



Scottish Information
Commissioner
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Decision Notice 080/2025

Tender documents – Hulls 801 and 802

Authority: Caledonian Maritime Assets Ltd (CMAL)
Case Ref: 202200951

Summary

The Applicant asked the Authority for information relating to the tender bid for Hulls 801 and 802. The Authority withheld some information on the grounds that it was commercially sensitive, and told the Applicant it did not hold other information. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. During the investigation the Authority applied new exemptions to the withheld information. The Commissioner required the Authority to carry out further searches and issue the Applicant with a new review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 16(1) (Refusal of request); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 1 July 2022, the Applicant made a request for information to the Authority. He asked for:
 - (i) The tender bid from Ferguson Marine relating to the contracts for Hulls 801 and 802, including the original bid, plus any updates or changes, and any internal or external correspondence relating specifically to the tender bid and not the wider process.

- (ii) In addition, any internal or external correspondence in 2015 about the full builder's refund guarantee and lack thereof within the Ferguson Marine tender bid.
2. The Authority responded on 26 July 2022. In response to request (i) it withheld the information under section 33(1)(b) (Commercial interests) of FOISA, on the grounds that disclosure would substantially prejudice its commercial interests and that the public interest favoured withholding the information. In response to request (ii) the Authority gave the Applicant notice, under section 17(1) of FOISA, that it held no information falling within the scope of his request. It explained that staff members who had been involved during that timeframe had left, and therefore any information that could have been communicated or shared over these systems was no longer held.
 3. On 26 July 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's response to request (i) because he considered that there was a significant public interest in the disclosure of the information. In relation to request (ii) the Applicant disagreed that the information was not held.
 4. The Authority notified the Applicant of the outcome of its review on 16 August 2022 and upheld its original decision without modification.
 5. On 29 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review of request (i), because he believed the exemption had been incorrectly applied and the public interest favoured disclosure. In relation to request (ii) the Applicant argued that the information should be held.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 2 November 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority was also asked to send the Commissioner the information withheld from the Applicant.
9. The Authority provided the information and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Authority's change of position

11. During the investigation, the Authority provided the Commissioner with a schedule of documents that indicated that, in addition to section 33(1)(b) of FOISA, it was also withholding information falling within the scope of request (i) under sections 38(1)(b) and 39(1) of FOISA.

12. The Authority provided the Commissioner with no submissions or explanations supporting its reliance on these newly applied exemptions. Furthermore, the Authority did not provide the Commissioner with any substantial comments (beyond those contained in its response and review outcome) in support of its application of sections 33(1)(b) or 17(1) of FOISA.
13. The Commissioner notes that the Authority did not apply the additional exemptions until after the Applicant had made his application to the Commissioner and it has not informed the Applicant that it is now relying on these new exemptions. This means that the Applicant has not had an opportunity to challenge these exemptions.
14. Given the Authority's change of position, the Commissioner requires the Authority to provide the Applicant with a revised review outcome, which lists all of the exemptions that the Authority is now seeking to apply, and which explains, in detail, why the Authority considers these exemptions to be relevant. This will enable the Applicant to challenge the Authority's reasons for withholding information in a new application, if necessary.
15. Furthermore, the Commissioner considers that an updated review outcome will allow the Authority to consider the passage of time (since its original response and review outcome was issued) and address this in a revised review outcome. It will also allow the Commissioner to consider the time which has passed in any subsequent appeal to him.

Section 17(1) – Notice that information is not held

16. The Authority has submitted that it does not hold any information falling within the scope of request (ii).
17. 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 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.
18. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
19. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities.
20. The Commissioner will consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request).
21. In its comments on request (ii), the Authority explained that it provided information to various Parliamentary committees and Audit Scotland, which was released into the public domain regarding the tender bids for hulls 801 and 802, along with information around the builders' refund guarantee. It provided the Commissioner with a copy of its original response to the Applicant's information request, which contained links to this information.
22. The Authority noted that the Applicant had incorrectly assumed that it held information from individuals who had left the organisation.

It stated that communications systems which might have been used for correspondence (email, text etc.) would have been deleted in line with its records management plan.

23. However, the Authority did not provide the Commissioner with evidence of any searches carried out for communications falling within the scope of request (ii). Furthermore, the Authority did not provide any screenshots of electronic searches or copies of relevant records management policies in order to evidence its position that the information was not held.
24. The Commissioner is not persuaded that the Authority has carried out thorough and proportionate searches. The Authority has not provided details of any such searches, nor of its record retention policies in relation to email or other electronic communications or in relation to policies more generally. He considers that it would be reasonable to believe that information might be held by the Authority in relation to a builder's refund guarantee, or any decision to dispense with such a guarantee, given the sums of public money involved and (without wishing to comment directly on this particular situation) the potential consequences for any purchaser in situations where such a guarantee is not in place.
25. He considers it reasonable to suppose that communications in relation to any significant aspect of the tender might have been held elsewhere, in addition to email accounts which may have been subject to deletion. Although it is apparent from previous decisions that certain correspondence relating to the procurement of these vessels was not retained following the departure of certain employees, the Commissioner would still be surprised if nothing relevant to request (ii) had been deemed worthy of retention in the corporate record (even before the procurements assumed the profile they have more recently).
26. In all the circumstances, therefore, the Commissioner is not satisfied that the Authority was entitled to give the Applicant notice, under section 17(1) of FOISA, that it did not hold the information he had requested.
27. He requires the Authority to carry out fresh searches for information in relation to request (ii) and issue the Applicant with a revised review outcome. He suggests that the Authority retains evidence of these searches in case it is required in a future appeal to his office.
28. He also requires the Authority to provide the Applicant with any relevant policy or policies (or extracts thereof) in relation to record-keeping and/or deletion of records, where appropriate, in light of the content of its revised review outcome.
29. The Commissioner has also considered the extent to which the Authority provided public interest arguments in relation to section 33(1)(b) of FOISA. It provided none in its comments to him, but did address the public interest test in its response of 26 July 2022 and in its review outcome of 16 August 2022. The Commissioner (while he is not considering the substantive arguments made in relation to this exemption in this Decision) notes that these were generic arguments in relation to the exemption at section 33(1)(b).
30. The Commissioner considers that this appeal relates to an issue of considerable public interest, which is the late delivery of two ferries, over-budget at considerable public cost. He has reviewed the Authority's communications with the Applicant in the case so far and, without pre-judging any future potential appeal, he considers that in its review response, the Authority did not engage with the specific public interest test arguments put forward by the Applicant but instead restricted itself to general arguments about confidentiality within the tender process.

31. The Commissioner considers that effective submissions on the public interest should also engage with the points raised by the Applicant (in addition to any other general – or more specific – points which the Authority wishes to make).
32. The Commissioner therefore requires the Authority, in its new review outcome, to fully address the points made by the Applicant in his requirement for review and to consider all public interest issues relevant to this particular subject.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Specifically, the Authority has failed to satisfy the Commissioner that it has identified all relevant information falling within the scope of the Applicant's request. As a result, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

He also finds that the Authority failed to comply with section 16(1)(c) of FOISA, in failing to notify the Applicant of all the exemptions it was relying on to withhold information.

The Commissioner requires the Authority to carry out adequate, proportionate searches for the information requested, and to issue a new review outcome to the Applicant (adhering to the guidance outlined in paragraphs 31 and 32) either disclosing any further information identified or notifying the Applicant why the information cannot be provided under a provision in either FOISA (or, where applicable, the Environmental Information (Scotland) Regulations 2004), by **15 May 2025**.

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.

Enforcement

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

Euan McCulloch
Head of Enforcement

31 March 2025