärtsilä that defined the deliverables required by the Authority

42. Looking at the original wording of paragraph 2 of the Applicant's request, the Commissioner notes that the Applicant asked for "...the parts of the Authority's contract on Wärtsilä that defined the deliverables required by the Authority". He notes that, in its initial response, the Authority stated that "... a General Arrangement drawing was the deliverable from Wärtsilä to the Authority" and, in its review outcome, that "...the Authority had appointed Wärtsilä as the primary concept designer and that Wärtsilä were asked to develop the concept design which included the outline GA".
43. The Commissioner has considered the explanations put forward by the Authority explaining why it does not hold a copy of the contract with Wärtsilä and why it was unable to confirm whether such a contract had existed or what it might have contained. Taken with the explanation of the searches carried out by the Authority which, the Commissioner considers, would have been capable of identifying any relevant information relating to such a contract,

the Commissioner is satisfied that the Authority's submissions sufficiently explained why it did not hold that particular information.

44. In the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information on the parts of its contract with Wärtsilä that defined the deliverables required by the Authority (as set out in the second paragraph of the Applicant's request).
45. However, under section 17(1) of FOISA, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect. In this case, the Authority did not provide the Applicant with such notice in respect of that element of his request concerning the parts of the contract that defined the deliverables. Given that the Authority did not hold any such information, it had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.
46. As the Authority failed to provide such a notice to the Applicant until during the investigation, the Commissioner finds that it failed to comply with the requirements of section 17(1) of FOISA at review stage, for that particular information.
47. As set out above, the Authority issued such a notice to the Applicant on 29 August 2024. In light of this, the Commissioner does not require the Authority to take any further action in relation to this failure.

Information on "what the Authority asked Wärtsilä to do"

48. In his request for review and his application to the Commissioner, the Applicant was dissatisfied that the Authority's responses had failed to provide information on "what the Authority asked Wärtsilä to do", in response to paragraph 2 of his information request.
49. The Commissioner has considered all relevant submissions and the terms of the request, including the Authority's explanation of the searches undertaken to establish whether it held the information requested.
50. As referenced above, the Authority identified some further information as a consequence of fresh searches carried out during the course of the investigation. The Commissioner therefore finds that the Authority failed to carry out adequate, proportionate searches and failed to identify the relevant recorded information held at the time it responded to the Applicant's requirement for review. He is satisfied however that, by the end of the investigation, the Authority had taken adequate, proportionate steps to identify the information held that that was relevant to that part of the request, as clarified by the Applicant.
51. It is evident to the Commissioner that this further information, identified by the Authority during the investigation, should clearly have been located by the close of the Authority's review (i.e. its response of 25 April 2024) at the latest. In failing to do so, the Commissioner finds that the Authority failed to deal with the Applicant's request fully in accordance with section 1(1) of FOISA. The Commissioner notes that not only was this a breach of FOISA, but it resulted in avoidable delay for the Applicant.
52. Given that the Authority disclosed this further information to the Applicant on 29 August 2024, with some personal data redacted under section 38(1)(b), the Commissioner does not require the Authority to take any further action in response to this failure.

53. Finally, while the Commissioner would repeat the concern set out in Decision 175/2024 regarding the Authority's failure to safeguard material likely to be of future public interest, he would also express the hope that the subsequent records management measures described in this decision will prevent such issues from recurring in the future.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

He finds that the Authority failed to comply with Part 1 of FOISA by:

- (i) failing to fully comply with section 17(1) of FOISA, by failing to inform the Applicant, at review stage, that it held no information relating to the parts of the Authority's contract on Wärtsilä that defined the deliverables required by the Authority, and
- (ii) failing to identify information falling within the scope of the request, at review stage, relating to information on "what the Authority asked Wärtsilä to do" and, in so doing, failed to comply with section 1(1) of FOISA.

For the reasons set out in this decision notice, the Commissioner does not require the Authority to take any action in respect of these failures in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Euan McCulloch
Head of Enforcement

20 January 2025

Appendix

Applicant's full request for information dated 7 February 2024

I refer to the submission from Caledonian Maritime Assets Ltd to the RECC Inquiry into Ferry Procurement relating to CMAL's task (Submission Page 2 Para 1.3) to generate 'the Technical Specification and General Arrangement ("GA") that would be contained in the Invitation to Tender ("ITT") issued by [the Authority] to the market.' It states (again Page 2 Para 1.3) 'CMAL engaged Wartsila to further develop the drawings. Wartsila in turn employed a design house called Houlder and it was this output that was used as part of CMAL's documentation provided to the bidders with the ITT.'

I request the parts of CMAL's contract on Wärtsilä that defined the deliverables required by CMAL, particularly in relation to the propulsion and power generation systems and equipment, and the control system.

In addition, did CMAL define what Wärtsilä was to sub-contract to Houlder, and if so what was defined? What contact, if any, did CMAL have with Houlder during Wärtsilä's execution of their contract? What visibility, if any, did CMAL have of dialogue between Wärtsilä and Houlder during the execution of the contract?

On completion of the contract, did Wärtsilä provide CMAL with costs of the propulsion and power generation equipment, or the means of quantifying the shipbuilding task of installation or costs, such as system schematics for LNG piping or electrical interconnections?

I do not ask for or about the commercial aspects of main or sub- contracts.