



Scottish Information
Commissioner

**Decision 067/2005 Mr Gordon Ross, Managing
Director of Western Ferries (Clyde) Limited and the
Scottish Executive**

*Refusal to provide information about "Out of Undertaking" ferry
services operated by Caledonian MacBrayne between Gourock and
Dunoon*

**Applicant: Gordon Ross, Managing Director of Western
Ferries (Clyde) Limited
Authority: The Scottish Executive
Case No: 200501748
Decision Date: 7 December 2005**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 067/2005 – Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and the Scottish Executive

Request for information about “Out of Undertaking” ferry services operated by Caledonian MacBrayne between Gourock and Dunoon – whether the release of information would be likely to prejudice substantially the commercial interests of any person (section 33(1)(b)) – whether release would be likely to prejudice substantially the financial interests of an administration in the UK (section 33(2)(b)) – whether release would inhibit substantially the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii))

Facts

Mr Ross requested a copy of the “relevant document that overrides the Scottish Office restrictions and permits or instructs Caledonian MacBrayne to provide peak sailings” between Gourock and Dunoon. He also requested financial information showing that extra sailings were provided on a commercial basis. The Scottish Executive refused this request on the grounds that the information sought was exempt from release under sections 30(b)(ii), 33(1)(b) and 33(2)(b) of FOISA. This decision was confirmed following an internal review. Mr Ross then applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Scottish Executive breached Part 1 of FOISA because there were insufficient grounds for withholding the information sought by Mr Ross under any of the exemptions relied upon. Therefore, by refusing to release the information, the Scottish Executive had failed to comply with the requirements of section 1(1) of FOISA. The Commissioner now requires the Scottish Executive to provide Mr Ross with the information it holds that falls under the scope of his request.



Appeal

Should either Mr Ross or the Scottish Executive 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 case concerns a request for information held by the Scottish Executive that relates to the ferry service operated by Caledonian MacBrayne between Gourock and Dunoon. Before detailing this request and the Scottish Executive's responses, it would be helpful briefly to set out some contextual information about Caledonian MacBrayne and this service.

Case context: Caledonian MacBrayne and Gourock to Dunoon

2. Caledonian MacBrayne is a company wholly owned by the Scottish Ministers which currently operates lifeline ferry services over 26 routes in the Clyde and Hebrides. As these services are loss making, Caledonian MacBrayne's operations are subsidised by an annual deficit grant from the Scottish Executive. The deficit grant in the financial year 2003-04 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 follow timetabling and other requirements that are set by the Shipping Services Advisory Committees, which are made up of community representatives, councillors, hauliers and members of the public.



5. 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.
6. Alongside its core business activity of supplying the approved services, Caledonian MacBrayne also has a strategic objective of identifying and, where appropriate, exploiting other commercial opportunities. However, the Scottish Executive places restrictions on such "Out of Undertaking" activities to avoid the "leakage" of subsidy to these non-core activities, and to avoid distortion of the marketplace. 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. These guidelines state further that usually a profit at least equivalent to a real return of 8% will be required.
7. The Caledonian MacBrayne service between Gourock and Dunoon currently carries both vehicles and foot passengers. The vehicle service is an Out of Undertaking activity and so should be a profit-making service in line with the guidelines described in paragraph 6. Prior to 2003, further Out of Undertaking sailings were carried out on this route at peak times. These 4 sailings were brought under the Undertaking (thereby making them liable to subsidisation) in 2003. However, prior to this date these peak sailings should also have been carried out on a commercial basis in line with the Scottish Executive guidelines.
8. Mr Ross's request to the Scottish Executive was made in the context of his efforts to confirm the commercial basis for these peak sailings from the point when they were first introduced in 1986.

Mr Ross's request to the Scottish Executive

9. Mr Ross wrote to the Development Department of the Scottish Executive on 22 February 2005. His letter referred to a Scottish Parliament Information Centre (SPICe) briefing on the proposed tendering of ferry services currently operated between Gourock and Dunoon by Caledonian MacBrayne. This briefing (available online here: <http://www.scottish.parliament.uk/business/committees/lq/papers-05/lgp05-07.pdf>) provides the following information on the history of the funding arrangements for Caledonian MacBrayne on this route, and the restrictions on its operations:

"CalMac's Gourock-Dunoon service is limited, by the Scottish Executive, to one return sailing per hour outside the morning and evening peaks, to ensure



that the subsidised service does not undermine the privately operated Western Ferries service. This arrangement was introduced in late 1981. At that time, the Secretary of State for Scotland announced his intention to withdraw the public subsidy from the CalMac service and transfer it to the Western Ferries' service, but this decision was subject to a route closure enquiry by the Scottish Transport Users' Consultative Committee (STUCC). There was considerable public opposition to the proposal to withdraw CalMac's service and the STUCC recommended against the proposal. As a result, the Scottish Office decided to allow both operators to continue on the route, with CalMac restricted to one advertised return journey per hour, but authorised to use vessels capable of carrying vehicles. The Secretary of State at the time also decided to reduce the subsidy for the route from approximately £0.5m per annum to £0.25m per annum, calculated on the amount required in respect of foot passengers."

10. Mr Ross noted that from this extract, it would appear that Caledonian MacBrayne were specifically authorised to provide one return sailing per hour between Gourock and Dunoon, but there was no mention of the current peak sailings. He asked the Scottish Executive to provide the "relevant document that overrides the Scottish Office restriction and permits or instructs Caledonian MacBrayne to provide peak sailings".
11. The Scottish Executive responded to Mr Ross's letter on 1 March 2005. Its response confirmed that in November 1987, Scottish Office Ministers had acknowledged that Caledonian MacBrayne had added four scheduled services to the hourly service pattern and that these were being operated on a commercial basis, consistent with an Out of Undertaking activity. The Scottish Executive also provided Mr Ross with a copy of a letter, from the Head of the Transport Division at the Scottish Executive to the Chairman of Caledonian MacBrayne, dated 18 March 2003. This letter confirmed that these additional sailings were regarded by the Scottish Ministers as within the Undertaking since they had been operating for more than 15 years and were included within the draft service specification for the Clyde and Hebrides Ferry Services published in June 2002.
12. Mr Ross wrote to the Executive again in an email of 10 March 2005. He stated that the response described in paragraph 11 did not completely answer his query. He asked, on the basis that the Caledonian MacBrayne was limited to one sailing per hour, that the Scottish Executive provide the relevant documentation that permitted the additional sailings. He also asked to be provided with the financial information that showed that these additional sailings were provided on a commercial basis consistent with an Out of Undertaking activity. Mr Ross noted that this information should cover the period from the inception of the additional sailings to the point where they were included in the Undertaking in March 2003.



13. The Scottish Executive considered this email as a new request for information under FOISA, and responded by issuing a refusal notice on 12 April 2005. This notice stated that the information sought was exempt from release under the following sections of FOISA
- a) section 30(b)(ii) – that release would or would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation;
 - b) section 33(1)(b) – that release would or would be likely to prejudice substantially the commercial interests of any person; and
 - c) 33(2)(b) – that release would or would be likely to prejudice substantially the financial interests of an administration in the UK.

The Scottish Executive also concluded that the public interest in maintaining each of these exemptions outweighed that in release.

14. Mr Ross sought a review of this decision in a letter dated April 13 2005. This letter stated that he could not understand why the release of the information sought should prejudice the effective conduct of public affairs. While strongly refuting the application of the exemptions in section 33 of FOISA, Mr Ross noted that he would be happy to accept details of the net contribution resulting from the commercial service to avoid the need for disclosure of associated revenues and costs.
15. The Scottish Executive notified Mr Ross of the outcome of its review in a letter dated 12 May 2005. This confirmed the decision set out in the letter described in paragraph 13 above.
16. On 13 May 2005, Mr Ross applied to me for a decision in relation to his request to the Scottish Executive. He informed me that he failed to see the relevance of the application of the exemption in section 30(b)(ii) when the Scottish Executive had already disclosed information relating to the commercial nature of the sailings in 1987 and their adoption into the Undertaking in 2003.
17. Mr Ross also stated that he very much doubted the validity of the claim that release might affect the commercial environment given that the additional sailings were adopted into the Undertaking in 2003, and the fact that Caledonian MacBrayne's current timetable had been specified and guaranteed as part of the proposed tender of the Gourock to Dunoon route.
18. He noted that to confirm the commercial basis of the sailings, all that would be required to be released would be the net contribution. Given that the Executive had already confirmed that they were operated on a commercial basis, he contended that there should be no substantial prejudice to the Scottish Executive's financial interests through such disclosure.



19. Mr Ross called into question whether the additional sailings had been conducted on a commercial (profit-making) basis prior to their inclusion within the Undertaking: if they had not, Caledonian MacBrayne would have been exceeding the terms of the Undertaking by operating them, and public funds would have been misused. He suggested that the possibility of misuse of public funds meant that disclosure by the Scottish Executive would be in the public interest.
20. The application was received on 16 May 2005 and an investigating officer was assigned to the case.

Investigation

21. Mr Ross's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Scottish Executive to review the response to his request.
22. The investigating officer wrote to the Scottish Executive on 19 May 2005, informing it that an appeal had been received and that an investigation into the matter had begun. The Scottish Executive was invited to comment on the case in terms of section 49(3) of FOISA.
23. The Scottish Executive was also asked to provide the following.
 - a) copies of any information held that fell under the scope of Mr Ross's request,
 - b) detailed explanation of the reasons for the application of each exemption cited in relation to these,
 - c) detailed explanation of the reasons for the judgement that the public interest in withholding the information outweighed that in release, and
 - d) details of any consultation with Caledonian MacBrayne to establish its views on whether the information should be released.

The Scottish Executive's submission

24. The Scottish Executive responded to these requests in a letter dated 20 June 2005. This identified three Documents that fell under the scope of Mr Ross's request. However, it is clear from the information provided to me that the Executive does not hold records illustrating the financial performance of the additional sailings over the period from 1986 to 2003.



25. The documents identified to me which are of direct relevance to Mr Ross's request all date from 1986 and 1987, and there are clearly gaps in the records now held from that period. The records search carried out by the Scottish Executive appears to have been adequately conducted. Given the age of the records under consideration, I can only conclude that those documents that appear to be missing are no longer held (or at least not traceable using reasonable means) by the Scottish Executive.
26. The records held by the Scottish Executive therefore do not provide the information sought by Mr Ross in full. However, Documents 2, 3 and 4 (as numbered in the schedule provided to me) are clearly relevant to his request. These are:
 - a) Document 2: A letter from the Chief Executive of Caledonian MacBrayne Ltd to the Scottish Office Development Department and attached paper dating from March 1986 setting out forecasts with respect to the financial effects of the introduction of 4 additional peak time sailings.
 - b) Document 3: A letter from the Managing Director of Caledonian MacBrayne Ltd to the Scottish Office Development Department and attached paper dating from April 1987 showing traffic on the additional sailings during the previous year.
 - c) Document 4: A letter dating from November 1987 from the Scottish Office Development Department to the Managing Director of Caledonian MacBrayne.
27. Document 4 was identified as the document that fulfilled Mr Ross's request for the relevant document permitting or instructing Caledonian MacBrayne to provide the additional sailings between Gourock and Dunoon.
28. The Executive pointed out that it had disclosed to Mr Ross the key content of these documents, by confirming the commercial nature of the additional sailings, and their adoption into the Undertaking in 2003. However, it maintained that disclosure of the underlying details would inhibit the future free and frank exchange of views between the Scottish Ministers and Caledonian MacBrayne.
29. The Scottish Executive asserted that its sponsorship of Caledonian MacBrayne requires the exchange of detailed financial and operational information that would by its nature be of considerable commercial interest to any potential or active competitor. It stressed that it considered release of even historical details to be a sensitive issue requiring careful consideration. The Scottish Executive emphasised that its working relationship with Caledonian MacBrayne was based on the ability to engage in frank exchanges on commercially sensitive matters in the expectation that these would remain confidential. It indicated that anything that prejudiced that relationship and hampered the effective working of a government owned company would itself not be in the wider public interest.



30. In support of its claim about the need for confidentiality in the relationship with Caledonian MacBrayne, the Scottish Executive provided me with an additional piece of correspondence from 1985. This letter contained a request for detailed carryings data to be provided by Caledonian MacBrayne to the Scottish Office. While this letter is not directly relevant to Mr Ross's request, it included an assurance that carrying data provided in response would be treated in strictest confidence by the Scottish Office.

Section 30(b)(ii)

31. The Scottish Executive informed the investigating officer that this exemption was judged to apply to all of the correspondence between its officials and Caledonian MacBrayne relevant to Mr Ross's request. In relation to Document 4, it was observed that the letter contained many sensitive and confidential comments. The Scottish Executive noted that while there were often clear public interest arguments for the disclosure of information which might enhance public understanding of government policy and strategy on specific issues, in this case, release would inhibit substantially the free and frank exchange of views between officials in the sponsoring department of the Scottish Executive and Caledonian MacBrayne.
32. The Scottish Executive noted further that should such internal communications between the Department, its Ministers and the company be routinely released, this would constrain the willingness of all parties to offer frank views and carry out sensitive analysis of issues.

Sections 33(1)(b) and 33(2)(b)

33. The Scottish Executive explained that these exemptions were applied on the basis that the financial details were confidential, related to the finances of a company incorporated under the Companies Act, and that release could weaken Caledonian MacBrayne's position in a competitive environment by revealing market-sensitive information or information of potential usefulness of its competitors.
34. However, the Scottish Executive also noted that commercial sensitivities, and market sensitivities in particular, are likely to diminish over time, and that these exemptions apply where disclosure will cause substantial prejudice to current commercial/financial interests. It went on to note that the use of the section 33 exemption in this case was "intended to emphasise the commercial nature of the information to which the section 30(b) exemption applied, and given the age of the information its use was perhaps questionable in this instance".



The public interest

35. The Scottish Executive explained that it was judged that release of the information under consideration would cause significant harm to the relations between officials and Caledonian MacBrayne and the effective work of the Scottish Government. It asserted that while it was important to have transparency in the Government's operations, the handling of commercially sensitive information required a special approach. The Scottish Executive therefore argued that where release would damage a relationship of mutual trust, co-operation and respect built up over many years, there was a strong reason for the balance of public interest to lie in withholding and not releasing the information concerned.

Discussions with Caledonian MacBrayne on Mr Ross's request

36. The Scottish Executive confirmed that there had been no formal consultation with Caledonian MacBrayne to establish its views on the release or otherwise of the information sought by Mr Ross. However, it confirmed that there had been informal (unrecorded) discussions to advise the company of developments. It was also confirmed that the company's views were sought about the disclosure of financial and operational information and that Caledonian MacBrayne had made clear that it would prefer that the Scottish Executive did not release the information requested or copies of correspondence between the Scottish Office and Caledonian MacBrayne, which were considered confidential.

The Commissioner's analysis and findings

37. The first question I need to address in this case is that of what information the Scottish Executive holds that falls under the scope of Mr Ross's request. Two distinct types of information were requested:
- a) The document that authorised or instructed Caledonian MacBrayne to carry out the additional sailings between Gourock and Dunoon.
 - b) Financial information that demonstrates that these sailings were conducted on a commercial basis, covering the period from their introduction in 1986 through to their incorporation into the Undertaking in 2003.
38. The letter referred to above as Document 4 has been identified by the Scottish Executive as the document relevant to (a) above.



39. It is clear that the Scottish Executive does not hold detailed information demonstrating the commercial basis of the sailings over the entire period from 1986 to 2003. Some relevant information from 1986 and 1987 is nonetheless contained in Documents 2 and 3. I do not consider the letters associated with Documents 2 and 3 to fall under the scope of this request, however. Rather, my findings below relate to the reports associated with these letters, as it is these that contain financial information relating to the commercial basis for these services.

Application of section 30(b)(ii)

40. This section of FOISA provides an exemption from release in circumstances where disclosure of the information under consideration would, or would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation.
41. As I have said in previous decisions (015-2005, 041-2005 and 057-2005), it is my view that the test to be applied in section 30(b)(ii) is high. In applying this exemption the chief consideration is not whether the information constitutes opinion, but whether the release of the information would inhibit substantially such exchanges of views in future. The Executive's guidance to its staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, or would be more reticent or less inclusive.
42. The Scottish Executive indicated in this case that its relationship with Caledonian MacBrayne is such that it should be able to communicate with each other on commercial and operational matters in private. Release of such communications as a matter of course, has been argued to be likely to harm that relationship, and, as a result, the interests of the Scottish Ministers. The Scottish Executive has also suggested that where commercial issues are at stake, we must take a more cautious approach. As a result, it has invoked section 30(b)(ii) in relation to each of the relevant documents in Documents 2, 3 and 4.
43. I have made clear in previous decisions that it is important for public authorities to treat each request for information on a case by case basis. Release of certain types of communications in one case should not be taken to imply that such communications will be "routinely" released in future. The individual circumstances of each case must be taken into consideration and the public interest in each case assessed on its own merits. Now that FOISA has come into force, it is also important for officials within Scottish public authorities to recognise that previous assumptions of confidentiality (which has not been identified specifically as an exemption by the Scottish Executive) may have to be re-assessed in line with the new legislation.



44. It seems to me that the argument advanced by the Scottish Executive implies that exchanges between Caledonian MacBrayne and the Executive's officials on financial or operational matters should be regarded as a class of documents which should generally be treated as exempt from disclosure, as the disclosure of any part of such information will reduce the willingness of the company to provide such advice (and vice versa) in future.
45. I expect requests for information, regardless of the source of that information and its relationship with the holding organisation to be assessed on an individual basis, taking into account the effects anticipated from the release of the particular information involved. This would have to consider:
- a) the subject matter of the opinion,
 - b) the content of the opinion itself,
 - c) the manner in which the opinion is expressed, and
 - d) whether the timing of release would have any bearing (releasing opinion whilst a matter was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).
46. The age of the three documents under consideration here means that their sensitivity has diminished considerably in the period since their creation. The adoption of the additional sailings into the Undertaking means that the question of their commercial basis (as an Out of Undertaking activity) is now a historical one. The age and limitations of the financial data contained in these documents in my view make it of extremely limited commercial value.
47. However, I also am aware that the circumstances in which these documents were created and exchanged have not changed significantly in the last 20 years. Caledonian MacBrayne still has the same relationship with the Scottish Ministers as its sole shareholder. It still operates a restricted service between Gourock and Dunoon, and the main alternative to this service is still provided by Western Ferries.
48. The reports in Documents 2 and 3 were provided by Caledonian MacBrayne to the Scottish Office advising it of the projected (Document 2) and then actual (Document 3) effects of introducing additional sailings between Gourock and Dunoon. These documents presumably informed the Scottish Office's consideration on these sailings. While they were provided in the context of a deliberative process by the Scottish Office, I do not consider these reports to be expressions of opinions or views. They are essentially statements of facts, analysis and interpretation. The broad conclusion that the Scottish Executive reached on the basis of this information is accepted as a matter of public record by the Executive and has already been communicated to Mr Ross.



49. As the Scottish Ministers are Caledonian MacBrayne's sole share holders, and in addition are acknowledged to be a shadow director of the company, it must be difficult to conceive of circumstances in which they (and therefore the Scottish Executive) might reasonably be denied such information about Caledonian MacBrayne's activities. Also, clause 11 of the Undertaking requires Caledonian MacBrayne to provide the Scottish Ministers (and therefore the Executive) with "such information as [they] may reasonably require from time to time relative to any approved service". In practical terms, it can hardly be in Caledonian MacBrayne's interests not to maintain an open working relationship with the Executive. Therefore, I do not accept that release of these documents nearly 20 years on would lead to a future refusal by Caledonian MacBrayne to provide factual information and analysis about its operations to help inform the Executive's decision making.
50. The letter in Document 4 was sent by the Scottish Office to Caledonian MacBrayne, apparently as the culmination of a series of communications between the two organisations about the additional sailings. This letter expresses the views of the Scottish Office in a candid (albeit measured) manner, and confirms its position on the subject of additional sailings following from these exchanges. This letter therefore appears to state the outcome of its deliberations on additional sailings rather than expressing views as part of an ongoing deliberative process.
51. The issue at stake in these exchanges has therefore been settled for 18 years. Given the time that has elapsed since its sending, I do not accept that release of this letter would have a substantially inhibitive effect on the Scottish Executive's current and future ability to express its views frankly (as it must inevitably do from time to time if it is to maintain its stewardship of public funds effectively) in the process of deliberation with and in relation to Caledonian MacBrayne.
52. I am aware that Caledonian MacBrayne's relationship with the Scottish Executive means that the latter will often be in receipt of financial and operational information that is commercially sensitive. FOISA would rightly enable the Scottish Executive to restrict access to such information where release would be likely to prejudice substantially Caledonian MacBrayne's commercial interests and where the public interest in withholding the information outweighed that in release (regarding which see paragraph 54 onwards below). However, I do not accept that release of any communications between Caledonian MacBrayne and the Scottish Executive, of any age will lead to a significant deterioration or breakdown in the relationship between the two organisations, which is the more pertinent consideration in the circumstances for the purposes of section 30(b)(ii).
53. Therefore, I conclude that the reports in Document 2 and 3 and the letter in Document 4 are not exempt from release under section 30(b)(ii) of FOISA.



Application of section 33(1)(b) and 33(2)(b)

54. In its submission to me, the Scottish Executive has observed that its reliance upon these exemptions may have been questionable in this instance.
55. On the basis of the information before me, I agree with this observation, and conclude that these exemptions were wrongly applied to Documents 2, 3, and 4. The financial data contained in the Executive's records is both limited, and of significant age. It is difficult to see what significant commercial advantage could be gained by a potential or existing competitor through access to this information today.
56. The exemption in section 33(2)(b) is an important one, designed to protect the tax payer from potential long term costs that could be caused by the disclosure of information. To demonstrate that this exemption applies, an authority will need to show that release would affect the administration to the point where release would be likely to impact on overall public spending levels or taxation. In this case, it has not been demonstrated that Caledonian MacBrayne's commercial interests would be substantially prejudiced by release of this information. Even if it had been shown that there would be harm to Caledonian MacBrayne's operations on the Gourock to Dunoon route, it is most unlikely that this would have had an impact on the financial interests of the Scottish Executive as a whole that would justify the application of section 33(2)(b).
57. I am therefore not persuaded that either the commercial interests of Caledonian MacBrayne or the financial interests of the Scottish Ministers are likely to be prejudiced substantially by release.

The Public Interest

58. I am aware that Mr Ross is the Managing Director of the company that operates a service that competes directly with that operated by Caledonian MacBrayne between Gourock and Dunoon. The Scottish Executive informed me that because Mr Ross had made the request, it had concluded that his interest was of a private and commercial nature. As a result, it had concluded that the public interest did not favour release.
59. I have concluded that the exemptions claimed by the Executive do not apply and that the relevant information should be released. In this instance therefore consideration of the public interest test is not required.



60. However, if it did require to be considered, then I would be of the view that Mr Ross's commercial interest in the information should not be either the determining matter or a disqualifying factor in establishing the public interest in release. In this case I would also have considered the strong public interest in the accountability for, and transparency of, decisions which affect the operations of a major publicly owned and funded commercial body and in particular in providing information as to the basis of consent for such operations, given that such operations are not unrestricted.

Decision

I find that the Scottish Executive has not dealt with the Mr Ross's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) because there are insufficient grounds for withholding the information identified under sections 30(b)(ii), 33(1)(b) and 33(2)(b). Therefore, I conclude that the Scottish Executive failed to comply with section 1(1) of FOISA.

I require the Executive to provide the following information to Mr Ross:

- a) The report contained in Document 2
- b) The report contained in Document 3
- c) The letter contained in Document 4

I am obliged to give the Scottish Executive at least 42 calendar days in which to supply Mr Ross with the information as set out above. In this case, I require the Scottish Executive to take these steps within 45 calendar days of the date of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
7 December 2005