

# Decision Notice



Decision 167/2010 Dr Sandy Spowart and the Scottish Ministers

Grant payments

Reference No: 201001078

Decision Date: 21 September 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Dr Spowart requested from the Scottish Ministers (the Ministers) information relating to a SMART: SCOTLAND grant. The Ministers responded by withholding the information under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Dr Spowart remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers also indicated that it wished to rely upon section 33(2)(b) of FOISA the Commissioner found that the Ministers had not been entitled to withhold the information under the exemption in section 33(1)(b) of FOISA (as he did not accept that any commercial interests would or would be likely to be substantially prejudiced by disclosure) and also that it could not be withheld under section 33(2)(b) (not accepting the Ministers' arguments that disclosure would, or would be likely to, prejudice the Scottish Government's financial interests substantially). He therefore required the Ministers to provide the withheld information to Dr Spowart.

## Relevant statutory provisions and other sources

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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) and (2)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. SMART: SCOTLAND is a Government Initiative which provides financial assistance to individuals and small to medium-sized enterprises to help support development projects which represent a significant technological advance for the relevant UK sector or industry. SPUR grants were among the predecessors to the current SMART: SCOTLAND grants.
2. Dr Spowart was in correspondence with the Ministers in relation to various matters connected with SMART: SCOTLAND and SPUR grants. This correspondence included aspects of grant payments applied for by, or made to, specific named companies.
3. On 10 February 2010, Dr Spowart emailed the Ministers with a request for information in the following terms, naming 2 specific companies:



*Under the Freedom of Information Act I request that you answer the following questions with respect to all of the above Companies:*

- a. Is SPUR 06/024 still ongoing? If so what monies have the above Companies received to date from the project start.*
- b. Are there any partners or partner Companies involved in this project? If so please name them.*
- c. Have these Companies applied for/been successful in securing public funding since 5 June 2009 ? If so please detail the awards offered and monies paid to date from project start.*
- d. If further projects have sought or have been awarded public monies since June 2009 please confirm the names of any partner Companies working with [the 2 named companies].*
- e. Have any other Companies having [named individuals] as directors sought or had approved any other R&D projects since June 2009? If so please give, details of said projects, and costs applied for or paid.*

4. The Ministers responded on 17 March 2010, providing responses to all of the requests except that part of request i relating to monies received by the named companies. The Ministers withheld that information under section 33(1)(b) of FOISA.
5. On 2 April 2010 Dr Spowart wrote to the Ministers, requesting a review of their decision to withhold the information covered by the second part of request i.
6. On 5 May 2010, the Ministers responded to Dr Spowart indicating that they were upholding the decision to withhold the information on the basis of section 33(1)(b) of FOISA. As he was in correspondence with the Ministers at that time in relation to more than one information request, on 12 May 2010 Dr Spowart sought clarification as to which request this related to.
7. On 25 May 2010, the Ministers confirmed that the letter of 5 May 2010 was a response to Dr Spowart's request for review of 2 April 2010.
8. On 26 May 2010 Dr Spowart wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Dr Spowart had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



## Investigation

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10. On 15 June 2010, the Ministers were notified in writing that an application had been received from Dr Spowart and asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested (with particular reference to section 33(1)(b)). They were also asked to consider the relevance of the fact that successful awards are published on a six monthly basis.
12. The Ministers responded, confirming that they were relying upon section 33(1)(b) and 33(2)(b) of FOISA in withholding the information.
13. The relevant submissions obtained from the Ministers and Dr Spowart will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Dr Spowart and the Ministers and is satisfied that no matter of relevance has been overlooked.

### **Section 33(1)(b) – commercial interests of any person**

15. Section 33(1)(b) of FOISA 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.
16. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate whose commercial interests would, or would be likely to be, harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. 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.



17. In this case, the Ministers submitted that while the amount of grant offered under SPUR 06/024 was a matter of public record (and had been provided to Dr Spowart in response to a previous request for information) the amount of the grant actually paid, as requested by Dr Spowart, had not been published. The Ministers pointed out that only the amount awarded (as opposed to that actually paid from time to time) was published under the SMART scheme and its predecessors, and contended that release of the requested information would substantially prejudice the commercial interests of the recipient(s) of the grant.
18. The Ministers went on to argue that the amount of grant funding paid to date to the recipient(s) could prove to be very useful to any potential competitor, which could use it to formulate a competitive response. The Ministers claimed that the information would allow others to gauge the scale of the project, how soon it might come to the market and the level of risk involved. They further claimed that the projects such as this, which relied on the exploitation and development of new technology, had a unique window of opportunity for entering the market: allowing competitors access to this information could significantly affect the ability of a company to enter the market, having spent years of investment in research and development, and could result in a loss of competitive advantage for the company.
19. Noting that payments were ongoing and dependent on technical progress being demonstrated and robust plans being in place for exploiting the technology, and also that the possibility of repayment remained for a period following the final payment if the technology was not commercialised adequately, the Ministers argued that payment information (including information on any sums requiring to be repaid) would give a strong indication as to the level of success or otherwise of the project and the progress made by the grant recipient(s) in getting their product to market. This, they submitted, was highly valuable market data the release of which would substantially prejudice the interests of the recipient(s).
20. Taking account of the potential size of the project relative to that of the grant recipient(s), and noting that the project was critical to their attempt to enter a particular market, the Ministers contended that disclosure could put the recipient(s)' future at considerable risk. In this connection, it referred to earlier submissions made to the Commissioner in respect of the recipient(s)' individual circumstances. Comments had also been received from the recipient(s), suggesting that the disclosure of any project details would prejudice their commercial success.
21. Having considered Dr Spowart's request and his subsequent correspondence with the Ministers (noting in particular his letter of 12 May 2010 in which he distinguished this request from another information request which was then current), the Commissioner is satisfied that the information requested by Dr Spowart in this case is the total sum paid to the relevant companies in respect of SPUR 06/024. No breakdown of that figure is sought and no reference is made to sums (if any) reclaimed. In the Commissioner's view this information would offer only a very general impression of progress with the project in question. He does not believe that such an impression would, or would be likely to, confer a commercial advantage of any significance on any potential competitor. Therefore, while the arguments presented by the Ministers might be relevant to more detailed or specific information relating to the project and/or the companies in question, the Commissioner cannot accept that these arguments are applicable to the information requested in this case.



22. Having considered the withheld information and all relevant submissions, therefore, the Commissioner has concluded that disclosure of the information requested by Dr Spowart would not have prejudiced substantially, and would not have been likely to prejudice substantially, the commercial interests of any person. Consequently, he finds that the information was not exempt under section 33(1)(b) of FOISA and he is not required to consider the public interest test.

### **Section 33(2)(b) – financial interests of an administration in the UK**

23. During the investigation the Ministers also argued that the information was exempt under section 33(2)(b) of FOISA, which states that information is exempt if its disclosure would, or would be likely to, prejudice substantially the financial interests of an administration in the United Kingdom. Again, this is a qualified exemption and therefore subject to the public interest test.
24. The Ministers explained that SPUR (now amalgamated into SMART:SCOTLAND) was a key policy instrument for supporting near-market research and development by small and medium-sized companies, adding (with reference to a recent evaluation) that it was one of the most significant tools the government had to increase the performance of the Scottish economy.
25. The Ministers submitted that any company would consider it essential that critical information, including details of funding, should be protected from competitors. They believed that any suggestion of disclosure of what they considered to be sensitive information relating to a project (including that relating to its progress and potential success) would be substantially prejudicial to the SMART: SCOTLAND scheme, and that as a consequence companies would question whether to apply. Any question about the scheme's integrity, and any reduction in the potential numbers of applications and grants, would substantially prejudice the Scottish Government's target of doubling business expenditure on R&D (which was considered crucial to the competitiveness of Scotland's economy and therefore the financial interests of the Scottish Government).
26. As indicated above in relation to section 33(1)(b), the Commissioner has not accepted that the information under consideration in this case is of the commercial significance the Ministers have suggested. As a consequence, while he does not dispute the importance of SMART: SCOTLAND and related schemes, in the context of the information requested by Dr Spowart he cannot accept the deterrent effect of disclosure put forward by the Ministers. In the absence of such a deterrent effect, he does not accept that the prejudice to the Scottish economy suggested by the Ministers (which might be relevant in any consideration of substantial prejudice to the Scottish Government's, and therefore the Scottish Administration's, financial interests) would, or would be likely to, follow from disclosure. Taking all the circumstances into account, therefore, the Commissioner is not satisfied that disclosure of the information requested would have prejudiced substantially, or would have been likely to prejudice substantially, the financial interests of an administration in the United Kingdom.



27. The Commissioner has therefore found that the withheld information is not exempt in terms section 33(2)(b) of FOISA and he is not required to consider the public interest test. As he has not upheld either of the exemptions claimed, he requires the Ministers to disclose the withheld information to Dr Spowart.

## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Dr Spowart. In particular, by withholding the information requested under section 33(1)(b) of FOISA the Ministers failed to comply with section 1(1) of FOISA. The Commissioner also finds that the Ministers were not entitled to withhold the information under section 33(2)(b) FOISA.

The Commissioner therefore requires the Ministers to provide Dr Spowart with the information requested, by 6 November 2010.

## Appeal

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Should either Dr Spowart or the Scottish Ministers wish to appeal against this 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 after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**21 September 2010**



## Appendix

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### Relevant statutory provisions

#### 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).

- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (b) the financial interests of an administration in the United Kingdom.