



Scottish Information
Commissioner

**Decision 061/2005 Mr Carl Reavey and Caledonian
MacBrayne Limited**

Losses attributable to the Islay ferry service

**Applicant: Mr Carl Reavey
Authority: Caledonian MacBrayne Limited
Case No: 200501827
Decision Date: 30 November 2005**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 061/2005 Mr Carl Reavey and Caledonian MacBrayne Limited

Request for information about losses attributable to the Islay service – section 33(1)(b) – whether release would or would be likely to prejudice substantially the commercial interests of any person – failure to provide a refusal notice in accordance with section 16

Background

Mr Reavey wrote to Caledonian MacBrayne Limited seeking a range of information including the losses incurred by the Islay route alone. In Caledonian MacBrayne's annual report, losses for the Gigha and Islay routes are shown collectively. Caledonian MacBrayne refused to provide this information. In doing so, it relied upon section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA), which states that information can be withheld where its release would or would be likely to prejudice substantially the commercial interests of any person. Caledonian MacBrayne confirmed this decision following an internal review and Mr Reavey then applied to the Commissioner for a decision in this case.

Outcome

The Commissioner found that Caledonian MacBrayne had breached part 1 of FOISA because there were insufficient grounds for withholding the information sought by Mr Reavey under section 33(1)(b). As a result, he found that the Council had failed to comply with section 1(1) of FOISA. The Commissioner also found that Caledonian MacBrayne had failed to provide a decision notice in line with the requirements of section 16 of FOISA in response to Mr Reavey's request.

Appeal

Should either Caledonian MacBrayne or Mr Reavey wish to appeal against the Commissioner's 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. Mr Reavey requested information from Caledonian MacBrayne in a letter that was undated, but was received by Caledonian MacBrayne on 23 February 2005. This letter requested a range of information, most of which is not the subject of this decision.
2. Mr Reavey's final request within this letter noted that Caledonian MacBrayne's annual report for 2003/04 showed losses attributed to the Islay and Gigha routes collectively. It asked what proportion of this loss could be attributed to the Islay route alone.
3. Caledonian MacBrayne's annual report for 2003/04 shows operating losses on its services within a number of groups. These are:
 - Upper Clyde
 - Outer Isles
 - Islay/Gigha
 - Mull/Colonsay
 - Skye and Small Isles
 - Arran/Kintyre

Caledonian MacBrayne does not publish details of these losses on a route by route basis.

4. Caledonian MacBrayne responded to Mr Reavey's request in a notice dated 18 March 2005. This stated that it was not possible to comply with the request because the information was exempt from release under section 33(1)(b) of FOSIA, on the grounds that release of the requested information would substantially prejudice the interests of Caledonian MacBrayne. The refusal notice made no reference to any consideration of the public interest in relation to the request.



5. Mr Reavey requested a review of this decision in a letter (again undated) that was received by Caledonian MacBrayne on 6 April 2005. Mr Reavey refused to accept that to make this information available would prejudice substantially Caledonian MacBrayne's commercial interests. He suggested that refusal to provide this information undermined the argument that private companies would seek to "cherry pick" profitable routes from Caledonian MacBrayne. (The arguments in relation to "cherry picking" of routes are discussed in some detail below.)
6. Caledonian MacBrayne responded to Mr Reavey's request for review in a letter dated 29 April 2005. This confirmed its previous conclusion that the information sought was exempt from release under section 33(1)(b) of FOISA.
7. Mr Reavey applied for a decision by me in a letter dated 18 May 2005. He stated that he wished to appeal Caledonian MacBrayne's decision on several grounds.
 - a) Mr Reavey first suggested that the accounts as presented by Caledonian MacBrayne were formulated with the deliberate intention of misleading the public by disguising the true picture.
 - b) Secondly, he suggested that it was in the public interest to know what level of public subsidy was applied to each route operated by Caledonian MacBrayne ferries.
 - c) Finally, Mr Reavey referred to Caledonian MacBrayne's response to the Scottish Executive's 2002 consultation on proposals for tendering the Clyde and Hebrides lifeline ferry services. He highlighted comments pointing out the financial and operational the benefits of tendering these services as a bundle. Mr Reavey contended that the validity of these arguments could not be judged if Caledonian MacBrayne refused to break out the subsidy or loss associated with individual routes.
8. In a later email to the investigating officer, Mr Reavey also drew my attention to the annual report of Highlands and Islands Airports Limited (HIAL), the publicly owned company that operates 10 airports in Scotland. HIAL, like Caledonian MacBrayne, is a company wholly owned by the Scottish Ministers. However, HIAL's annual report (the most recent of which can be viewed online here: <http://www.hial.co.uk/hial-2005-annual-report.pdf>) provides financial and other information (including operating losses) about each of its airports individually.



Investigation

9. Mr Reavey's case was allocated to an investigating officer. His 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 Caledonian MacBrayne to review the response to his request. Caledonian MacBrayne is a company wholly owned by the Scottish Ministers and as such is a publicly owned company (and therefore a public authority) for the purposes of section 3(1)(b) of FOISA.
10. The investigating officer wrote to Caledonian MacBrayne on 2 June 2005, informing it that an appeal had been received and that an investigation into the matter had begun. Caledonian MacBrayne was invited to comment on the case in terms of section 49(3) of FOISA.
11. This letter also asked Caledonian MacBrayne to provide the following:
 - a) Copies of documents providing details of the losses associated with the Islay and Gigha routes for the year 2003-04.
 - b) Copies of any internal communications relating to Mr Reavey's request for information and subsequent request for review, and details of the review process carried out in this case.
 - c) Copies of any internal guidance on the application of the exemption in section 33 and the application of the public interest test.
 - d) Detailed explanation of the application of the exemption in section 33(1)(b) to the information sought by Mr Reavey, to include detail of the nature, extent and likelihood of harm to Caledonian MacBrayne's commercial interests that was predicted to be a consequence of release, and any supporting evidence for this judgement.
 - e) Detailed explanation of the evaluation of the public interest to determine whether the information should be released despite the application of the exemption.

Caledonian MacBrayne's submission

12. Caledonian MacBrayne responded to the investigating officer's letter on 16 June 2005. It provided to me the information sought by Mr Reavey, and confirmed that there were no recorded communications relating to this request, or internal guidance on the application of the exemption in section 33(1)(b).



13. Caledonian MacBrayne informed me that that the exemption in section 33(1)(b) was applied because providing information on the level of loss attributable to individual lifeline services would provide potential competitors with the opportunity to identify individual routes on which to place services, particularly on a “cherry-picking” basis.
14. Although Caledonian MacBrayne advised me that it welcomed fair competition, it stated that the outcome of release in this case would be detrimental to the level of services that it currently provided, and would have a major effect on the network-based subsidy level received from the Scottish Ministers. Caledonian MacBrayne suggested that there must be safeguards on providing financial management information which would affect the services it provided and as a result, adversely impact on the public purse, investment in existing and future services and the communities served.
15. Caledonian MacBrayne also suggested that the information requested could be misleading and open to misinterpretation when viewed in isolation for a specified time period.
16. Caledonian MacBrayne argued that competition on a route by route basis would be detrimental to the network as a whole, in that the network subsidy level received would increase and existing timetabled services might have to be reduced or eliminated. As the network subsidy received by Caledonian MacBrayne was provided by the public purse, Caledonian MacBrayne suggested that it would not be in the public interest to supply information that could:
 - a) allow competitors to substantially affect the subsidy level received;
 - b) impact the financial stability of Caledonian MacBrayne and its corporate governance requirements under the Companies Act legislation;
 - c) lead to a diminution in service provision; and
 - d) adversely impact the communities involved and the staff employed by Caledonian MacBrayne.
17. Caledonian MacBrayne finally responded to the three specific grounds of appeal raised by Mr Reavey.
 - a) Caledonian MacBrayne stated that there was no intention to mislead or disguise through its published accounts. It noted that its annual report and accounts were prepared in accordance with the requirements of Companies Act legislation and were audited by KPMG, Caledonian MacBrayne’s registered auditor.



- b) In response to Mr Reavey's assertion that it was in the public interest to publish losses on an individual route basis, Caledonian MacBrayne referred again to its view of the public interest in this case, as set out in paragraph 16 above.
- c) Finally Caledonian MacBrayne responded to Mr Reavey's opinion that it was not possible to judge the validity of its arguments with regard to benefits of tendering the network as a bundle if it was not willing to show losses on a route by route basis. Caledonian MacBrayne noted that the subsidy it received was paid on a network basis, and that the Scottish Executive was developing proposals for tendering also on this basis. It noted that the decision to tender the network on this basis was taken by the Scottish Executive and not Caledonian MacBrayne.

Further information provided by Caledonian MacBrayne

- 18. The investigating officer visited Caledonian MacBrayne's offices in Gourock on 8 September 2005 to meet with a range of staff about a number of ongoing investigations. The purpose of this visit was to increase our understanding of Caledonian MacBrayne, the environment in which it operates and overarching issues that might be relevant to consideration of requests under FOISA. During this visit, the investigating officer met with Caledonian MacBrayne's Finance Director and Director of Strategic Development, who provided further background information and details on issues relating to Mr Reavey's case.
- 19. These meetings and further background information provided contributed to my understanding of three main areas that are relevant to considering Mr Reavey's case. These are Caledonian MacBrayne's operation and funding arrangements; the effects of competition on individual routes; and the upcoming competitive tendering of the contract to operate the lifeline services, along with the associated subsidy.

Caledonian MacBrayne operation and funding

- 20. Caledonian MacBrayne currently operates lifeline ferry services over 26 routes in the Clyde and Hebrides. As these routes are loss making, Caledonian MacBrayne's services are subsidised by an annual deficit grant from the Scottish Executive. The deficit grant in the financial year 2003-04 was £25.9m.



21. 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) 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.
22. 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.
23. The deficit grant is awarded each year on a network-wide basis. Funding is not awarded to each route individually.
24. Caledonian MacBrayne has also asserted that presentation of financial information on a route by route basis could be misleading. It suggests that such presentation would fail to take into consideration various costs (such as ticketing and administration) that relate to a route but are incurred on a network-wide basis.

Competition on individual routes and "cherry-picking"

25. As the recipient of public subsidy, Caledonian MacBrayne currently holds a secure position as the provider of lifeline ferry services. On most of the routes it operates, it is the sole operator. The exception to this is the Gourock to Dunoon route, where the commercial operator Western Ferries provides a competing vehicle and passenger service carrying around 80% of the available vehicle, passenger and freight business.
26. There are no formal restrictions preventing existing and other operators setting up commercial services to compete with Caledonian MacBrayne on its routes. Where such competition is introduced on a route, the effects on Caledonian MacBrayne would potentially be significant. A competing service would be likely to take business from the Caledonian MacBrayne service, resulting in reduced revenue, and therefore increased losses (assuming that operating costs remained the same). As the Scottish Executive's deficit grant reflects these losses, reduced revenue would be likely to result in an increased subsidy requirement if the same level of service were to be maintained by Caledonian MacBrayne.



27. Caledonian MacBrayne has suggested that the release of information about losses on a route by route basis would allow potential competitors to identify and cherry-pick those routes where a competing service would be most likely to succeed, leaving Caledonian MacBrayne as the sole operator on the less financially attractive routes.
28. If alternative services were to be established on such routes, Caledonian MacBrayne would be unable in the short term to modify its timetable or charges to respond effectively to the competition.
29. Caledonian MacBrayne has pointed out that it has recently experienced just this type of cherry-picking. In 2001, a competitor operated for 5 months between Ullapool and Stornoway resulting in a significant loss of revenue for Caledonian MacBrayne.

Tendering of the Clyde and Hebrides ferry services

30. Caledonian MacBrayne is also currently facing competition in relation to its position as the provider of the whole network of lifeline services. In order to comply with EU rules on state aids, the Scottish Executive is in the process of putting these services and the associated funding out to competitive tender. The winning bidder in this process will be the one that is able to provide the service level required with the minimum public subsidy.
31. Companies will be invited to bid for the opportunity to operate the network as whole rather than individual routes. The one exception to this is the Gourock to Dunoon route, in relation to which (for reasons not relevant to this decision) different arrangements will apply. For the other 25 services currently operated by Caledonian MacBrayne, a single operator will continue to provide the subsidised services.
32. In the period since Mr Reavey made his request for information, the need for such tendering has been confirmed by the Scottish Executive, and this process has commenced with expressions of interest being invited from companies across the EU. The full tendering process is likely to take place in 2006, with a view to the winning provider commencing its service in 2007.
33. Caledonian MacBrayne has pointed out to me that it is important that this tendering process is able to proceed on a level playing field for all parties, both for Caledonian MacBrayne as the incumbent operator, and for the other bidding companies. The Scottish Executive will provide the bidding companies with information that it considers relevant to making a bid via a secure information room.



34. Caledonian MacBrayne has argued that release of detailed financial information would be prejudicial to its own bid to operate the network by providing details to competitor companies that they would not in turn be required to release in respect of its own operations.

The Commissioner's analysis and findings

35. Mr Reavey's request is for information about losses on one route; the service operating between Kennacraig and Islay. However, I must assume that my decision in this case would mean future requests for similar details for any other Caledonian MacBrayne operated service should be handled in the same way.
36. Effectively, therefore, I must consider whether the release of details of Caledonian MacBrayne's losses on a route by route basis across the entire Clyde and Hebrides network would be likely to prejudice substantially Caledonian MacBrayne's commercial interests. If it would, I must conclude that the information is exempt from release under section 33(1)(b) of FOISA.

Does Caledonian MacBrayne have commercial interests?

37. The first question I must ask is whether Caledonian MacBrayne has commercial interests that can be harmed. In my consideration of cases relating to Caledonian MacBrayne, the argument has been made (not directly in relation to this case, but the point is relevant nonetheless) that because Caledonian MacBrayne's services are non-profit making and subsidised from the public purse, they are not operated on a commercial basis.
38. This argument appears to correlate the term "commercial" with "profit making", a natural assumption in relation to the private sector. In my interpretation of section 33(1)(b) of FOISA, however, I consider the term to have wider meaning. Commercial interests relate to a person's ability to successfully participate in a commercial activity, e.g. the sale and purchase of goods or services. There is no requirement that these activities are profit making before this exemption can be engaged.



39. Caledonian MacBrayne engages in the sale and purchase of services by operating the Clyde and Hebrides ferry network. Furthermore, it does so in a competitive environment (albeit an environment where it currently holds an advantageous position as a result of its funding arrangements) where any organisation can choose to establish a rival service. In addition, although owned and subsidised by the Scottish Ministers, it operates as a limited company, subject to the same requirements of company law (including requirements as to competition and solvency) as any of its competitors.
40. Therefore, I conclude that Caledonian MacBrayne does have commercial interests, and the exemption in section 33(1)(b) can be appropriately invoked in circumstances where the release of information would be likely to prejudice these interests substantially.

Would release substantially prejudice Caledonian MacBrayne's commercial interests?

41. Caledonian MacBrayne has identified two ways by which its commercial interests might be harmed by release in this case; firstly by increasing the risk of effective competition being established on individual routes (cherry picking) and secondly by lessening Caledonian MacBrayne's potential for success in the upcoming tendering of the network as a whole. I will consider each of these possibilities in turn.

Prejudice through cherry picking of individual routes

42. Caledonian MacBrayne argues that if losses were revealed on a route by route basis, rival companies would be able to see the relative value of the routes and thereby identify the most attractive targets for the establishment of competing services.
43. Although Caledonian MacBrayne's services are all currently loss making, some will of course be less so than others. If Caledonian MacBrayne lost business on these services, the overall losses of the network would increase, as would the subsidy required in order to maintain the current level of service.
44. I accept that the introduction of competing services on any of Caledonian MacBrayne's routes would be likely to have an impact on its commercial interests. I also accept that increased losses would be a likely outcome of this, particularly in the short term in which Caledonian MacBrayne's obligations to provide a specified level of service would prevent a swift response to the changed environment.
45. However, I also note that the potential for the introduction of such competition exists already, as shown by the introduction of an alternative service between Stornoway and Ullapool in 2001.



46. Caledonian MacBrayne has pointed out that it welcomes fair competition when it arises but it suggests that releasing information about losses on a route by route basis would give competitors an unfair advantage by assisting them in identifying target routes where they would be most likely to succeed.
47. Therefore, I do not need to ask in this case whether release of information about losses on individual routes would create an opportunity for competitors where there was none before. I understand the key questions here to be:
 - a) Would release of this information make the introduction of competing services on individual routes significantly more likely?
 - b) Would release of this information make a competing service more likely to succeed to the substantial detriment to Caledonian MacBrayne's commercial interests?
48. To answer these questions, we need to ask what information is already available to a potential competitor, and how useful this information might be.
49. A starting point is Caledonian MacBrayne's annual carrying statistics. These are available online here: <http://www.calmac.co.uk/annual-carryings-2004-internet.pdf> and we can look for patterns in these figures over 10 years in the Scottish Executive's annual Transport Statistics here <http://www.scotland.gov.uk/Publications/2005/08/25100154/04263>. We can use these data to identify those routes where the greatest volume of traffic is available.
50. We can then use this carrying information to calculate a broad estimate of the revenue generated on each route, using the fares set out in Caledonian MacBrayne's timetable, available here: <http://www.calmac.co.uk/winter-full-timetable.pdf>.
51. We could refine our estimates further by factoring in some indication of the costs of providing the services. These might be based on consideration of the size of vessel operating on each route (available here: <http://www.calmac.co.uk/fleet.html>), the length of the route (assuming that longer routes and larger vessels will incur greater fuel and other running costs), and the number of sailings per day (details available from Caledonian MacBrayne's publicly available timetables).
52. This type of analysis would clearly lack refinement, but it would allow a broad assessment of the relative value of the different routes on an annual basis. A company that was seriously considering establishing a competing service would be likely to bring far more specialised knowledge to such a task.



53. What more would the release of information showing annual losses on a route by route basis bring? It would confirm the relative value of the routes to Caledonian MacBrayne but I would suggest that there is already information in the public domain that would allow such an assessment to be made (albeit in the form of a broad estimate). I am not persuaded that this information would give to a potential competitor any further significant advantage.
54. This information would not, for example, confirm the costs associated with providing each of Caledonian MacBrayne's services, or the income generated. It would not confirm which times of the day, week, month or year are the busiest and therefore most valuable. It would not confirm the cost of buying, maintaining and operating an appropriate vessel, or administering a ticketing system. To be confident that it could compete effectively with Caledonian MacBrayne on any given route, a competing company would need to have a clear understanding of all of these things.
55. I agree that cherry-picking of its routes is a threat for Caledonian MacBrayne, and that where and when competition is introduced on a route, its effect on Caledonian MacBrayne's commercial interests will be significant. A knock on effect of this may be the need for additional subsidy to be provided if the existing level of service provision is to be maintained.
56. However, I do not agree that the release of information showing annual losses on a route by route basis will significantly affect the likelihood of (a) new competition being introduced, or (b) that competitor succeeding to the detriment of Caledonian MacBrayne's commercial interests.
57. Therefore, I conclude that, in relation to the threat of competition on individual routes, the information sought by Mr Reavey is not exempt from release by virtue of section 33(1)(b) of FOISA.

Prejudice to Caledonian MacBrayne's interests in the tendering process

58. Caledonian MacBrayne's secondary argument in favour of the application of section 33(1)(b) to the information requested by Mr Reavey is that release would be likely to harm its position in the upcoming tendering process.
59. Caledonian MacBrayne argues that other bidding companies would not be required to provide such information in respect of their own operations and therefore release by Caledonian MacBrayne would give other bidders an advantage. They point out that the Executive will provide the information needed to make a bid to all parties and further release on its part would lead to an uneven playing field.



60. I agree that the tendering process should be allowed to progress in a manner that is fair to all parties but I do not accept this argument. For the reasons outlined in paragraphs 49-56 above, I do not think that the information under consideration would add significant value to a competitor's understanding of Caledonian MacBrayne's financial position beyond what can already be established from the public domain. To affect Caledonian MacBrayne's commercial interests significantly, I believe this information would need to be combined with more detailed data showing the costs and revenue that contributed to overall losses.
61. Furthermore, I note that the release of information about profit or loss on individual routes would not be innovative. Western Ferries, Caledonian MacBrayne's only current competitor, operates a single service between Gourock and Dunoon. Its annual report and accounts, available publicly from Companies House, therefore shows the profit that is made on this single route. On this route, therefore, the publicly funded Caledonian MacBrayne has access to more detailed information about its private sector competitor than vice versa.
62. Once again, therefore, I conclude that release of information about losses on a route by route basis would not be likely to prejudice Caledonian MacBrayne's commercial interests. Therefore, I do not agree that the exemption in section 33(1)(b) applies.

The public interest and Caledonian MacBrayne's refusal notice

63. As I have concluded that the exemption in section 33(1)(b) does not apply to the information sought by Mr Reavey, it is not necessary for me to consider the public interest in relation to this case.
64. However, I do want to note briefly that neither Caledonian MacBrayne's refusal notice nor its notice confirming the outcome of its review in relation to Mr Reavey's request mentioned its consideration of the public interest. Section 33(1)(b) is a qualified exemption and when it applies, a decision to withhold should only be taken when the public interest in doing so outweighs that in release.
65. Section 16 of FOISA states that any refusal notice should confirm that the public authority holds the information sought; state that it is exempt from release, and state which exemption has been judged to apply and why. Where the exemption claimed is qualified, the notice must also state the authority's reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in release.



66. By failing to state the reasons for determining that the public interest favoured withholding the information requested by Mr Reavey, I conclude that Caledonian MacBrayne failed to fully comply with the requirements of section 16 of FOISA.

The risk of misinterpretation

67. Finally, I want to briefly address Caledonian MacBrayne's point that release of details of losses on a route by route basis would be misleading, because it would fail to accurately reflect those costs, such as ticketing and administration, that are incurred on a network-wide basis. I recognise that this may well be a concern in this case.
68. Unlike an operator of a single route, where all of the costs reflected in its annual accounts will be those incurred in operating that route, Caledonian MacBrayne's network contains 26 routes, so economies of scale will be achieved through centralisation of certain aspects of the work. I agree therefore that the losses attributable to each of the routes will not necessarily reflect the financial position that would be found if each route was operated independently. To assume that this is the case would be a mistake (albeit not one, I would suggest, likely to be made by anyone with a reasonable understanding of an operation of this kind and scale).
69. However, the simple fact that information could be misinterpreted is not a valid reason for withholding it under FOISA. The code of practice on the discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002 (the section 60 Code) makes clear, for example, that when considering the public interest, authorities should not take the risk of the applicant misinterpreting the information. Where there is a potential for misinterpretation, a public authority can take steps to prevent this, by providing advice on interpretation, background information or explanation of how the data is calculated. I would recommend doing so in this case.

Decision

I find that Caledonian MacBrayne Limited failed to comply with Mr Reavey's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). In failing to release information to Mr Reavey, Caledonian MacBrayne has breached section 1(1) of FOISA. The reasons for my findings are fully detailed above.



I cannot require Caledonian MacBrayne to release the information to Mr Reavey until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require Caledonian MacBrayne to provide Mr Reavey with the information he has requested within 45 days of the date of receipt of this decision notice.

I also find that Caledonian MacBrayne failed to comply with section 16 of FOISA by failing to provide detail of its consideration of the public interest in its refusal notice. However, I do not require Caledonian MacBrayne to take any action in relation to this breach.

Kevin Dunion
Scottish Information Commissioner
30 November 2005