

# Decision Notice

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## **Decision 027/2015: Mr Ross McLelland and the Scottish Ministers Dentists who were awarded SDAI grants**

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Reference No: 201402498

Decision Date: 27 February 2015



Scottish Information  
Commissioner

## Summary

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On 27 January 2014, Mr McLelland asked the Scottish Ministers (the Ministers) for information about dentists who had obtained grants under the Scottish Dental Access Initiative (SDAI) from 2007 to the current date.

The Ministers disclosed some information, withheld some information, and notified Mr McLelland that they did not hold some of the information he had asked for. Following a review, Mr McLelland remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation, the Ministers disclosed additional information to Mr McLelland, withholding only the names of the dentists who obtained grants or who had to repay some of the grant monies received.

The Commissioner found that the Ministers had partially failed to respond to Mr McLelland's request for information in accordance with Part 1 of FOISA. The Ministers wrongly withheld the names of the dentists who had obtained a grant under the exemption in section 38(1)(b), but correctly applied this exemption to the names of dentists who had to repay some or all of the grant monies. She required the Ministers to disclose the names of all dentists who had obtained (but not had to repay) a SDAI grant.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part I: the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition and 6)

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

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1. The SDAI scheme provides capital grants to help dental practitioners open new practices or extend existing practices either to meet unmet demand or to address areas of high need. On 27 January 2014, Mr McLelland asked the Ministers for information about the amount of money awarded to individual dentists under the SDAI scheme since 2007. Mr McLelland requested a range of information, including the amount and date of grant awards, name of grant recipient, reason for the grant, number of dental surgeries funded, as well as details of any grants which had to be repaid (and the reason for that repayment).

2. The Ministers responded on 24 February 2014. The Ministers provided Mr McLelland with some information, but withheld other information, citing a number of exemptions, including 38(1)(b) of FOISA (Personal information). The Ministers submitted that it would cost more than £600 to provide Mr McLelland with a response to his request for the amount and date of grant awards, the number of surgeries funded, and the target patient registration per grant award, and they withheld this information under section 12(1) of FOISA (Excessive costs). The Ministers suggested that Mr McLelland reduce the scope of his request to bring it under the £600 cost ceiling.
3. The Ministers also gave Mr McLelland notice, in terms of section 17(1) of FOISA, that they did not hold any information regarding the current level of patient registration per grant, the reason for repayment of funding and the date of repayment.
4. On 28 March 2014, Mr McLelland wrote to the Ministers requesting a review of their decision on the basis that he considered that parts of his request had been withheld on “spurious” grounds. Mr McLelland argued that huge sums of money had been spent on the SDAI process and it was in the public interest to see where that money has been spent, and to identify the recipients. However, Mr McLelland acknowledged the arguments about section 12(1) of FOISA and the £600 cost ceiling, and he refined and restated his requests as follows:
  - *Request 1*

The name of the recipient / contract holder. The reason for the grant. The amount of the grant. Broken down by Health Board Region.
  - *Request 2*

Details to be provided of all SDAI funded practices that have had to repay or refund any part of their funding, and the reason for repayment. Broken down by Health Board region.
5. The Ministers notified Mr McLelland of the outcome of their review on 29 April 2014. The Ministers withdrew their previous reliance on some of the exemptions in FOISA, but they maintained that section 38(1)(b) (read in conjunction with section 38(2)(a)(i)) of FOISA applied on the basis that disclosure of the requested information would breach the first data protection principle. The Ministers provided some explanation as to why they did not hold all of the information Mr McLelland had requested. The Ministers also provided Mr McLelland with a further breakdown of the data, but not at the level of detail he had asked for.
6. On 28 October 2014, Mr McLelland wrote to the Commissioner. Mr McLelland applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr McLelland stated he was dissatisfied with the outcome of the Ministers’ review because, although the review outcome provided him with slightly more information than before, the Ministers did not provide the detailed information he had requested.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr McLelland made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.

8. On 3 November 2014, the Ministers were notified in writing that Mr McLelland had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him. The Ministers provided the withheld information to the Commissioner 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. The Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

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

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10. 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 Mr McLelland and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Information under consideration**

11. On 12 November 2014, the Ministers sent Mr McLelland two spreadsheets which provided further details of the SDAI grants awarded since 2007. The first spreadsheet listed the amount of each grant awarded, along with the reason for the grant (e.g. extension, new premises), broken down by NHS Health Board. The second spreadsheet contained details of the grants that had been wholly or partially recovered since 2007, listing the NHS Board; the reason for the grant; the amount of grant initially claimed along with the amount of monies recovered by the NHS Board; and the reason for the recovery.
12. Neither of the spreadsheets contained the name of the recipients of the grants. This means that the only information withheld from Mr McLelland in this case are: a) the names of the individual dentists who obtained the SDAI grants; and b) the names of the individual dentists who had some or all of their grant awards recovered by the NHS Boards.

### **Section 38(1)(b) – personal information**

13. The Ministers have applied the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i) of FOISA, to the names of all of the dentists. This provision exempts information from disclosure if it is "personal data" as defined in section 1(1) of the DPA, and disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.

#### *Is the withheld information personal data?*

14. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
15. In this case, the withheld information comprises the names of the recipients of SDAI grant funding (and of those who have repaid part of all of the grants). The Ministers argued that these individuals could easily be identified if their names were disclosed. The Commissioner agrees. She also notes that the information would clearly relate to the individuals involved – it names the individual, lists the amount of grant they received and for what purpose.

16. However, as can be seen from the definition of “personal data”, personal data is data which relates to a living individual. The Ministers explained that some grants were awarded to individual dentists who are practice owners and have no other dentists working in their practice (sole traders). Some grants went to individual dentists who are sole practice owners, but have other dentists working in their practice. Some grants were awarded to partnerships. Not all of these will necessarily be “living individuals” for the purposes section 1(1) of the DPA.
17. Having viewed the lists of the recipients of the grants, the Commissioner agrees with the Ministers that it is not possible to be certain which names are the names of living individuals (and which therefore comprise personal data) and which names are not. This is partly because of the number of grants involved. It is also because, while the Ministers hold information on the status of the grant recipients (e.g. whether the recipient is a sole trader) at the time the Ministers received the grant forms from the Health Boards, they do not hold any information about their current status. It is the grant recipients’ current status which is relevant for determining whether the name of the recipients comprises personal data.
18. Given that it is not possible to be certain which of the grant recipients are living individuals for the purposes of section 1(1) of the DPA, the Commissioner has concluded that the safest approach is to treat all of the names appearing on the lists as personal data.

*Would disclosure breach the first data protection principle?*

19. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.
20. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and she is satisfied that the personal data in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 to the DPA in this case.

*Can any of the conditions in schedule 2 be met?*

21. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*<sup>1</sup>, that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject (i.e. the person or persons to whom the data relate).
22. It appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr McLelland. In any event, neither Mr McLelland nor the Ministers have suggested that any other condition would be relevant.

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<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

23. Condition 6 allows personal data to be processed if that processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
24. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- Does Mr McLelland have a legitimate interest in obtaining the personal data?
  - If so, is the disclosure necessary to achieve those legitimate interests? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subjects?
  - Even if disclosure is necessary for those purposes, would it nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject? As noted by Lord Hope in the above judgment, there is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr McLelland must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed.

*Does Mr McLelland have a legitimate interest in obtaining the personal data?*

25. The Commissioner notes that the information which has been withheld falls into two separate categories: a) the names of dentists who obtained grant funding under the SDAI scheme; and b) the names of dentists who had to repay some, or all of the grant funding they obtained under the SDAI scheme.
26. Mr McLelland's submissions to the Commissioner indicated why he considered the information should be disclosed: he referred to the "mismanagement" of public/tax payers' money; he argued that recipients of the grants (which comprised "free" government handouts from the public purse) should be identified and he argued that the SDAI grant scheme (which has handed out £21 million in public grants) should be open to scrutiny.
27. Mr McLelland told the Commissioner he had obtained information under FOISA (from Grampian NHS Board) which had enabled him to demonstrate that some SDAI recipients were breaching the terms and conditions of their grant funding. He considered that the Health Board was being "incredibly slow" in dealing with those dental practices. Mr McLelland suspected that such errors might be happening on a national scale (across all NHS Health Boards) and submitted that only by obtaining the names of the individuals who obtained the grants could he assess the validity of their grant awards and terms.
28. Having considered all relevant submissions she has received on this point, the Commissioner considers that Mr McLelland has a legitimate interest (which would be shared by the general public) in the withheld information, as disclosure would provide transparency on how a significant amount of public money has been spent and would enable an assessment of whether, or to what extent, grant recipients are meeting the terms of their grant.

*Is disclosure necessary to achieve those legitimate interests?*

29. Having concluded that Mr McLelland has a legitimate interest in obtaining the personal data under consideration, the Commissioner must now consider whether disclosure of the personal data is necessary to achieve those legitimate aims and fairly balanced as to ends, or whether these legitimate aims can be achieved by means which interfere less with the privacy of the data subjects. In doing so, she must consider whether these interests might reasonably be met by any alternative means.
30. The Ministers stated that while they consider there is a legitimate interest in ensuring that grant recipients meet the requirements of the grant project, they do not accept that disclosure of this personal data to Mr McLelland furthers that interest. The Ministers argued that any legitimate interests can be met by the existing remit of the NHS Boards, which already monitor the grant recipients for compliance, and seek to recoup any grants provided in error or no longer appropriate. The Ministers submitted that if the information were to be disclosed to Mr McLelland, it is likely that he would use it to contact grant recipients about their funding. The Ministers argued that it would not be appropriate or legitimate for him to do so, and that it should be for the NHS Boards to determine whether grant conditions are being met.
31. Although the Ministers have argued that monitoring of the grant conditions is the sole remit of the NHS Boards (arguing that the NHS Boards offer an alternative means of meeting the legitimate interests specified in this case), the Commissioner notes that the legitimate interests in this case are wider than simply ensuring grant conditions are met; they include the transparency of knowing which businesses have obtained substantial amounts of public money. The Commissioner therefore considers that it is necessary for the withheld personal data to be disclosed to Mr McLelland in order to satisfy the identified legitimate interests. The Commissioner is not aware of any other viable means of meeting Mr McLelland's legitimate interests which would interfere less with the privacy of the data subjects.
32. For this reason, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of Mr McLelland's legitimate interests.

*Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?*

33. The Commissioner is satisfied that disclosure of the withheld personal data is necessary to fulfil Mr McLelland's legitimate interests, but must now consider whether that disclosure would cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr McLelland and the data subjects in question. Only if the legitimate interests of Mr McLelland outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
34. In the Commissioner's briefing on the personal information exemption, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
  - whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
  - the potential harm or distress that may be caused by disclosure
  - whether the individual objected to the disclosure
  - the reasonable expectations of the individual as to whether the information should be disclosed.

35. The Ministers argued that the grant recipients would have no reasonable expectation that their personal data would be released, allowing third parties to identify them and to contact them to discuss their grantee status. The Ministers also argued that any potential legitimate interest requiring disclosure would be outweighed by the interest in avoiding the possibility of harassment from a third party.
36. The Ministers submitted that the processing (disclosure) of the personal data would be unwarranted, as it would prejudice the legitimate interests of the data subjects in terms of protection of information supplied for a particular reason in no anticipation of wider publication. They argued that the data subjects had a right to expect that their personal data would be treated in confidence.
37. As noted above, Mr McLelland argued that the public has a right to know who receives grant funding from the public purse, and that the process for allocating these funds is valid and that any terms and conditions attached to the grants are being met.
38. The Commissioner has considered all of the submissions made by Mr McLelland and the Ministers when balancing the legitimate interests in this case.
39. As indicated above, there are two types of personal data under consideration in this case: a) the names of dentists who obtained grant funding under the SDAI scheme; and b) the names of dentists who had to repay some of the grant funding they obtained under the SDAI scheme.
40. The Commissioner considers that individuals who obtain large amounts of public funding for a specific, business-related purpose should have some expectation that information about the award could be made public. The Commissioner notes that the amount of grant funding awarded to individual dentists under the SDAI scheme was significant. The majority of grant recipients received more than £100,000, with some receiving more than £200,000 and several obtaining a grant in excess of £300,000.
41. The Commissioner has reviewed samples of the award letters sent to grant recipients from various NHS Boards. The Commissioner acknowledges that some of these letters are marked "In confidence" or "Private" but this, on its own, is not enough to indicate that grant recipients would expect their application for the funding to be kept confidential. The Commissioner has reviewed the terms and conditions of the SDAI grant scheme, and notes that there is nothing within the documentation that states or implies that the application for a grant is a confidential process.
42. In the circumstances, the Commissioner is not satisfied that the data subjects would have had any real expectation that the fact they had applied for an SDAI grant would be kept confidential.



43. The Commissioner notes that the SDAI grants are for a specific business purpose and are not related to the private lives or personal income of any of the grant recipients (with the possible exception of dentists operating as sole traders). The Commissioner considers that disclosing the fact that the data subjects obtained a SDAI grant does not reveal any private or personal information about that individual, but simply records the fact that they applied for and were given a government-funded business grant. The Commissioner does not see that any harm can come from such disclosure, in terms of the data subjects' rights and freedoms or legitimate interests. The Commissioner notes that the grant is a one-off payment provided for a specific purpose (e.g. an extension or relocation of the dental surgery) and does not relate directly to the private income of the data subjects; this is of particular relevance when considering the rights and freedoms or legitimate interests of the sole traders included on the list of grant recipients.
44. The Commissioner has also considered the legitimate interests of Mr McLelland. She accepts that, like any other member of the public, he has an interest in ensuring that when £21 million pounds worth of government funding is allocated to independent businesses, there is sufficient transparency and accountability in the process to provide the public with reassurance that its money is being spent wisely.
45. The Commissioner acknowledges the Ministers' arguments that the NHS Boards are charged with ensuring that grant recipients fulfill the terms and conditions of the grant. However, she does not consider this should not mean that there is no value in providing the general public with information about the grants. The grants in question are sizeable and have been awarded for purely business purposes.
46. Accordingly, the Commissioner finds that the names of dentists who obtained SDAI grant funding were wrongly withheld by the Ministers under section 38(1)(b) of FOISA and she requires them to disclose this information to Mr McLelland.
47. With regard to the names of dentists who have had to repay some or all of the grant money awarded to them under the SDAI scheme, the Commissioner considers that different arguments apply.
48. The Ministers provided Mr McLelland with a table that provides details of grant funding which has had to be repaid. The table sets out the reason for the recovery (e.g. practice sold) and details how much the initial grant was for, and how much money has been recovered, but the names of the dentists have been withheld. The Commissioner acknowledges that there may be many legitimate reasons why the grant money had to be repaid, but she also acknowledges the possibility that repayments may be required after the discovery that the grant recipient has breached the terms of the grant.
49. The Commissioner is also aware that, even if the reasons for the repayment are valid, there may be some who will presume that some wrong-doing must be involved. She considers that this might unfairly lead to judgments being made about those who had repaid grants, with the effect that this would cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects.
50. In the circumstances, the Commissioner finds that the exemption contained in section 38(1)(b) of FOISA applies to the names of dentists who have had to repay some, or all, of the grant funding they received under the SDAI scheme, and the Ministers were correct to withhold such information.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McLelland.

The Commissioner finds that the Ministers were entitled to withhold the names of grant recipients who had to repay some or all of the grant funding received under the SDAI scheme.

However, by wrongly applying the exemption contained in section 38(1)(b) of FOISA to the names of grant recipients who obtained grant funding under the SDAI scheme, the Ministers failed to comply with Part 1.

The Commissioner therefore requires the Ministers to provide Mr McLelland with the names of all grant recipients who obtained funding under the SDAI from 2007 until the date of receipt of Mr McLelland's request. This information must be disclosed by **13 April 2015**.

## Appeal

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Should either Mr McLelland or the Scottish Ministers 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 the Scottish Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Scottish Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Scottish Ministers as if they had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**27 February 2015**

### 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

...

- (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 –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

#### 38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or

...

- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

# Data Protection Act 1998

## 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## Schedule 1 – The data protection principles

### Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

...

...

### Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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