



Scottish Information  
Commissioner

**Decision 225/2006 Mr Edward Milne and the Chief  
Constable of Tayside Police**

*Copies of Memoranda of Understanding*

**Applicant: Edward Milne  
Authority: Tayside Police  
Case No: 200502263  
Decision Date: 5 December 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 225/2006 – Mr Edward Milne and the Chief Constable of Tayside Police

***Request for Memoranda of Understanding between Tayside Police and various other bodies – information not held – information considered not relevant and in any event withheld***

### Relevant Statutory Provisions and other Sources

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Freedom of Information (Scotland) Act 2002 sections 17(1) (Notice that information is not held) and 21(1) (Review by Scottish public authority).

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 Milne requested a copy of memoranda of understanding (MOUs) between Tayside Police (the Police) and the Law Society; the Lord Advocate, Trading Standards (including Environmental and Consumer Protection), the Office of Fair Trading, and Procurators Fiscal. The Police replied by sending a copy of the MOU that existed. The Police also stated that the other MOUs requested did not exist and therefore were not held by the Police in terms of section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA). Finally, the Police stated, with reference to one document that, although it was not a MOU it might have been construed as such and, in any event, claimed it exempt under section 35 of FOISA.

Following an investigation, the Commissioner found that Tayside Police dealt with Mr Milne's request for MOUs between the Police and the Law Society, the Lord Advocate, the Office of Fair Trading, and Procurators Fiscal in accordance with Part 1 of FOISA, in that it applied section 17(1) of FOISA as the information was not held.

The Commissioner found that Tayside Police failed to deal with Mr Milne's request for review in accordance with Part 1 of FOISA, in that it failed to respond to a request for review in terms of section 21(1) as the review was not conducted within the twenty working days specified in that subsection.



## Background

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1. On 18 March 2005 the Police received a request from Mr Milne for copies of memoranda of understanding (MOUs) between the Police and:
  - i. The Law Society
  - ii. The Lord Advocate
  - iii. Trading Standards (including Environmental and Consumer Protection)
  - iv. The Office of Fair Trading
  - v. Procurators Fiscal
2. On 28 April 2005 the Police responded to the applicant's request stating that, in relation to items a), b), d) and e) above, no such MOU existed and therefore none could be provided, citing section 17 of FOISA and issuing a notice in terms of that section to the effect that they did not hold the information.
3. The Police advised, in relation to item b) above, that the Lord Advocate issued guidelines on the investigation and prosecution of crime in Scotland. Although not a MOU and not asked for by the applicant, the Police in any event claimed it exempt under section 35 of FOISA as the disclosure of the information would, or would likely to, prejudice substantially the detection and prosecution of crime. Accordingly, the Police gave Mr Milne a refusal notice in terms of section 16 of FOISA.
4. In relation to item c) above, the Police supplied a copy of a MOU between Tayside Police and Dundee City Council, Environmental and Consumer Protection Department, relating to the investigation of noise nuisance.
5. On 4 May 2005 Mr Milne requested a review of the Police decision stating that he was not content with it.
6. On 6 June 2005, having had no response to the request for review of 4 May 2005, Mr Milne sent a second request for review to the Police.
7. On 12 July 2005 Mr Milne applied to the Scottish Information Commissioner for a decision stating that he was not content with the lack of response to his requests for review and questioning whether the Police had dealt with his information request in accordance with FOISA.



8. The case was allocated to an investigating officer and validated by establishing that Mr Milne had made a valid information request to a Scottish public authority and had applied to the Commissioner only after asking the public authority to review its response to his request.

## **The Investigation**

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9. My investigating officer contacted the Police for its comments on the application and for further information in relation to this case, as required by section 49(3)(a) of FOISA. The Police responded on 1 September 2005.

### **Submissions by the Police**

10. The Police stated that a search had been conducted for any MOU between Tayside Police and the Law Society of Scotland and for any MOU between the Association of Chief Police Officers in Scotland (ACPOS) and the Law Society of Scotland. None had been found.
11. The Police established that a MOU between the Association of Chief Police Officers (England and Wales) (ACPO) and the Law Society (of England and Wales) existed. A copy of the MOU was supplied to Mr Milne with the Police response of 28 April 2005.
12. The Police stated that research had found that there existed no MOUs between the Police and the Lord Advocate, the Office of Fair Trading, or Procurators Fiscal. There were, however, instructions (generally described as guidelines) issued by the Lord Advocate to the police and Procurators Fiscal on conduct of criminal investigations and criminal prosecutions in Scotland. These documents were not considered to match the applicant's request in terms of description or content and therefore this information was not supplied.
13. The Police added that, were the guidelines to be construed as MOUs, they would seek to apply section 35(1)(a), (b) and (c) of FOISA to the information as their disclosure under the Act would, or would be likely to, prejudice substantially the prevention or detection of crime; the apprehension or prosecution of offenders; or the administration of justice.
14. The Police stated that the lack of response to the applicant's requests for review was explained by a breakdown of the administration system dealing with requests for review. The Police confirmed that the process had been reviewed and no further lapses were anticipated.



15. The Police acceded to my investigating officer's request to undertake a formal review of the original decision dated 28 April 2005.
16. This review was completed 21 October 2005 and the outcome of the review upheld the original decision of 28 April 2005 – items a), b), d) and e) were not held in terms of section 17 of FOISA. The review also upheld the decision that the exemptions applied to the guidelines under section 35(a), (b) and (c) of FOISA.

### **Submissions by the applicant**

17. Mr Milne stated that he was not satisfied with the response from the Police and their failure to conduct a review of his request, despite two requests for review. He confirmed that he remained dissatisfied following the outcome of the review.
18. In a separate submission Mr Milne stated that he *had* requested the Lord Advocate's Guidelines which relate to the investigation and prosecution of crime in Scotland and disputed the application of section 35 of FOISA to the information withheld.

### **The Commissioner's Analysis and Findings**

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19. This case raises three distinct issues:-
  - 1) The claim by the Police that section 17 of FOISA applies to the items a), b), d) and e) in paragraph 1, above.
  - 2) Whether the Police were correct in discounting the Lord Advocate's guidelines as a MOU for the purposes of Mr Milne's request.
  - 3) If the Police were incorrect in their interpretation of the guidelines' relevance to Mr Milne's request (i.e. assuming they do in fact constitute MOUs), consideration of the application of section 35(a), (b) and (c) of FOISA by the Police to that information.
20. I will consider the Police failure to respond the applicant's requests for review in the section below, entitled "Technical breaches of FOISA".

### **Issue 1 - Section 17(1)**



21. Having viewed the information supplied by the Police and considered the submissions made by the Police and the applicant, I am satisfied that no MOUs exist between Tayside Police and the Law Society, the Lord Advocate, the Office of Fair Trading, or Procurators Fiscal. I am satisfied with the steps taken by the Police to establish this.
22. I am therefore satisfied that the items a), b), d) and e) of paragraph 1, requested by Mr Milne are not held by the Police in terms of section 17(1) of FOISA.

## **Issue 2 – Relevance of Lord Advocate’s guidelines**

23. The Lord Advocate’s guidelines consist of clear step-by-step instructions to police and Procurators Fiscal on how to apply the law to particular circumstances (for example, the investigation and reporting of road traffic deaths or racist crimes) and police procedure to be carried out in order to satisfy the legal requirements for admissibility of evidence for the apprehension or prosecution of offenders (for example, identification parades or breath tests.)
24. These differ substantially from a memorandum of understanding which may be described as a document which details agreed principles and structures that underlie relations between two or more parties on areas of mutual interest. An MOU may also set out specifics such as the obligations and responsibilities, rights and privileges of those parties. It is usually considered to be a statement of intent rather than a set of instructions or methodology. In any event, it will be the subject of mutual agreement
25. Having viewed copies of six specific examples of guidelines issued by the Lord Advocate to police and procurators fiscal on the conduct of criminal investigations and prosecutions in Scotland, I am satisfied that these are clearly directive in nature, setting out requirements laid down by the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, and meet the description of instructions rather than memoranda of understanding.
26. I am therefore satisfied that the Lord Advocate’s guidelines do not fall within the definition of MOUs in terms of description or content and that the Police were correct in not considering these as part of the applicant’s original request.
27. Turning to the applicant’s assertion that he did request the Lord Advocate’s guidelines, I can find nothing in the evidence submitted to me by either the Police or the applicant to support this.



28. Throughout the correspondence between Mr Milne and the Police the only term used to describe the information is “Memorandum of Understanding”. At no point in his request or request for review does the applicant alter the description of the information he requires. The applicant’s first reference to the Lord Advocate’s guidelines as being the information he in fact required was in a submission to my Office dated 15 July 2005.

### **Issue 3 – Section 35(a), (b) and (c)**

29. Having satisfied myself that the Lord Advocate’s guidelines are not MOUs, and were not required to be supplied as part of the applicant’s original request, I need not consider the application of exemptions under section 35 of FOISA. The applicant is, of course, perfectly entitled to make a fresh request of the Police for the Lord Advocate’s guidelines, in which connection I note that the Police, in dealing with Mr Milne’s request for review, invited him to clarify which particular set or sets of guidelines he was looking for. Given the multiplicity of guidelines issued by the Lord Advocate, this would appear to be a good idea if the Police are to be able to respond in a considered manner to any future request.

### **Technical breaches of FOISA**

30. From the points summarised in paragraphs 5 to 7 of this decision, it is clear that the Police did not respond to the applicant’s request for review within the twenty working days stipulated in section 21(1) of FOISA.
31. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review.
32. I am satisfied that the lack of response to the applicant’s letters, dated 4 May and 6 June 2005, constituted a breach of section 21(1) as the Police did not respond to the applicant’s request for review within the timescale specified by FOISA.
33. I accept, however, that there was no deliberate attempt on the part of the Police to deny the applicant the right to review. Rather, there was a breakdown in the administration system for review within the Police. I am advised that this has since been remedied and that no further lapses are anticipated.
34. In carrying out a formal review of the applicant’s request on 21 October 2005, I am satisfied that the Police have now fulfilled the requirements of section 21(1) of FOISA.



## **Decision**

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I find that Tayside Police dealt with Mr Milne's request for MOUs between the Police and the Law Society, the Lord Advocate, the Office of Fair Trading, and Procurators Fiscal in accordance with Part 1 of FOISA, in that it applied section 17 of FOISA as the information was not held.

I find that Tayside Police failed to deal with Mr Milne's requirement for review in accordance with Part 1 of FOISA, in that it failed to respond to a requirement for review in terms of section 21(1) as the review was not conducted within twenty working days of the requirement for review being received.

I require no remedial action from Tayside Police.

## **Appeal**

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Should either Mr Milne or Tayside Police wish to appeal against my 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**5 December 2006**





## APPENDIX

### Relevant Statutory Provisions

#### Freedom of Information (Scotland) Act 2002

##### **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.

##### **21 Review by Scottish public authority**

- (1) ... a Scottish public authority receiving a requirement for review must ... comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.