



Scottish Information  
Commissioner

**Decision 048/2006 Mr Gordon Ross, Managing  
Director of Western Ferries (Clyde) Limited and  
Caledonian MacBrayne Limited**

*Refusal to release various financial 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 1)**

**Decision Date: 24 March 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 048/2006 - Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited**

***Various requests for financial 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 – refusal notice as required by section 16 of FOISA***

### **Facts**

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In January 2005, Mr Ross submitted several requests for financial information relating to Caledonian MacBrayne's Gourock to Dunoon service over the previous five financial years. Caledonian MacBrayne refused each of these requests on the grounds that release would be likely to prejudice substantially its commercial interests. The company then upheld these decisions following an internal review. Mr Ross applied for a decision by me in relation to 10 distinct requests for information. This decision is concerned with five of these requests.

### **Outcome**

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The Commissioner found that Caledonian MacBrayne had correctly applied the exemption in section 33(1)(b) of FOISA to the information considered in this decision. He also found that in all the circumstances of the case, the public interest in maintaining this exemption outweighed that in release. Therefore, the Commissioner found that Caledonian MacBrayne had acted in accordance with Part 1 of FOISA when refusing to supply the information requested.

However, the Commissioner did find that the refusal notices issued by Caledonian MacBrayne in response to Mr Ross's various requests failed to fully comply with the technical requirements of section 16 of FOISA. This was because these notices did not state the reasons for Caledonian MacBrayne's conclusion that the public interest in maintaining the exemption outweighed that in release.



## Appeal

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

## Background

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1. This decision is concerned with a number of requests for financial information relating to Caledonian MacBrayne's ferry service between Gourock and Dunoon. The issues raised by this case require some understanding of the current arrangements on this service, 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 case.

### **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 five of these, which sought a range of financial information:
  - a) Breakdown of operational costs on this route over the last five financial years.
  - b) Breakdown of revenue by passenger, car, freight and coach over the last five financial years.
  - c) Revenue of agent sales, by type, in Dunoon over the last five years.
  - d) Accounting procedure and allocation percentage of revenue to the Dunoon route from "rover" or "hopscotch" tickets. Value and number of "rover" and "hopscotch" tickets over the last five years.
  - e) Copies of all freight invoices on the route over the last five financial years.These requests are referred to throughout this decision as requests a) – e).
15. There is some ambiguity in requests a) – d), which can be read in two ways, as either:



- a) requests for information covering a five year period broken down to show totals for each year, or
- b) requests for information showing totals for the five year period.

Mr Ross has confirmed that these requests were intended to seek annual totals over the five year period. I understand that Caledonian MacBrayne assumed this interpretation of the requests when responding to Mr Ross.

16. Caledonian MacBrayne responded to each of requests a) – e) in separate refusal notices, dated 28 January 2005. These notices each informed Mr Ross that the relevant information was considered exempt from release under section 33(1)(b) of FOISA, which applies where release of information would or would be likely to substantially prejudice the commercial interests of any person.
17. The notice provided in response to request d) did provide a broad explanation that the allocation percentage of revenue from Hopscotch and Rover tickets to particular routes was based on relative fare levels on applicable routes. However, the number and value of these ticket types was withheld.
18. The reasons specified for the application of the exemption in section 33(1)(b) were the same in each case. Caledonian MacBrayne explained that the information sought comprised details of its commercial operations, and noted that the Scottish Executive had announced that the ferry routes it operated would be subject to competitive tendering. Caledonian MacBrayne stated that release of the information sought would prejudice the commercial interests of the company and its ability to tender successfully for the Gourock to Dunoon route.
19. Section 33(1)(b) is a qualified exemption, and so before reaching a decision to withhold information that falls under its scope, a public authority must first consider whether the public interest in maintaining the exemption outweighs that in release. None of the refusal notices issued in response to requests a) – e) explained why Caledonian MacBrayne had reached the conclusion that the public interest favoured withholding the information sought by Mr Ross.
20. Mr Ross wrote to Caledonian MacBrayne on 8 February to request that it review its decisions in relation to requests a) – e) (alongside a further 9 of the requests initially submitted on 3 January).
21. Caledonian MacBrayne again provided its responses in relation to requests a) – e) in separate notices, each dated 28 February 2005. These notices each upheld the initial decision that section 33(1)(b) of FOISA applied to the information in question. They informed Mr Ross that the Scottish Executive had invited expressions of interest to operate the Gourock to Dunoon route and that release of the information sought would substantially prejudice the Caledonian MacBrayne's commercial interests.



22. The notice stating the outcome of the review in relation to request d) did not deal specifically with the part of the request relating to the allocation percentage of revenue from Hopscotch and Rover tickets.
23. Mr Ross then applied for a decision by me in relation to requests a) – e) (and another of the five requests of 3 January) in a letter dated 18 March 2005.
24. This decision relates only to these five requests a) - e). For the sake of clarity, the other requests referred to me in the same application are considered in the separate decisions 027/2006 and 049/2006.

## Investigation

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25. Mr Ross's application for decision was received by my office on 23 March 2005 and allocated to an investigating officer. The appeal was then validated by establishing that Mr Ross had made valid information requests to a Scottish public authority under FOISA and had appealed to me only after asking the Caledonian MacBrayne to review the responses to his requests. Caledonian MacBrayne is a company wholly owned by the Scottish Ministers and as such is a publicly owned company (and therefore a public authority) for the purposes of section 3(1)(b) of FOISA.
26. 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:
  - a) examples of the information sought by Mr Ross's five requests,
  - b) further information about the application of the exemption in section 33(1)(b) to this information, and
  - c) information about its consideration of the public interest in relation to this information.
27. Caledonian MacBrayne's response to these requests was received on 18 April 2005. This confirmed that Caledonian MacBrayne had applied the exemption in section 33(1)(b) of FOSIA because, in the light of the developing proposals for tendering of the Gourock to Dunoon route, it was judged that release would have a major effect on the company.





28. The investigating officer visited Caledonian MacBrayne's headquarters in Gourock in September 2005 to meet with a range of staff about a number of ongoing investigations. The purpose of this visit was to increase understanding of Caledonian MacBrayne, the environment in which it operated, and overarching issues that might be relevant to my consideration of various types of request under FOISA.
29. During this visit, the investigating officer met with Caledonian MacBrayne's Finance Director and Director of Strategic Development, who provided further background information on issues relating to Mr Ross's case. This provided the opportunity for some detailed discussion of Caledonian MacBrayne's reasoning for its application of the exemption in section 33(1)(b) to the five types of information sought by Mr Ross in requests a) – e).
30. In particular, Caledonian MacBrayne's Director of Strategic Development emphasised that the successful bidder in any tendering to operate a subsidised service between Gourock and Dunoon would be the one that made the compliant bid requiring the least public subsidy. This would presumably be achieved by minimising the cost base for the service while maximising its income. He asserted that revealing Caledonian MacBrayne's recent costs and revenue could provide a significant advantage to its competitors in this process.
31. At this stage in the investigation, Caledonian MacBrayne also emphasised that it believed that a second type of harm to its commercial interests would be likely to follow from release of the information under consideration. It was argued that the release of financial information on a route by route basis would increase the threat of "cherry picking" within the network by competitors outwith the tendering process.
32. Currently, the only route on which a competing service operates alongside the Caledonian MacBrayne service is Gourock to Dunoon. However, there are no formal restrictions preventing existing and other operators setting up commercial services to compete with Caledonian MacBrayne (or the future winner of the tendering process) on any of its routes.
33. Where such competition was introduced or enhanced on a particular route, the effects on Caledonian MacBrayne would potentially be significant. A competing service would be likely to gain business from the Caledonian MacBrayne service, resulting in reduced revenue and therefore increased losses (assuming that operating costs remained the same). As the Scottish Executive's deficit grant reflects these losses, reduced revenue would be likely to result in an increased subsidy requirement if the same level of service were to be maintained by Caledonian MacBrayne.





34. Caledonian MacBrayne has suggested that the release of detailed financial and carryings information on a route-by-route basis would allow potential competitors to identify and cherry-pick those routes where a competing service would be most likely to succeed, leaving Caledonian MacBrayne as the sole operator on the less financially attractive routes.
35. Caledonian MacBrayne has advised me that if detailed information were released showing the performance of particular routes at different times during the day, week, month or year, a competitor would be able to identify periods when a competing service would be most likely to succeed. If new or enhanced competition were to be established on individual routes, Caledonian MacBrayne would be unable in the short term to modify its timetable or fares to respond effectively to the changed environment.
36. Caledonian MacBrayne has pointed out that it has recently experienced just this type of cherry-picking. In 2001, a competitor operated for 5 months between Ullapool and Stornoway resulting in a significant loss of revenue for Caledonian MacBrayne.
37. During the investigating officer's visit, it was also noted that the freight invoices requested by Mr Ross (request e) would provide valuable information to actual or potential competitors on the Gourock to Dunoon route, including volume of freight traffic on a daily basis, the identity of users and the prices paid.

### **Caledonian MacBrayne's reasoning on the public interest**

38. In correspondence and discussions with the investigating officer, Caledonian MacBrayne identified a number of public interest considerations that it considered to favour the maintenance of the exemption in relation to the information sought by Mr Ross. These included:
  - a) the public interest in ensuring that the tendering process should proceed in a manner that was 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; and
  - d) the public interest in protecting the economic interests of the communities served by lifeline ferry services.

### **Submissions from Mr Ross**

39. In his initial application for a decision by me, Mr Ross raised a number of arguments in support of his view that Caledonian MacBrayne should not withhold the information under consideration here. Most importantly for my consideration here:



- a) Mr Ross suggested that as Caledonian MacBrayne's operations were not conducted on a profit making or commercial basis, release of the information he requested should not prejudice its interests.
  - b) Mr Ross also rejected Caledonian MacBrayne's argument that release would harm its position in the tendering process. He suggested that this level of information would be required by all bidders in order to ensure that any bids were based on robust empirical data, and that Caledonian MacBrayne did not have an unfair advantage as the incumbent operator.
40. Following the investigating officer's visit to Gourock, she wrote (in an email dated 7 October 2005) to Mr Ross summarising broadly the arguments put by Caledonian MacBrayne in the course of the investigation. She invited Mr Ross to comment further, particularly in relation to the public interest as it might apply in this case.
  41. Mr Ross's response to this email was received on 19 October 2005. His letter rejected Caledonian MacBrayne's arguments on the threat of cherry picking. He pointed out that since Caledonian MacBrayne's re-organisation in 1973 only two companies had competed with Caledonian MacBrayne, one being Western Ferries (of which Mr Ross is Managing Director) and the other being the operator that briefly provided a freight only service between Ullapool and Stornoway. He suggested that if all Caledonian MacBrayne routes were loss-making there was little likelihood that a competitor would provide a competing, commercial and unsubsidised service.
  42. Mr Ross also commented on the public interest in relation to this case. He informed me that his organisation believed that Caledonian MacBrayne's service between Gourock and Dunoon was over-subsidised.
  43. He noted that the vehicle service on this route was 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.
  44. Mr Ross indicated that his various requests for information about the Gourock 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.



45. 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 Gourock and Dunoon. Mr Ross was asked to provide reasons for his belief that the vehicle service between Gourock 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.

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

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46. The requests under consideration here sought the following information about the Gourock to Dunoon ferry service:
- a) Breakdown of operational costs on this route over the last five financial years.
  - b) Breakdown of revenue by passenger, car, freight and coach over the last five financial years.
  - c) Revenue of agent sales, by type, in Dunoon over the last five years
  - d) Accounting procedure and allocation percentage of revenue to the Dunoon route from "rover" or "hopscotch tickets". Value and number of "rover" and "hopscotch tickets" over the last five years.
  - e) Copies of all freight invoices on the route over the last five financial years.
47. For the most part, I have considered these requests together, as the same exemption has been cited in relation to each and the main points raised by Caledonian MacBrayne and Mr Ross in the course of the investigation apply to each. Where particular considerations apply to individual requests rather than all five, this will be made clear below.

### **Would release prejudice substantially Caledonian MacBrayne's commercial interests?**

48. Caledonian MacBrayne's submissions have set out two distinct rationales for the application of section 33(1)(b) to these requests. These are:
- a) that release would be likely prejudice substantially its commercial interests by harming its ability to tender successfully to continue to operate the Gourock to Dunoon service; and



- b) that release would be likely to prejudice its commercial interests by providing information that would allow competitors to establish a [more effective] competing service alongside Caledonian MacBrayne's service.
49. These two rationales raise different considerations and so I will address them in turn below. However, a prerequisite for each is the presumption that Caledonian MacBrayne has commercial interests that can be harmed.
50. I have addressed this point in previous decisions (see e.g. 061/2005), and concluded that Caledonian MacBrayne does have commercial interests for the purposes of section 33(1)(b) of FOISA. I understand this exemption to relate to a person's ability to participate in a commercial activity, e.g. the sale of goods or services. There is no requirement that these activities are profit making before this exemption can be engaged.
51. Caledonian MacBrayne engages in the sale of services by operating the Clyde and Hebrides ferry network. Furthermore, it does so in a competitive environment where any organisation may choose to establish a rival service. In addition, Caledonian MacBrayne operates as a limited company, subject to the same requirements of company law (including requirements as to competition and solvency) as any of its competitors.
52. Therefore, the exemption in section 33(1)(b) can be appropriately invoked in circumstances where the release of information would be likely to prejudice Caledonian MacBrayne's commercial interests substantially. I do not accept Mr Ross's view that because Caledonian MacBrayne's activities are loss-making and subsidised, that no harm can come to its commercial interests as a result of the release of information about these activities.

### **Tendering of the Gourock to Dunoon service**

53. So, would the release of the information sought by Mr Ross be likely to substantially prejudice Caledonian MacBrayne's commercial interests by reducing its chance of success in the forthcoming competitive tendering of the Gourock to Dunoon service?
54. The task of answering this question is complicated by the current uncertainty about the future of this service. In making my decision I have considered the effects of release on Caledonian MacBrayne's position in the current process to identify a suitable operator of a commercial service, and also any tendering to operate a subsidised service. While this second process may ultimately not take place (if the initial tendering process identifies a suitable operator to provide a service without subsidy), there remains a real possibility that it will at the time of writing this decision.



55. Having considered the arguments put to me by Caledonian MacBrayne, and read the Scottish Executive's published documentation relating to the tendering process, I agree that release of the information in a) – e) would be likely to substantially prejudice Caledonian MacBrayne's commercial interests in relation to the tendering of the Gourock to Dunoon service.
56. Information about the operating costs and projected revenue will form a central part of any bid to operate the Gourock to Dunoon service. It is this that will either demonstrate that a service can operate on a commercial basis, or determine the level of public funding required to operate a subsidised service. Each bidding company will be required to make projections based on its own operating costs and anticipated revenue.
57. The information sought in Mr Ross's request a) would provide detailed information about Caledonian MacBrayne's operating costs on the Gourock to Dunoon service. The information sought in request b) would provide an overall picture of the revenue generated by different types of traffic on the service. The information sought in requests c) and d) would provide further details of the revenue from particular ticket types. The information sought in request e) would provide details of revenue from freight traffic, identifying the volume of this traffic on a day-by-day basis, as well as levels of use by particular customers.
58. The information sought by Mr Ross in a) – e) would therefore provide valuable insights into the likely content of a Caledonian MacBrayne bid for the Gourock to Dunoon service. It could thereby assist a competitor in formulating their own in a way that is more likely to succeed. I am satisfied that the release of any or all of these sets of information in the run up to the competitive tendering of this route would be likely to substantially prejudice Caledonian MacBrayne's commercial interests.
59. Mr Ross has argued that this kind of detailed information about Caledonian MacBrayne's operations will be required by bidders if there is to be a level playing field in the tendering process. However, it is not my role to determine what information should be made available to bidders in a tendering process. I must determine what information should be *publicly* available under FOISA.
60. It is the responsibility of the Scottish Executive to determine what information should be available to the parties bidding to operate the Clyde and Hebrides ferry services in order to ensure that the tendering operates fairly for all parties and in compliance with legal requirements. Information made available to bidders in the tendering process would not necessarily also be available more widely, however, as considerations under FOISA are different.



61. Therefore, I conclude that Caledonian MacBrayne has correctly applied section 33(1)(b) of FOISA when judging that the release of the information sought in requests a) – e) would be likely to significantly prejudice its commercial interests by undermining its ability to tender successfully for the contract to provide the Gourock to Dunoon ferry service.

### **The risk of cherry picking**

62. In decision 061/2005, I considered whether the release of information showing losses incurred by individual Caledonian MacBrayne services would be likely to substantially prejudice its commercial interests by increasing the likelihood of individual competing services being introduced, or increasing the likelihood of success of any such competitor. There I decided that this would not be likely as a result of release of broad figures showing losses.
63. The information Mr Ross has requested here also relates to an individual service, but would reveal financial information at a significantly greater level of detail.
64. Caledonian MacBrayne's submissions on the risk of cherry picking have emphasised that financial information revealing costs and revenue associated with specific routes on an annual basis would be of value to competitors seeking to identify target routes, and determine the viability of a competing service. Information showing the performance of the Caledonian MacBrayne service on a day to day level, could then help a competitor build a service pattern that would cherry pick the most attractive periods in the day, week, month and year, while leaving the Caledonian MacBrayne service unchallenged at the quieter periods.
65. The current requests, however, are concerned with the Gourock to Dunoon service, where a direct and established competitor (Western Ferries) is already in place, carrying more than 80% of the available traffic. The circumstances are therefore different from those on other Caledonian MacBrayne routes, where currently no competing services operate.
66. Given the particular circumstances on the Gourock to Dunoon service, I do not accept that release of the information sought in requests a) – d) would be likely to prejudice substantially Caledonian MacBrayne's commercial interests by increasing the likelihood of the introduction or enhancement of competition on this service. This competition is already there. As it is, I do not see how this competition would be significantly enhanced as a result of release of annual cost and revenue breakdowns.
67. For requests a) – d), therefore, I conclude that the exemption in section 33(1)(b) does not apply on the grounds that Caledonian MacBrayne's commercial interests will be likely to be prejudiced substantially as a result of the increased risk of cherry picking.





68. However, I want to emphasise that this conclusion is based solely on the information requested in this case and the specific circumstances of the Gourrock to Dunoon service. Requests for similar information about other Caledonian MacBrayne services would need to be considered on the basis of the circumstances on that route.
69. I do find that release of individual freight invoices sought in Mr Ross's request e) would be likely to substantially prejudice Caledonian MacBrayne's commercial interests by increasing the risk of cherry picking. I accept that the information contained in these could be used by a competitor to analyse in some detail the patterns of freight use on Caledonian MacBrayne's Gourrock to Dunoon service, and as such could enable the enhancement of a competing service to the significant detriment of Caledonian MacBrayne's commercial interests. Therefore, in relation to request e), I find that the exemption in section 33(1)(a) has been correctly applied on the grounds of the risk of cherry picking.

### **Consideration of the public interest**

70. Having concluded that Caledonian MacBrayne correctly applied the exemption in section 33(1)(b) to the information under consideration, (although only accepting part of the rationale for doing so in respect of requests a) – d) I must now consider the public interest as it relates to the information under consideration.
71. Both Mr Ross and Caledonian MacBrayne have raised matters of public interest in arguing for the disclosure and withholding of the requested information. What I must consider is whether in all the circumstances of the case, the public interest in disclosing the information is outweighed by maintaining the exemption.
72. 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.
73. 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 is 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, on whose behalf it is owned), while going significantly beyond the level required of its private sector counterparts.
74. In this case, my consideration of the public interest has rested on the balancing of two key issues.





75. 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.
76. If release would demonstrate that there had or had not been misuse of public funds, this would be 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.
77. 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.
78. I believe that the fairness of the tendering process could be undermined if Caledonian MacBrayne were required to the various details sought in Mr Ross's requests a) – e) at this point in time. I have concluded therefore that the public interest in disclosing this information is outweighed by maintaining the exemption from release.

#### **Technical Breach: refusal notices**

79. Finally, I will note one breach of the technical requirements of FOISA in Caledonian MacBrayne's responses to Mr Ross's requests a) – e). The refusal notices issued in response to these requests each noted that the exemption in section 33(1)(b) was judged to apply to the information sought. However, no reference was made to the reasons for Caledonian MacBrayne's judgement that in all the circumstances of the case, the public interest in maintaining this exemption outweighed that in release.
80. In failing to explain its consideration of the public interest in refusal notice Caledonian MacBrayne failed to fully comply with the requirements set out in section 16 of FOISA.



## Decision

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I find that Caledonian MacBrayne Limited acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in judging that the exemption in section 33(1)(b) of FOISA applied to the information sought by Mr Ross in his requests a)– e) (listed in paragraph 14 above). I also find that the public interest in maintaining the exemption in each case outweighs that in release. As a result, I find that section 1(1) of FOISA was applied correctly.

However, I find that Caledonian MacBrayne find that Caledonian MacBrayne failed to fully comply with the requirements of section 16 of FOISA by failing to explain the reasons for its decisions that the public interest in maintaining the exemption in section 33(1)(b) outweighed that in release in the five refusal notices dated 28 January 2005.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**24 March 2006**