

# Decision Notice

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**Decision 106/2017: Mr Douglas W Tott and CalMac Ferries Limited**

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**Late cancellations of pre-booked commercial vehicle sailings**

Reference No: 201700464

Decision Date: 6 July 2017



Scottish Information  
Commissioner

## Summary

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CalMac was asked for the number of late cancellations of pre-booked commercial vehicle sailings by a specified haulier over a specified period.

CalMac refused to provide the information as it considered it to be commercially confidential, and so exempt from disclosure.

The Commissioner investigated and found that CalMac had incorrectly withheld the information under section 33(1)(b) (Commercial interests and the economy) of FOISA. She required CalMac to disclose the withheld information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 18 November 2016, Mr Tott made a request for information to CalMac Ferries Limited (CalMac). The information requested was:

*During the period 1st January 2016 to 31st October 2016 how many late cancellations of pre-booked commercial vehicles sailings by [specified haulier] on the Kennacraig to Islay route were there for:*

*(a) within 24 hours of the date of the pre-booked sailing;*

*(b) within 48 hours of the date of the pre-booked sailing.*

*These figures cover late cancellations for pre-booked sailings departing Kennacraig, Port Ellen and Port Askaig.*

2. CalMac responded on 23 December 2016, refusing to provide the information requested as it considered it to be exempt from disclosure under section 33(1)(b) (Commercial interests and the economy) of FOISA. CalMac stated that it was a long-standing operational requirement for hauliers to make advance block bookings which, for various reasons, were subsequently not required. It explained that the nature of many island businesses dictated that some goods required to be shipped at short notice and, where no advance booking had been made, this could result in thousands of pounds worth of wasted goods.
3. CalMac considered disclosure of the information for one particular haulier could lead to reputational damage, which would have an adverse impact on the company's commercial interests. While the information might seem innocuous, CalMac believed the island economy

could be adversely affected were the haulier to reduce or stop making advance block bookings, resulting in goods not being transported when required (which was vital to the local economy).

4. On 26 January 2017, Mr Tott wrote to CalMac, requesting a review of its decision as he disagreed that the information was exempt from disclosure. Mr Tott argued that it was well known on Islay that the haulier in question continually cancelled pre-booked sailings at short notice, or simply failed to appear, with no penalty (either financial or a reduction in the number of permitted future block bookings). As CalMac was subsidised by the Scottish Government, Mr Tott believed this unnecessary expense, funded by taxpayers, could be spent elsewhere on public services. Mr Tott further argued that residents and holidaymakers were being prevented from booking crossings on ferries that ultimately sailed with empty spaces as a result of these late cancellations or non-appearances, of which he had personal experience.
5. CalMac notified Mr Tott of the outcome of its review on 8 March 2017, upholding its original decision without modification. Appreciating Mr Tott's frustration at not being able to book a crossing, CalMac explained it was important for an island's economy that hauliers were permitted a certain amount of block bookings on sailings to enable the transportation of (sometimes perishable) goods on and off the island. Recognising that the system was not ideal, resulting in occasions where the bookings were no longer required, CalMac argued it had a duty to ensure the needs of the island community were met. Where the booking system showed as full, customers could contact CalMac for advice. CalMac still believed singling out one haulier could lead to reputational damage, adversely impacting its business.
6. On 8 March 2017, Mr Tott wrote to the Commissioner applying for a decision in terms of section 47(1) of FOISA. Mr Tott stated that he disagreed with CalMac's decision to withhold the information.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Tott had 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 26 April 2017, CalMac was notified in writing that Mr Tott had made a valid application. CalMac was asked to send the Commissioner the information withheld from Mr Tott. CalMac 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. CalMac was invited to comment on this application and answer specific questions, with specific reference to its application of section 33(1)(b) of FOISA.
10. Mr Tott was also invited to submit any comments he wished to make on why he considered it was in the public interest that the information be disclosed.
11. Both parties provided submissions to the Commissioner.

## Commissioner's analysis and findings

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

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

13. CalMac confirmed that it was withholding the information requested by Mr Tott under section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
14. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, 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.
15. 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.

### *CalMac's submissions*

16. In its submissions to the Commissioner, CalMac took the view that, while the information requested might seem innocuous, its disclosure could impact on the interests of the haulier, CalMac and the island of Islay.
17. Noting Mr Tott's comments about hauliers not being penalised for cancelling bookings, either financially or by way of a reduction in block bookings, CalMac submitted that both of these alternatives would have a detrimental effect on the haulier. Further, any forced reduction in block bookings would also affect the community, as hauliers would face a reduced ability to transport goods on and off the island.
18. Recognising that the system was not 100% ideal, and acknowledging that there were occasions when individuals were unable to make advance bookings, CalMac argued that the system permitted the constant flow of goods required for the island community to operate.
19. CalMac explained that it worked together with the haulier to manage the system and ensure bookings which were no longer required were freed up as early as possible (although unfortunately this was often at short notice).
20. CalMac was asked to provide an overview of how the advance block booking system worked. It explained that prior to the start of the summer/winter timetables, light goods vehicle (LGV) and commercial vehicle (CV) operators, which are regular customers, are asked to submit their block booking requirements for the forthcoming season, based on known and forecast activity levels. These are then reviewed by the relevant port and

compared with actual utilisation for the previous corresponding period. Any major differences are queried by the Port Manager and adjusted where required.

21. CalMac stated that it had the right to remove a CV operator's block bookings in the event of continuous lack of utilisation, but it could not impose any form of financial penalty. For the haulier in question, CalMac explained that actual usage exceeded block booked space on a weekly basis, albeit (on occasion) at different times from that originally requested, due to variations in customer demand behaviour (it cited various vagaries in the whisky production cycle and the operation of the island's distilleries). In CalMac's view, a thorough understanding of customer behaviour was necessary to fully understand the reasons behind short notice cancellations.
22. CalMac confirmed that the same CV block booking policy applied across the whole Network without variation, and that the overall numbers of affected LGV and CV operators were in the hundreds. It explained that the same policy applied to all other commercial entities operating LGVs and CVs in their own right (e.g. utility companies and local authorities).

#### *Commercial interests*

23. CalMac submitted that disclosure would not only damage its own commercial interests, but also those of the haulier and the island of Islay. In this instance, "commercial interests" referred to the following:
  - (i) CalMac's position as the UK's largest ferry operator, contracted by the Scottish Government and operating 32 vessels to 22 islands off Scotland's west coast, with delegated statutory harbour authority for 24 harbours and slipways on behalf of the statutory harbour authority. Operating 33 services per week to and from Islay with two vessels, CalMac viewed the provision of such services as a "life line" allowing the island economy to prosper. CalMac explained that increase in CV demand on this route was mainly due to the increased requirement to move raw materials to the nine distilleries on Islay and Jura, with distilled bulk spirit, filled casks and draff being the main exports to the mainland.
  - (ii) The haulier's position as a CV operator with its main base on Islay, employing 24 staff on the island and 20 on the mainland. Operating in a highly competitive market, and competing with a number of other mainland-based CV operators, it was described as the only Islay-based haulier employing a number of the island's population.
  - (iii) The island of Islay, whose main economic activity is whisky distilling. The island has a population of circa 3,250, many of whom are employed directly or indirectly by the nine distilleries on Islay and Jura, and its economy is highly dependent on both the haulage industry and CalMac to facilitate the free flow of raw materials to, and the export of spirit from, the island. CalMac submitted that the availability of significant car deck space allowed the industry to operate efficiently and timeously, with some aspects operating on a "just in time" basis.
24. Having considered CalMac's submissions on this point, the Commissioner is satisfied that the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA. She recognises that CalMac must be able to provide the relevant facilities required for the transportation of goods on and off the island, particularly for the key elements of the local economy.

25. The Commissioner accepts that CalMac has identified commercial interests relating to the haulier which might be adversely impacted, should disclosure of the information harm CalMac's ability to accommodate the haulier's transportation requirements.
26. The Commissioner also accepts that CalMac has identified commercial interests relating to the island of Islay, whose economy might be adversely affected should disclosure of the information result in detriment to effective arrangements for transporting goods from or to the island. Recognising that the island's main economy is whisky distilling, the Commissioner accepts that those individuals or businesses connected with that industry have relevant commercial interests that would be affected should either CalMac or the haulier be unable to provide the necessary transportation facilities.
27. The Commissioner must now go on to consider whether the commercial interests identified by CalMac would, or would be likely to, be prejudiced substantially by disclosure of the information requested.

*How would disclosure prejudice these commercial interests?*

28. CalMac argued that, in absence of all the relevant facts, individuals might misinterpret the information requested at face value. It was concerned that wrong conclusions might be drawn about its reputation in relation to managing car deck space.
29. To put the importance of CV whisky-related traffic into perspective, CalMac explained that the Islay CV revenue accounted for approximately 15% of its entire CV income. The haulier in question was one of three main hauliers, and generated approximately 80% of all Islay-derived CV income for CalMac.
30. In respect of the haulier's commercial interests, CalMac submitted that disclosure of commercially sensitive information would allow competitors an insight into the haulier's operation and its levels of business with individual distillers. It argued that taking the information at face value, in the absence of specific knowledge about whisky distilling operations, could lead to wrong conclusions being drawn about short-notice cancellations.
31. CalMac also argued that the island of Islay was heavily dependent on the whisky industry for both direct and indirect employment. It submitted that the provision of efficient and responsive transportation by both itself and the haulage companies contributed to the success of the island's whisky economy. In CalMac's view, any restraint on ferry space for whisky-related CVs would have a significant impact on the island's economy.

*Third party comments*

32. CalMac explained that it had obtained comments from the haulier's solicitors, who confirmed they concurred with CalMac's decision to withhold the information under section 33(1)(b) of FOISA. In their view, disclosure would seriously damage the haulier's commercial interests, as well as those of CalMac and other users of the corresponding route, without providing value to the public or to Mr Tott.
33. The haulier's solicitors provided the following comments to support their position:
  - The haulier operates services on behalf of a number of businesses on Islay and the mainland, and must ensure contractual and other obligations to customers are met.
  - There are two timetables in operation – Core and Shoulder. Where a vessel is required elsewhere on the network (due to unavailability elsewhere), Shoulder sailings

are cancelled and the vessel is relocated. Regardless, the haulier still requires the same approximate number of weekly bookings.

- CalMac's procedures permit hauliers to book a maximum of 50 loads per week. The haulier's requirements exceed this, scheduling 58 loads per week with the balance being carried on a standby basis wherever there is spare capacity.
- Where both timetables operate, the haulier will consult with CalMac and cancel some pre-bookings on the Core service, releasing these to other users. This ensures greatest utilisation and convenience for all users. Were this arrangement not in place (i.e. the ability to cancel/re-arrange without penalty), the haulier would take up all pre-bookings. This would lead to a lack of availability for other users on Core sailings, and under-utilised vessels on Shoulder sailings, causing inconvenience and disruption to other potential users.
- Disclosure of the number of occasions where this specific haulier had assisted in vessel utilisation, through the cancellation of pre-booked crossings and reallocation on other sailings, would prejudice the haulier's commercial interests. Disclosing this information, solely for this haulier, would give a distorted, inaccurate and unrepresentative picture of this ferry service and would provide competitors with information on the haulier's operation and *modus operandi*.
- The percentage of pre-booked crossings which are not subject to operational adjustment is high and at a level which CalMac considers to be satisfactory. In the absence of the necessary understanding and background knowledge, the raw data would not only be misinterpreted but would "single-out" the haulier, leading to significant damage to its commercial interests.
- The flexibility afforded under the present scheme is in the public interest, both in relation to CalMac and to Islay's residents and visitors, as it allows a greater number of non-haulage crossings to be effected at very busy times. This flexibility would be lessened were the information disclosed, as the haulier would no longer be amenable to a proactive load management process

#### *The Commissioner's views*

34. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
35. She accepts that, were information to be disclosed that would compromise the operation and flexibility of the advance block booking system operated by CalMac for CV operators, this would be likely to prejudice the commercial interests of all parties concerned. The current flexibility would appear to be beneficial to all of these interests, and correspondingly its loss would appear likely to be detrimental to them. Essentially, that appears to be the argument advanced by both CalMac and the operator concerned. What is less clear is how disclosure of the information requested by Mr Tott would, or would be likely to, bring about the harm claimed.
36. CalMac has argued that, in the absence of background information explaining short-notice cancellations and reallocations of bookings, the information sought by Mr Tott might be misinterpreted, causing it reputational damage. However, CalMac has provided no explanation of how this would impact on its business, either on this or any other route. In any event, the scope for misinterpretation is not generally considered to be a relevant factor by the Commissioner in applying any of the harm-based exemptions in FOISA: it is always open

to the public authority to provide any context required to mitigate any perceived scope for misinterpretation.

37. CalMac (with the haulier itself) has also argued that disclosure of the information would damage the haulier's reputation and result in it being less willing to negotiate in reallocating pre-bookings (when both timetables are running). The Commissioner considers this to be unlikely. It has already been explained to her that the haulier in question regularly schedules more loads than CalMac can provide capacity for, within the advance block booking system. In her view, it is unlikely that the haulier would choose to depart from being able to negotiate in the way described, as a result of disclosure of the information requested, as this would undoubtedly constrain it from transporting goods as necessary and thus pursuing its business. There is, surely, a degree of mutual dependency in the commercial relationship between the haulier and CalMac, which must render negotiation inevitable.
38. CalMac has further argued that disclosure of commercially sensitive information would give competitors an insight into the haulier's operations and its levels of business with distilleries. While the Commissioner agrees that the information would be of considerable commercial sensitivity if this were true, she cannot identify how disclosure of this particular information would give such an insight. This is not apparent either from the information itself or from the submissions provided. In this regard, the Commissioner considers it significant that the same advance block booking system is available, applied without variation, to all LGV and CV operators across the Network.
39. CalMac has submitted that the haulier in question is one of its main customers, generating a substantial percentage its Islay-derived CV income. Given the nature of the haulier's business, the Commissioner recognises that its vehicles will have a visible presence on, and on routes to and from, the island. It will be well known that it is a major operator in this trade, and hardly a secret that it will make a large number of block bookings under the arrangements offered by CalMac.
40. It would hardly be surprising, in the circumstances, if this haulier had a higher cancellation rate (under the flexibility afforded by CalMac's policy) than a smaller operator. The Commissioner is not convinced that the information would tell the average reader even that much: it would tell them how many late (24 or 48 hour) cancellations were made by this particular operator over a particular period, and it is not evident to the Commissioner how it could be indicative of the proportion of bookings cancelled or any particular pattern of cancellation.
41. For these reasons, the Commissioner is not satisfied that disclosing the requested information, for this one operator over one specified period, would damage that haulier's commercial interests in the manner claimed by CalMac.
42. Having reached the conclusions set out above, neither does the Commissioner concur with CalMac's claims that disclosure of the information requested would directly prejudice the economy of the island of Islay. While she recognises that any breakdown in the transportation system in operation would be likely to impact on the island's economy to an extent, perhaps significantly depending on the extent of the breakdown, for the reasons already explained she cannot accept that this would be a likely consequence of disclosing the information Mr Tott has asked for.
43. In all the circumstances of the case, therefore, it is the Commissioner's view that the harm claimed by CalMac is not likely to occur as a direct result of disclosure of the information in question. She is not satisfied that disclosure of the withheld information would, or would be



likely to, prejudice substantially the commercial interests of CalMac, the haulier or the island of Islay. She cannot, therefore, accept that the information is exempt from disclosure under section 33(1)(b) of FOISA.

44. As the Commissioner has found that the exemption in section 33(1)(b) of FOISA does not apply, she is not required to go on to consider the public interest in disclosing the information or maintaining the exemption.

## Decision

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The Commissioner finds that CalMac Ferries Limited (CalMac) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tott. It was not entitled to withhold the information requested under section 33(1)(b) (Commercial interests and the economy) of FOISA, and in doing so failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires CalMac to disclose the withheld information to Mr Tott by **21 August 2017**.

## Appeal

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Should either Mr Tott or CalMac Ferries Limited 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

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If CalMac Ferries Limited (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.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**6 July 2017**

### 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 –

...

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 33 Commercial interests and the economy

(1) Information is exempt information if-

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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