

**Decision 099/2007 Mr Alexander J. Mitchell and  
Scottish Public Services Ombudsman**

*Information on accounts of applicant and NHS Trust*

**Applicant: Mr Alexander J. Mitchell  
Authority: Scottish Public Services Ombudsman  
Case No: 200601542  
Decision Date: 02 July 2007**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
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## Decision 099/2007 Mr Alexander J. Mitchell and the Scottish Public Services Ombudsman

***Request for information about complaint and contrasting accounts of applicant and NHS Trust – information not held - section 17 (Notice that information is not held) of FOISA.***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1 (General entitlement) and 17(1) (Notice that information is not held).

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

### Facts

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Mr Mitchell requested from the Scottish Public Services Ombudsman (SPSO) information which showed whether the discrepancies in the two accounts of events leading up to his daughter's death had ever been addressed. The SPSO responded by seeking clarification of the information requested by Mr Mitchell and offered to provide a copy of information which was Mr Mitchell's personal data under the Data Protection Act 1998 (DPA). Mr Mitchell was not satisfied with this response and asked the SPSO to review its decision. The SPSO carried out a review and, as a result, notified Mr Mitchell that neither FOISA nor the DPA provided an obligation to explain, justify or respond to questions on the content of documentation, in this instance to make a comparison between reports. Mr Mitchell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPSO had dealt with Mr Mitchell's request for information in accordance with Part 1 of FOISA. He did not require the SPSO to take any action.



## Background

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1. On 28 May 2006, Mr Mitchell wrote to the SPSO requesting information which showed whether the discrepancies in the two accounts of events leading to his daughter's death (i.e. Mr Mitchell's own account and that of a named NHS Trust) had ever been addressed.
2. On 25 July 2006, the SPSO wrote to Mr Mitchell in response to his request for information. The SPSO sought clarification of the information requested by Mr Mitchell. The SPSO offered to provide a copy of information which was personal data under the DPA and offered advice about the remit of the SPSO and the other organisations referred to by Mr Mitchell in his letter of 28 May 2006.
3. On 8 August 2006, Mr Mitchell wrote to the SPSO requesting a review of its decision. In particular, Mr Mitchell drew the SPSO's attention to the information which he was seeking in his information request. He stated that he expected the information on the handling of his complaint to be within the file referred to in the SPSO's letter of 25 July 2006
4. On 24 August 2006, the SPSO wrote to notify Mr Mitchell of the outcome of its review. The SPSO distinguished a person's right of access to information under FOISA and the DPA and explained that neither piece of legislation provides an obligation to explain, justify or respond to questions on the content of documentation, in this instance to make a comparison between reports.
5. On 21 September 2006, Mr Mitchell wrote to my Office, stating that he was dissatisfied with the outcome of the SPSO's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Mitchell had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
7. On 9 January 2007, the SPSO was notified in writing that an application had been received from Mr Mitchell and was asked to provide my Office with specified items of information required for the purposes of the investigation the SPSO responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SPSO on 13 April 2007, asking it to provide comments on the application and to respond to specific questions on the application.



## The Investigation

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9. While Mr Mitchell's application was being validated, the SPSO explained, by letter of 5 February 2007, the reasons why it did not hold the information which Mr Mitchell sought. The SPSO explained that Mr Mitchell had made a complaint in 2000 to the Health Service Commissioner (HSC). The HSC had advised Mr Mitchell that his complaint could not be investigated and referred Mr Mitchell to the Mental Welfare Commission for Scotland (MWC). No investigation was undertaken by the HSC.
10. The SPSO explained to Mr Mitchell that the MWC had, after consideration, not investigated the complaint. Mr Mitchell in 2002 made a complaint to the HSC about the MWC. In this instance, the remit of the HSC only extended to considering the way in which the MWC had conducted any investigation, not the substantive issues of any investigation. The HSC decided that the MWC had acted reasonably in the handling of the complaint. No further action was taken against the MWC and the complaint against the MWC was not formally investigated.
11. In October 2002, the functions of the HSC were transferred to the SPSO. The SPSO, when contacted by Mr Mitchell in 2004, explained that the SPSO "could not revisit a decision of the HSC" and could not consider Mr Mitchell's complaint as a new complaint. The SPSO did not investigate Mr Mitchell's complaint. The SPSO took over responsibility from the HSC and from the MWC in relation to complaints concerning mental health services. It was explained that there are still circumstances in which the MWC retains competency to handle complaints and these are outlined in the Memorandum of Agreement between it and the SPSO.
12. The SPSO stated that what Mr Mitchell sought in his information request – a document which compared two sets of information (i.e. reports of Mr Mitchell's and the respective NHS Trust in respect of the circumstances of Mr Mitchell's daughter's death) would only exist if there had been a formal investigation of his complaint. Since the complaint was never subject to a full investigation, no comparative judgment was ever made by the HSC or the SPSO.
13. The SPSO explained that it had released a considerable amount of information to Mr Mitchell. It stated that it had also withheld material in terms of freedom information and data protection legislation. The SPSO stated that Mr Mitchell did not dispute this withholding in any letter (including his application of 21 September 2006) nor did the withheld material fall within the terms of his initial information request (that of 28 May 2006).



## The Commissioner's Analysis and Findings

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14. Mr Mitchell's application to my Office, of 21 September 2006, was based on his wish to receive any assessment of which of two accounts (that of a named NHS Trust or that of Mr Mitchell) was more accurate in respect of the events leading to the death of his daughter. Mr Mitchell stated that each account is in the form of a letter and held on file. Mr Mitchell explained that he was seeking information which showed that his core of his complaint had been addressed and voiced his concerns that his complaint was never fully investigated.
15. Mr Mitchell latterly asked that I investigate a question in regard to the MWC, with which he has also corresponded. Mr Mitchell supplied a copy of his information request - of 21 September 2006 - to the MWC and a copy of the response he received. However, no evidence was supplied to my Office which indicated that Mr Mitchell had made a request for review in respect of the MWC for Scotland (which is covered by schedule 1 of FOISA). The response given by the MWC – on 6 October 2006 – referred Mr Mitchell to the SPSO for the relevant information.

### Section 17 – Notice that information is not held

16. The question I have to decide is whether the SPSO holds information which falls within Mr Mitchell's request of 28 May 2006. Although not cited by the SPSO, the relevant section of FOISA is section 17. I must be satisfied that the SPSO does not hold (and did not hold at the time of Mr Mitchell's request) information which would address his request.
17. The SPSO explained to my Office the information which it had provided to Mr Mitchell. Mr Mitchell did not refer to this material in his application nor does the material provided fall within the terms of his initial information request (by letter of 28 May 2006).
18. The investigating officer asked the SPSO to detail any searches which it had conducted to assess whether it held information relevant to Mr Mitchell's request.



19. The SPSO explained that it had searched its electronic database for references to Mr Mitchell's complaint. This search led to the location of three files which were retrieved and examined. The justification for the fact that the complaints were not fully investigated – because this was not required (see paragraphs 9 -12 (above) for the reasons given by the SPSO) – was checked with the person originally involved in dealing with the complaints. Since there was no formal investigation, a comparative judgement of the two versions of events was never made and this information was not held. The SPSO commented that if it had investigated the complaint and reached a decision, this decision would have been communicated to Mr Mitchell.
20. The SPSO also explained the information which it had provided to Mr Mitchell: a copy of the HSC complaint file. The SPSO explained the nature of the information provided and withheld from Mr Mitchell. This was also explained to Mr Mitchell in the SPSO's letter of 19 September 2006. In his application to me Mr Mitchell does not question the information which has been withheld by letter of 19 September 2006 under FOISA by the SPSO.
21. Having considered the submissions that have been provided by the SPSO in respect of the searches that it carried out in order to determine whether it held the information requested by Mr Mitchell, and the submissions within Mr Mitchell's correspondence, I am satisfied that the information that Mr Mitchell is seeking is not held by the SPSO (and was not held at the time of his request). I am therefore satisfied that the SPSO has relied on section 17 of FOISA correctly in respect of their responses to Mr Mitchell.
22. I am also satisfied that although the SPSO did not advise Mr Mitchell that it was relying on section 17 of FOISA in not providing information in response to his requests, the responses given by SPSO would constitute a valid notice under section 17 of FOISA.
23. I would also comment that the SPSO was correct to consider Mr Mitchell's request under the DPA.

## Decision

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I find that the SPSO acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Mitchell.



## **Appeal**

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Should either Mr Mitchell or the SPSO 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 of receipt of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**02 July 2007**



## 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.

##### 17 Notice that information is not held

- (1) Where-
  - (a) a Scottish public authority receives a request which would require it either-
    - (i) to comply with section 1(1); or
    - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.