



Scottish Information  
Commissioner  
[www.foi.scot](http://www.foi.scot)

# Decision Notice 130/2025

---

## Benchmarking exercise

Applicant: Anonymous

Authority: Ferguson Marine (Port Glasgow) Ltd

Case Ref: 202200852

### Summary

The Applicant asked the Authority for a copy of a specified benchmarking exercise carried out in early 2021. The Authority withheld the information because it considered it to be commercially sensitive. The Commissioner investigated and found that the Authority complied with FOISA in responding to the request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner).

### Background

1. On 19 April 2022, the Applicant made a request for information to the Authority. Among other things, he asked for a copy of the benchmarking exercise carried out by First Marine International in early 2021.
2. The Authority responded on 18 May 2022. It withheld the benchmarking exercise under the exemption in section 33(1)(b) of FOISA on the grounds that disclosure would, or would be likely to, prejudice substantially both its own commercial interests and those of First Marine International.

3. On 25 May 2022, the Applicant wrote to the Authority requesting a review of its decision. He stated that he believed the public interest favoured disclosure of the benchmarking report and explained why.
4. The Authority notified the Applicant of the outcome of its review on 24 June 2022, which fully upheld its original decision.
5. On 1 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he believed that the public interest favoured disclosure of the benchmarking report.

## **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 26 September 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. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and its comments.
8. The case was subsequently allocated to an investigating officer.
9. During the investigation, the Authority was asked if it wished to provide any further comments. It confirmed it wished to rely on the comments it had already provided.

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

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

### ***Section 33(1)(b) – Commercial interests and the economy***

11. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
12. There are several elements a Scottish public authority needs to demonstrate are present when relying on this exemption. It needs to establish:
  - (i) whose commercial interests would (or would be likely to) be harmed by disclosure
  - (ii) the nature of those commercial interests, and
  - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
13. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on

disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

*The Authority's submissions about the exemption*

14. The Authority submitted that the benchmarking exercise had been carried out by HaskoningDHV UK Ltd (Haskoning DHV) (of which First Marine International is a division) and that the report was the intellectual property and confidential trade secret of HaskoningDHV, which contained highly commercially sensitive information relating to the Authority.
15. By way of background, the Authority explained that it had commissioned the report to establish its then performance in a structured, logical format, so a development plan could be generated, to map the pathway of the Authority's investment and development.
16. The Authority submitted that such an assessment could only be useful if it was "completely honest", which required the assurance of confidentiality. The assessment asked individuals to admit mistakes and examples of poor practice, so improvements could be planned and enacted. If confidentiality was not guaranteed for the initial and subsequent assessments, these assessments would not achieve the desired result.
17. The Authority explained that the benchmarking report was always intended to be an internal working document. It submitted that many shipyards, and other businesses around the world, employed similar processes, and that these documents are always maintained as internal.
18. The Authority considered that publishing the report would severely damage the Authority's ability to bid and win future contracts, as competitors would have access to internal business processes and standing, including levels of investment and productivity. This would cause a negative impact on the Authority's financial standing, resulting in concerns from suppliers who may choose to withdraw business, insist on modified payment terms or increase prices.
19. Under the terms and conditions of the contract it entered with HaskoningDHV, the Authority explained that it has an obligation to protect HaskoningDHV's intellectual property (which is the entire benchmarking process). It stated that HaskoningDHV had developed this process over decades and that the structure of the assessment, the questions they ask and the manner they analyse and present them was a closely guarded trade and commercial secret. It submitted that the publication of the report would therefore hand competitors of HaskoningDHV decades of their intellectual property development, which would "simply devastate" the business model of First Marine International (the division of HaskoningDHV that perform this work).
20. The Authority also provided submissions from HaskoningDHV, which set out the harm that they considered would result from disclosure of the benchmarking exercise.
21. Specifically, HaskoningDHV reiterated that the benchmarking report contained the intellectual property of First Marine International as well as highly commercially sensitive information relating to the Authority. They explained that their business depended on their intellectual property remaining confidential and not being placed in the public domain where it could be used or copied by competitors.
22. HaskoningDHV submitted that they had a very strong international reputation for integrity, which was essential to their business, and that disclosure of the benchmarking report would break the trust they have with existing business partners and potentially damage their

reputation and the willingness of other shipyards to enter into full and open relationships with them in future.

23. To date, HaskoningDHV confirmed that they had successfully protected their intellectual property from being disclosed and it stated that disclosure would be extremely damaging to First Marine International as well as to the Authority.

*The Applicant's submissions about the exemption*

24. The Applicant did not provide specific submissions disputing the application of the exemption in section 33(1)(b) of FOISA to the withheld information. However, he provided submissions on why he considered the public interest favoured disclosure of the withheld information.

*The Commissioner's view*

25. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
26. Given the Authority's submissions and the nature of the withheld information, the Commissioner is satisfied that the interests identified above are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA.
27. The Commissioner accepts that the Authority has identified commercial interests relating to itself and to HaskoningDHV (specifically, their First Marine International division), which could be adversely impacted should disclosure of the withheld information disadvantage either party in bidding for future contracts or otherwise damage or reduce their standing or reputation.
28. Having identified these commercial interests, the Commissioner must consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information.
29. The Commissioner accepts the submissions from the Authority that disclosure of the withheld information would be likely to negatively impact its commercial interests by affecting its ability to successfully bid for future contracts, which could deter potential investment or result in existing investment being withdrawn or reduced.
30. Similarly, the Commissioner accepts that disclosure of the withheld information would be likely to negatively impact HaskoningDHV's commercial interests by revealing the intellectual property of First Marine International, which, if placed in the public domain, could be used or copied by competitors to significant commercial detriment to HaskoningDHV.
31. In all the circumstances, having carefully considered the withheld information and the submissions from all parties, the Commissioner is satisfied that disclosure of the information requested would, or would be likely to, prejudice substantially the commercial interests of the Authority and HaskoningDHV (specifically, their First Marine International division).
32. The Commissioner considers that disclosure would reveal commercial information that would not otherwise be accessible and that would allow competing companies to develop significant insight into commercially sensitive information about both the Authority and HaskoningDHV. In other words, the information contained in the benchmarking report is commercially sensitive and is not information that any commercial entity would choose to make public.
33. The Commissioner also considers that disclosure would damage the respective abilities of the Authority and HaskoningDHV to operate in a competitive environment. He accepts that

trust and good relationships with industry partners are essential to both parties in enabling them to deliver their respective functions.

34. Accordingly, in this case, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA is engaged in relation to all of the information that is being withheld.

### ***The public interest test***

35. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 33(1)(b) was relevant to the withheld information, he is now therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

### ***The Authority's submissions***

36. The Authority explained that its primary commercial activity is shipbuilding, ship repair, fabrication and engineering services. To allow it to engage in this commercial activity, the Authority requires the ability to approach competitive tendering bids (the primary method of selling its services within the industry) from a position of commercial anonymity.
37. Due to the nature of a benchmarking report, the document primarily focused on commercially sensitive issues such as the Authority's current business model (including tendering, pricing strategies and specialised business practices) and its current efficacy. The report also focused on areas of improvement at the yard, which in turn would positively impact the Authority's business model in the future. It argued that the report was therefore influential to the success and sustainability of the Authority as an improved business model would benefit the Authority's ability to tender its services successful.
38. The Authority also explained that it was actively engaged in ongoing tendering bids. Disclosure of the report would substantially prejudice these bids, for the reasons set out above. It noted it was well publicised that the shipyard did not have any large-scale shipbuilding contracts in the pipeline beyond the historic Calmac ferry deal which resulted in its predecessor's administration in 2019.
39. Consequently, the Authority considered that there was a significant probability that substantial prejudice would, or would be likely to, occur if the report was disclosed and a genuine link between disclosure and the significant disadvantage that might result.
40. While the Authority recognised the public interest in transparency in relation to the investment of public funds in a publicly owned company, it did not agree that this outweighed the public interest in ensuring the sustained commercial viability of the Authority, a publicly owned company, in order that historic taxpayer investments were not wasted. It also stated that around 400 jobs were reliant on, and supported by, the Authority's viability.
41. The Authority therefore concluded that the public interest favoured upholding the exemption in section 33(1)(b) of FOISA due to the likely harm and disadvantage to the negotiating position of the Authority and the significant effect this would likely have on the Authority's financial position.
42. As stated above, the Authority also provided submissions from HaskoningDHV. These submissions did not specifically address the public interest test, but the Commissioner has considered these submissions (as well as the other submissions provided by the Authority) to the extent that they are relevant to the public interest test.

### *The Applicant's submissions*

43. The Applicant submitted that he believed strongly that the public interest favoured disclosure of the benchmarking report. He noted that the Scottish Government had so far refused to grant a public inquiry into the problems with the ferries contract at the Authority, which was five years behind schedule and now estimated to cost £240 million compared to the original contract value of £97 million. He argued that it was therefore in the public interest to, on behalf of taxpayers, get to the bottom of what went wrong with this contract.
44. The Applicant explained that First Marine International had carried out a benchmarking exercise in early 2021 and that a former owner of Ferguson shipyard had claimed that sources had informed him that an investigator of First Marine International had rated the Authority as one of the worst businesses they had reported on.
45. The Applicant considered the public interest favoured disclosure of the benchmarking report for two main reasons.
46. First, disclosure would inform the public about whether the nationalisation of the shipyard had led to a deterioration in performance which further added to the additional costs taxpayers have faced because of this project. It could also test whether statements made by the Scottish Government blaming the previous owner for the delays and cost overruns were accurate.
47. Second, disclosure would allow the public to make a judgement regarding whether the performance of the Turnaround Director employed by the Authority represented value for money.
48. The Applicant accepted that some commercially sensitive information may require redaction from any published report. However, he believed that it was in the public interest to gain an understanding of the assessment of the Authority's performance after the Ferguson shipyard was nationalised.

### *The Commissioner's view on the public interest*

49. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, and he considers that the very substantial sums of public money involved, particularly given the increases in cost, mean that there is an argument for disclosure.
50. There is undoubtedly a public interest in understanding the circumstances surrounding the construction of the ferries. However, having carefully reviewed the withheld information, the Commissioner does not consider, given the generally technical nature of the report, that disclosure of this information would shed much light on these circumstances or on the public interest considerations identified by the Applicant.
51. As noted above, the Commissioner is also of the view that disclosure of the information in question would give competitors a valuable insight into commercially sensitive information about the Authority and HaskoningDHV (specifically, their First Marine International division), thus giving their competitors an unfair commercial advantage.
52. The Commissioner considers that there is no public interest in placing a particular company at a commercial disadvantage, simply as a result of having entered into a commercial relationship with a public body to provide a service.

53. The Commissioner has already concluded that disclosure of the withheld information in this case would, or would be likely to, prejudice the commercial interests of both the Authority and HaskoningDHV (specifically, their First Marine International division). That would not be in the public interest.
54. Having balanced the public interest for and against disclosure, the Commissioner concludes that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) of FOISA outweighs that in disclosure of the withheld information under consideration here.
55. The Commissioner therefore finds that the Authority was entitled to apply section 33(1)(b) of FOISA to the withheld information.

## **Decision**

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

## **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.

**David Hamilton**  
**Scottish Information Commissioner**

**26 May 2025**