

# Decision Notice



Decision 156/2008 Dr Bill McDowell and the Scottish Ministers

Proposal for an independent inquiry into NHS care of the elderly

Reference No: 200801367

Decision Date: 11 December 2008

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Dr Bill McDowell asked the Scottish Ministers (the Ministers) for all information relating to a proposal submitted on his behalf for an independent inquiry into NHS care of the elderly. The Ministers responded by providing copies of correspondence and information relating to a meeting with Dr McDowell. Dr McDowell was not satisfied that all relevant information had been provided. Following a review, Dr McDowell remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that the Ministers had dealt with Dr McDowell's request for information in accordance with Part 1 of FOISA, by providing him with all information held in relation to his request.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1)

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. On 10 July 2008, Dr McDowell wrote to the Ministers requesting a copy of all paper and electronic information held in relation to a proposal for an independent inquiry into NHS care of the elderly, submitted to the Ministers on his behalf by Sarah Boyack MSP, on 22 January 2008. Dr McDowell asked for all internal correspondence on this matter and any material relating to contact with external organisations, such as Lothian NHS Board.
2. The Ministers responded on 11 August 2008, enclosing documents described as "the letters and papers which are eligible for release under your request". The Ministers confirmed that no other papers were held in relation to Dr McDowell's earlier correspondence with the Scottish Government.
3. On 19 August 2008, Dr McDowell wrote to the Ministers requesting a review of their decision and listing certain information which appeared to be missing from the Ministers' response.



4. The Ministers notified Dr McDowell of the outcome of their review on 16 September 2008. The Ministers were satisfied that he had received all the information held by the Scottish Government in relation to his request, with the exception of three attachments to an email which, the Ministers found, had been missed inadvertently from the original response. The Ministers noted that the documents in these email attachments were among the list of missing information in Dr McDowell's request for review. Copies were provided after the Ministers had redacted some information from one of the documents, considering it to be exempt from disclosure under section 38(1)(b) of FOISA (Personal information).
5. On 18 September 2008, Dr McDowell 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. Dr McDowell explained why he believed that the Scottish Government held other information which should have been included or considered in its response to his request.
6. The application was validated by establishing that Dr McDowell 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. The case was then allocated to an investigating officer.

## Investigation

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7. On 25 September 2008, the Ministers were notified in writing that an application had been received from Dr McDowell and were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Ministers were also asked specific questions about the way in which the Scottish Government had established what information was held in relation to Dr McDowell's request.
8. The Ministers replied on 21 October 2008, providing their comments and answers to the questions raised. During the investigation, further questions were raised with the Ministers, to which answers were provided. Details of the Ministers' submissions are given later in this decision notice.
9. Dr McDowell was asked to provide more detail about some of the information he believed to be missing from the Ministers' response, and did so in a letter dated 11 November 2008.
10. Dr McDowell was also asked whether he wished to challenge the Ministers' decision to withhold some information from one of the documents provided, under section 38(1)(b) of FOISA. Dr McDowell confirmed that he did not seek to challenge this decision.



## Scope of the investigation

11. In his request for review (dated 19 August 2008), Dr McDowell queried the absence of the following categories of information from the Ministers' response to his request:
  - a) Internal communications between 25 January and 12 February 2008 (the period between receipt of a letter from his MSP and allocation of his case to an official in the Older People and Age Team).
  - b) The Older People's Care post Jarvie Report (7/11/07) and Lothian Older People – brief for SNP.
  - c) Emails sent after 19 February 2008.
  - d) Documentary material sent by NHS Lothian to the Scottish Government regarding a complaint and claim relating to an NHS patient.
  - e) Ministerial or private office communications (none were included with the response).
  - f) Information relating to actions or events after meeting with officials on 20 May 2008, such as communications between the Scottish Government Health Directorate and Lothian Health Board.
12. Information from category (b) was provided to Dr McDowell after the Ministers had considered his request for review. The Commissioner's investigation and decision has focussed on the remaining five categories of information identified by Dr McDowell.
13. The Ministers were asked about the extent and nature of the searches carried out, and were asked specifically about the information in paragraph 11 above (with the exception of category (b)).
14. In relation to category (a), the Ministers advised that "Dr McDowell's letter" (which is understood to mean the letter sent by Sarah Boyack MSP on behalf of Dr McDowell) was received on 25 January 2008 and entered the automated Ministerial Correspondence System. The Ministers explained that until a case is accepted by an official for reply, no internal communication would be created; the automated system in itself would not have generated any information about the case until it was accepted and a response prepared.



15. In relation to emails exchanged after 19 February 2008 (category (c) above), the Ministers were asked about the absence of emails or other correspondence relating to the meeting between Dr McDowell and the Scottish Government Health Directorate. In their initial submission to the Commissioner (11 October 2008), the Ministers advised that no formal briefing was prepared for this meeting; the investigating officer then asked whether any informal briefing was provided to the officials attending the meeting, and whether the searches carried out in relation to Dr McDowell's request would have retrieved any emails relating to (for instance) the revised meeting arrangements. The Ministers confirmed that the searches had included both the information comprising the official record and information which did not form part of the official record but was held within the Scottish Government, such as emails held locally by officials.
16. In relation to information exchanged between NHS Lothian and the Scottish Government (category (d) above), Dr McDowell drew attention to wording in one of the emails supplied to him which indicated that the message had been forwarded from another party, implying that further correspondence might be held. This matter was raised with the Ministers, who advised that they could add nothing to their previous reply, and confirmed that all officials involved in the case had been asked to provide all relevant information which, without exception, had been passed to Dr McDowell.
17. The Ministers were also asked whether there had been any communication with NHS Lothian following the meeting between Dr McDowell and the Scottish Government officials, to advise NHS Lothian of the outcome of the meeting (this relates to category (f) above). The Ministers advised that all matters referred to by Dr McDowell would have been investigated independently by NHS Lothian and not at the request of the Scottish Government Health Directorates. It was pointed out that the notes of the meeting held on 20 May 2008 indicate that one of the participants had requested that NHS Lothian should be made aware of the meeting and its outcome. On behalf of the Ministers, further enquiries were made among Scottish Government officials and NHS Lothian were contacted again on this matter. NHS Lothian confirmed that it held nothing in connection with Dr McDowell's case other than the chain of emails already supplied to him (emails dating from 18 and 19 February 2008).
18. In relation to the absence of Ministerial or private office communications (category (e) above), confirmation was given that the Minister had not been provided with a note of the meeting with Dr McDowell.
19. The Ministers were also asked whether the option of a public inquiry was, at any stage, actively considered by officials or the Minister; if so, it might be expected that some recorded information about this proposal would exist. However, the Ministers advised that because existing policies were considered sufficient (to address the issues that a public inquiry might have examined), no information was generated regarding the possibility of a public inquiry.



## Commissioner's analysis and findings

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20. In coming to a decision on this matter, the Commissioner has consider all of the submissions made to him by both Dr McDowell and the Ministers and is satisfied that no matter of relevance has been overlooked.
21. The Commissioner has required the Ministers to address each of the points raised by Dr McDowell in his application, and has made inquiries about information likely to be generated by the internal processes of the Scottish Government.
22. The Commissioner accepts that under the procedure for dealing with Ministerial correspondence, as outlined above, no internal correspondence would have been generated in the period between receipt and logging of Sarah Boyack's letter, and the allocation of the case on 12 February 2008.
23. In relation to the other points raised by Dr McDowell, the Commissioner is satisfied that the searches carried out by the Ministers were sufficient to have retrieved any correspondence or other recorded information covered by the terms of Dr McDowell's request, and that no further information remains to be provided by the Ministers.
24. The Commissioner accepts that Dr McDowell's application raised reasonable questions about the range of information provided in response to his request and the extent of the searches carried out by the Ministers. The Commissioner finds that the wording used in the Ministers' initial response to Dr McDowell ("the letters and papers which are eligible for release under your request") may have led Dr McDowell to conclude that other information was held which was not deemed eligible for release. However, after investigation, the Commissioner is satisfied that Dr McDowell has been provided with all information covered by the terms of his request, and finds that the Ministers complied with Part 1 of FOISA in responding to Dr McDowell's request.

## DECISION

The Commissioner finds that the Scottish Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Dr McDowell.

Decision 156/2008  
Dr Bill McDowell  
and the Scottish Ministers



## Appeal

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Should either Dr McDowell 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.

**Margaret Keyse**  
**Head of Investigations**  
**11 December 2008**



## 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.