

Decision Notice

Decision 257/2014: Mr Morris Macleod and CalMac Ferries Limited

Safety Management System Manual

Reference No: 201401438

Decision Date: 16 December 2014



Scottish Information
Commissioner

Summary

On 4 April 2014, Mr Macleod asked CalMac Ferries Limited (CalMac) for the Safety Management System Manual (SMS Manual) for a new vessel then under construction.

CalMac refused to provide the information because it considered that disclosure would damage its commercial interests.

The Commissioner found that CalMac had failed to identify that some of the requested information was likely to be environmental information covered by the Environmental Information (Scotland) Regulations 2004 (the EIRs).

During the investigation, it became highly questionable that the full range of information CalMac considered was covered by Mr Macleod's request was within scope, leading the Commissioner to also find that CalMac had failed to provide advice and assistance in line with section 15 of FOISA and regulation 9 of the EIRs.

She required CalMac to provide reasonable advice to Mr Macleod and then issue him with a revised review response.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 15 (Duty to provide advice and assistance); 21(4) (Review by Scottish public authority); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request); 9(1), (2) and (3) (Duty to provide advice and assistance); 16(1), (3) and (5) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. CalMac operates the Clyde and Hebrides Ferry Services (CHFS) under contract from the Scottish Ministers (the Ministers). It is a wholly-owned subsidiary of David MacBrayne Ltd, which is in turn wholly-owned by the Ministers. As such, CalMac is a publicly-owned company in terms of section 6 of FOISA, and therefore a Scottish public authority in terms of section 3(1)(b) of FOISA.
2. On 4 April 2014, Mr Macleod made a request for information to CalMac, asking for a copy of the SMS Manual of the new vessel then under construction in Germany for the Stornoway to Ullapool route. He noted that the SMS Manual is a requirement under the International Safety Management (ISM) Code.
3. CalMac responded on 2 May 2014. It informed Mr Macleod that it was withholding the requested information under sections 33(1)(b) and 33(2)(a) of FOISA, on the grounds that disclosure would provide a commercial advantage to a competitor.

4. On 8 May 2014, Mr Macleod emailed CalMac requesting a review of its decision as he disagreed that the requested information should be withheld. Mr Macleod considered that CalMac was putting its commercial interests above the safety interests of the customer base, “the travelling public”, and that safety related information which would be beneficial to the travelling public should not be withheld.
5. CalMac notified Mr Macleod of the outcome of its review on 5 June 2014. It upheld its previous decision without amendment.
6. On 2 July 2014, Mr Macleod applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Macleod stated that he was dissatisfied with the outcome of CalMac’s review because it was unacceptable for CalMac to consider that the public interest in protecting its commercial interests outweighed the public interest in disclosing safety-related information that would be beneficial to the travelling public.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Macleod made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 17 July 2014, CalMac was notified in writing that Mr Macleod had made a valid application. CalMac provided the Commissioner with what it considered to be the information within the scope of the request and withheld from Mr Macleod. The case was then allocated to an investigating officer.
9. CalMac provided the investigator with a large volume of information. It was not clear to the investigator why it was all relevant to Mr Macleod’s request. Enquiries were made of both Mr Macleod and CalMac to clarify this.
 - (i) Mr Macleod was asked to describe the information he was seeking which he believed would be covered by his request. He provided the index page from a representative sample of a SMS Manual to show the type of information he was seeking.
 - (ii) CalMac and the investigator entered into dialogue based on the “index page” to try to clarify what information actually fell within scope of the request. CalMac commented that the documents it had sent the Commissioner comprised its SMS in its entirety and that specific elements could not be extracted and considered in isolation. So to disclose the SMS Manual would mean disclosing the whole Safety Management System.
10. On 29 September 2014, following this dialogue, the investigating officer issued a letter to CalMac, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). CalMac was also asked to comment on the application of the EIRs to any of the information, and to justify its reliance on any provisions of either FOISA or the EIRs it considered applicable to the information requested. CalMac responded on 30 October 2014.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information which CalMac considered to fall within scope of the request and the relevant submissions, or parts of submissions, made to her by both Mr Macleod and CalMac. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

12. The Commissioner has questioned whether the information withheld by CalMac was all within the scope of the request. Notwithstanding her views on that matter, the Commissioner has considered CalMac's handling of the request in relation to the information it considered should be withheld.
13. In this case, CalMac responded to Mr Macleod and the investigating officer solely in terms of FOISA and did not respond to the investigating officer's enquiry about whether it considered some or all of the requested information was environmental.
14. Having considered the nature of the withheld information, the Commissioner is satisfied that at least some of it is environmental information as defined within regulation 2(1) of the EIRs. The Commissioner is satisfied that it would fall within paragraph (a) of the definition of environmental information (as information on the state of the elements of the environment) or (b) of the definition (as factors affecting or likely to affect those elements) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
15. The Commissioner must therefore conclude that by initially failing to consider and respond to Mr Macleod's request in terms of the EIRs (in so far as it related to environmental information), CalMac failed to comply with regulation 5(1) of the EIRs.

Section 39(2) of FOISA - environmental information

16. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. CalMac did not provide and submissions about whether it wished to rely on the exemption in section 39(2) in relation to the environmental information requested by Mr Macleod.
17. As CalMac has not relied upon the exemption in section 39(2) of FOISA, and as the withheld information in this case is likely to comprise both environmental and non-environmental information, the Commissioner is required to consider CalMac's handling of the request in terms of both FOISA and the EIRs.

Information in scope, and advice and assistance

18. Section 15(1) of FOISA and regulation 9(1) of the EIRs provide that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to applicants and prospective applicants.
19. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60/62 Code)¹ states (at 1.3) that authorities should be flexible in offering advice and assistance, which can be given either

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

before a request is made, or to clarify what information an applicant wants after a request has been made.

20. CalMac sent the Commissioner a large volume of information about its SMS, all of which it considered to be covered by Mr Macleod's request. The investigating officer pointed out to CalMac that Mr Macleod had asked for the SMS Manual, not the SMS in its entirety and queried whether all of the withheld information was actually in scope. The investigator sent CalMac the example of a similar SMS Manual's index page which Mr Macleod had sent to the Commissioner to illustrate the type of information he sought. CalMac did not reduce the amount of information it considered to be covered by the request.
21. It is not clear to the Commissioner that the withheld information is all within the scope of the request and nor is she persuaded by CalMac's explanations as to why it is, especially when considered in the context of the "index page" sent by Mr Macleod. The Commissioner takes the view that had CalMac engaged with Mr Macleod to identify the exact information he was seeking, it is possible that it would have discovered he was seeking specific information as opposed to the entire SMS.
22. Given the range of information CalMac holds about the SMS and the fact that Mr Macleod asked for the SMS *Manual* right from the outset, the Commissioner considers that it would have been reasonable for CalMac to engage with Mr Macleod to establish what information he was seeking. This view is reinforced by the fact that, when asked by her investigator, Mr Macleod was readily able to send the Commissioner information that immediately suggested the whole of the SMS may not be in scope.
23. Without a clear view of what was being sought, the Commissioner cannot see how CalMac, or any other authority, could properly discharge its duties under section 1 of FOISA, or the EIRs. In the circumstances of this case, it is possible that extracts of the SMS, or even other information not included in the SMS, could result in Mr Macleod receiving some or all of the information he is seeking, but without clear understanding of what is in scope CalMac cannot properly take a considered view.
24. The Commissioner finds that, in the particular circumstances of this case, the failure to engage with Mr Macleod amounted to a failure to provide reasonable advice and assistance under section 15 of FOISA regulation 9(1) of the EIRs.

Decision

The Commissioner finds that CalMac Ferries Limited (CalMac) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Macleod.

The Commissioner finds that CalMac failed to:

- (i) comply with regulation 5(1) of the EIRs, by failing to identify that some of the requested information was likely to be environmental information, and
- (ii) provide reasonable advice and assistance to Mr Macleod to enable it to identify the specific information he required and therefore failed to comply with section 15(1) of FOISA and regulation 9(1) of the EIRs.

The Commissioner requires CalMac to provide Mr Macleod with reasonable advice and assistance and to issue a revised review response in line with section 21(4)(b) or (c) of FOISA and regulation 16 of the EIRs, by 9 February 2015.

Appeal

Should either Mr Macleod or CalMac 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.

Enforcement

If CalMac fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that CalMac has failed to comply. The Court has the right to inquire into the matter and may deal with CalMac as if it had committed a contempt of court.

Compliance note

The Commissioner requires CalMac to provide reasonable advice and assistance to Mr Macleod. In order to do this, it is necessary for both parties to engage in a dialogue about the request, and, if there is doubt about what is reasonable, to seek advice from the Commissioner's office.

Rosemary Agnew
Scottish Information Commissioner

16 December 2014

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a request has been formulated in too general a manner, the authority shall-

- (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

...

- (3) The Scottish public authority shall on receipt of such representations-
- (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.

...

- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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