

Decision Notice

Decision 210/2016: Ms Dawn Fraser and Caledonian Maritime Assets Limited

Cost of leasing the MV Loch Seaforth

Reference No: 201600631

Decision Date: 5 October 2016



Scottish Information
Commissioner

Summary

On 21 May 2015, Ms Fraser asked Caledonian Maritime Assets Limited (CMAL) for information on the leasing terms of the MV Loch Seaforth. CMAL provided some of the information, withholding other information under various exemptions in FOISA.

After an investigation the Commissioner accepted that the remaining information was correctly withheld under section 36(2) of FOISA (Confidentiality).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); (36)(2) (Confidentiality)

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. On 21 May 2015, Ms Fraser made a request for information to CMAL. The request, made in relation to CMAL's leasing of the MV Loch Seaforth from Lloyds Bank, sought the following information:
 - (i) the annual repayment to Lloyds Bank for leasing the vessel is (or, if easier, the interest rate on Lloyds Bank's initial £42 million outlay)
 - (ii) the length of time (number of years) of the leasing agreement, and
 - (iii) whether the vessel remained in the ownership of Lloyds Bank at the end of that lease period.
2. CMAL responded on 2 June 2015 and refused to disclose any of the information, on the grounds that it was commercially confidential. It did not, at this point, cite any exemption in FOISA
3. On 11 June 2015, Ms Fraser wrote to CMAL, requesting a review of its decision on the basis that she believed the information should be in the public domain. She submitted that this would allow transparency and examination of whether the taxpayer was receiving value for money.
4. In the absence of any further response from CMAL, Ms Fraser applied to the Commissioner for a decision on 7 January 2016. This culminated in *Decision 021/2016*, which instructed CMAL to provide a review response to Ms Fraser.
5. CMAL notified Ms Fraser of the outcome of its review on 25 February 2016. CMAL provided information in response to points (ii) and (iii) of the request but refused to disclose information in response to point (i). CMAL withheld this information on the grounds that it was exempt from disclosure under sections 36(2) (Confidentiality), and 33(1)(b) and (2)(a) of FOISA (Commercial interests and the economy).

6. On 11 April 2016, Ms Fraser wrote to the Commissioner and applied to her for a decision in terms of section 47(1) of FOISA. Ms Fraser stated she was dissatisfied with the outcome of CMAL's review because she considered it was in the public interest to know how public money was being spent.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Ms Fraser 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 4 May 2016, CMAL was notified in writing that Ms Fraser had made a valid application and asked to send the Commissioner the information withheld from Ms Fraser. CMAL provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. CMAL was invited to comment on this application, with reference to the exemptions claimed in correspondence with Ms Fraser. Relevant submissions were provided by CMAL.
10. Ms Fraser was also asked to provide any comments she wished to make but did not respond.
11. During the investigation, CMAL also provided a letter containing comments from Lloyds Bank.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Ms Fraser and CMAL and the comments made by Lloyds Bank. She is satisfied that no matter of relevance has been overlooked.
13. The Commissioner will firstly consider the application of section 36(2) of FOISA.

Section 36(2) of FOISA - Confidentiality

14. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.

Obtained from another person

15. Section 36(2) therefore contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.

16. CMAL explained that the information under consideration had been provided to it by Lloyds Bank as part of the agreement drawn up by Lloyds Bank containing the terms and conditions on which the Bank was prepared to offer the credit facilities. Lloyds Bank confirmed that it had generated the information and that it was not the result of negotiation.
17. In the circumstances, the Commissioner is satisfied that the withheld information was obtained by CMAL from another person and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

18. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
19. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

20. Having considered the information requested by Ms Fraser and the arguments put forward by CMAL, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence. The information is not common knowledge and could not readily be obtained by Ms Fraser through any other means.

Obligation to maintain confidentiality

21. CMAL explained that the information had been obtained from Lloyds Bank under an explicit obligation of confidentiality and provided the Commissioner with a copy of the confidentiality clause contained in the contract.
22. The Commissioner noted that it appeared to be the case that this clause could be overridden with Lloyds Bank's consent. CMAL provided submissions from Lloyds Bank to the effect that it was unwilling to give such consent.
23. Having considered the circumstances of its provision to CMAL, including the terms of the confidentiality clause, the Commissioner is satisfied that the information withheld from Ms Fraser was received in circumstances which imposed an obligation to maintain confidentiality on CMAL.

Unauthorised disclosure which would cause detriment

24. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and could follow from the mere fact of unauthorised use or disclosure in breach of confidence.

25. CMAL submitted that disclosure would be detrimental to the interests of Lloyds Bank and provided submissions from Lloyds Bank to this effect. Those submissions stated that if the information was made public it would disclose Lloyds Bank's pricing mechanism, impacting on its position in the market. Lloyds Bank stated that the information was commercially sensitive and that disclosure of information of this type would undermine business confidence and affect the pricing that would be available to public authorities in future.
26. Having considered the submissions put forward by CMAL, including the contents of the letter from Lloyds Bank, the Commissioner is satisfied that disclosure of the withheld information would be unauthorised by Lloyds Bank and sufficiently detrimental to meet the requirements for an actionable breach of confidence. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence are met in this case.

Public interest defence

27. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that there may be circumstances in which the strong public interest in maintaining confidences is outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
28. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
29. In coming to a decision on this matter, the Commissioner has taken account of the submissions made by Ms Fraser as to the importance of knowing the true cost to the taxpayer of the leasing of the MS Loch Seaforth over the years. The public interest in its financial activities is acknowledged by CMAL, which believes that public interest is met by information in its published accounts. In relation to the particular information withheld, it considers there to be stronger public interest in maintaining an effective working relationship with Lloyds Bank.
30. There is clearly a general public interest in economy, efficiency and effectiveness in the expenditure of public funds, and more particularly in transparency and effective scrutiny in relation to the spending of public money. There is, on the other hand, a strong public interest in the maintenance of confidences. On balance, having considered all relevant submissions, the Commissioner is not persuaded in this case that there is a public interest in disclosure sufficiently strong to outweigh the public interest in confidentiality.
31. Having considered all the arguments, therefore, the Commissioner does not consider there to be a reasonable argument in this case for the disclosure of confidential information on public interest grounds and so is satisfied that the Council was entitled to withhold the information remaining withheld from Ms Fraser under section 36(2) of FOISA.
32. The Commissioner would, however, express her disappointment that the inclusion of an all-embracing confidentiality clause was considered necessary in a contract concluded so recently, even if there would be genuine commercial harm in disclosing particular items of information relating to the contract. She would remind all Scottish public authorities of the relevant guidance in section 8 of Part 2 of the Scottish Ministers' Code of Practice on the

discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004¹.

33. Given that the Commissioner is satisfied that the Council was entitled to withhold the information under section 36(2) of FOISA, she is not required to (and will not) go on to consider the application of section 33(1)(b) or 2(a) of FOISA in this case.

Decision

The Commissioner finds that Caledonian Maritime Assets Limited (CMAL) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Fraser. The Commissioner is satisfied that CMAL was entitled to withhold the information in terms of section 36(2) of FOISA.

Appeal

Should either Ms Fraser or CMAL 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.

Margaret Keyse
Head of Enforcement

5 October 2016

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

36 Confidentiality

...

- (2) Information is exempt information if-
- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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