



Scottish Information  
Commissioner

**Decision 223/2006 – Mr Sandy Smith and the Chief  
Constable of Fife Constabulary**

*Evidential breath equipment used by Fife Constabulary*

**Applicant: Mr Sandy Smith  
Authority: Chief Constable of Fife Constabulary  
Case No: 200503019  
Decision Date: 5 December 2006**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 223/2006 - Mr Sandy Smith and the Chief Constable of Fife Constabulary**

### ***Evidential breath equipment used by Fife Constabulary***

#### **Relevant Statutory Provisions and other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA) Sections 20 (Requirement for review); section 16(1) (Refusal of requests).

The relevant text from each of these provisions is reproduced in Appendix I of this decision. The Appendix forms part of this decision.

#### **Facts**

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Mr Smith submitted 16 requests for information to Fife Constabulary (the Police). He was dissatisfied with the response received, and requested that the Police review their handling of 7 of those requests. An application was subsequently made to the Commissioner in relation to one request (Question 11).

The Commissioner found that the Police responded to Mr Smith's request for review appropriately in terms of FOISA. The Commissioner also found that the Police committed a technical breach of section 16(1) of FOISA in their handling of Mr Smith's initial request.

#### **Background**

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1. On 14 August 2005, Mr Smith submitted sixteen requests under FOISA for information relating to the evidential breath instruments used by the Police.



2. The Police issued a response to these requests on 9 September 2006. In this response, the Police provided information in relation to a number of Mr Smith's questions. In relation to others (including question 11), the Police referred Mr Smith to the equipment manufacturer (Intoximeters UK Ltd) for information while, in relation to one question, the Police sought clarification before a response could be provided.
3. Mr Smith submitted a request for review on 11 September 2005. This request for review expressed dissatisfaction with the Police's handling of 7 of his 16 information requests, including question 11.
4. The Police responded to this request for review on 13 October 2005. This response provided information in relation to six of Mr Smith's seven disputed requests. In relation to the seventh, the Police again requested further information before a response could be provided.
5. On 18 October 2005 Mr Smith submitted an application to me for a decision and this was allocated to an investigating officer. Mr Smith's application was validated by establishing that he had made a valid information request to a Scottish public authority (the Police) and had appealed to me only after asking the public authority to review its response to his request.

## The Investigation

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6. Mr Smith's application to my Office suggested that he was dissatisfied only with the Police's response to question 11 of his original request. Question 11 sought copies of:  
  
*"All the maintenance records/certification held on each instrument."*
7. In its response to Mr Smith's request for review, the Police provided Mr Smith with a single copy of a Certificate of Calibration. Mr Smith indicated that he was dissatisfied with this response for the reason that he was aware that the Police maintained seven evidential breath units, and that his request was worded in such a way to seek access to all records and certificates held in relation to those seven units.



8. My investigating officer contacted Mr Smith to confirm that his dissatisfaction related only to the Police's handling of question 11. Mr Smith's response confirmed that his application was made on the basis of the Police's response to Question 11 alone. In this correspondence, Mr Smith also stated that he acknowledged that the instruments in question may be several years old, and that he would be happy if the Police were only to supply the necessary records from January 2002.
9. My investigating officer contacted the Police to seek their comments in relation to this case, as required by section 49(3)(a) of FOISA. This correspondence also set out the nature of Mr Smith's dissatisfaction, and informed the Police that Mr Smith's stated intention in making his request was to obtain information on all seven units.
10. In response, the Police confirmed that, following the correspondence from my investigating officer, it was now fully aware of the intention of Mr Smith's request. The Police then offered to provide copies of all relevant calibration certificates and engineers' reports it held to Mr Smith in an attempt to settle the case.
11. My investigating officer wrote to Mr Smith to notify him of this settlement proposal. In response, Mr Smith indicated that he would be happy to receive the proposed information, but stated that he would also wish to pursue his application for a decision, on the basis that he was unhappy with the way in which the Police had dealt with his information request. Mr Smith indicated that he believed that the Police had dealt with his request in an obstructive manner, and stated that he was unhappy with the fact that the Police had originally referred him to Intoximeter UK Ltd to obtain the information requested under Question 11. Mr Smith also stated that he was aware that a conversation took place between the Police and a neighbouring police force with regard to his request and, as a result, he suggested that Police should have been fully aware of the specific information sought. Mr Smith also stated that the requested information had been provided promptly and accurately from all other forces he had approached.
12. The Police then supplied Mr Smith with relevant information falling within the scope of his request. In the accompanying correspondence, the Police stated that this information comprised all certificates and reports that the Police held, and informed Mr Smith that the Police was only obliged to retain those certificates which were either current, or related to outstanding cases.
13. On receipt of this information, Mr Smith wrote to the Police to express his dissatisfaction with aspects of the information provided. The Police subsequently issued a response in relation to Mr Smith's concerns.



## The Commissioner's Analysis and Findings

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14. While I note that Mr Smith has expressed dissatisfaction with the response provided by the Police to his initial request in relation to Question 11 (which referred him to Intoximeter UK Ltd), the key issue which I must consider is whether the Police's subsequent response to Mr Smith's request for review was appropriate. The purpose of the review stage in FOISA is to provide authorities with the opportunity to reconsider their handling of an initial information request, in order to ensure that they are satisfied that the request has been dealt with fully in accordance with FOISA, prior to an application being made to me (if necessary).
15. An authority may well commit breaches of FOISA with regard to its handling of an initial request, and, as Commissioner, I may comment on any such breaches when a related appeal is brought before me. However, where an authority has subsequently revised its decision and dealt with the request appropriately during the review stage, that authority will generally be deemed to have complied with FOISA in its handling of the request.
16. With regard to this case, the Police have argued in their submissions that Mr Smith's request for review was worded in such a way as to fundamentally alter the nature of the information request made under Question 11. The Police have suggested that, as a result, their response to that request for review should be considered to be appropriate, in that it fully addressed the concerns raised by Mr Smith in his request for review.
17. As set out above, Mr Smith's initial request in relation to Question 11 sought, with regard to the Police's evidential breath equipment, "*All the maintenance records/certification held on each instrument*".
18. Mr Smith's request for review in relation to Question 11 was, however, worded as follows:

***"Freedom of Information Act***

*I refer to your letter of 9 September 2005 wish to have a review carried out on the following items that appear in your letter...*

*...Number 11 Do Fife Constabulary not have a copy of a certificate to show that the intoximeter is calibrated to UK standards Could I have a copy of the certificate."*



19. The Police states that this request for review was considered by a separate reviewing officer, whose role it was to independently assess the Police's initial decision. The Police suggests that that this officer concluded that, based on the reason for dissatisfaction set out in Mr Smith's request for review, an appropriate response would be the provision of a single "*copy of a certificate*".
20. The Police therefore asserted their view that Mr Smith's request for review appeared to narrow the scope of his original request substantially, and its subsequent provision of a single copy of a single calibration certificate was appropriate in terms of that narrowed scope.
21. The Police also pointed out that, following receipt of correspondence from my Office which provided further details of Mr Smith's dissatisfaction, it subsequently supplied Mr Smith with a copy of all relevant information held, and followed this up with further clarification when it became clear that Mr Smith was dissatisfied with aspects of it.
22. Details of the information which must be contained in any request for review is set out in section 20(3) of FOISA (Requirement for review of refusal etc.). This sets out that a request for review must specify both the initial request for information to which the requirement for review relates, and the matter which gives rise to the applicant's dissatisfaction with the original response.
23. The request for review submitted by Mr Smith can be considered to contain an indirect reference to his original request, in that it referred back to the Police's original response to that request. With regard to the matter which gave rise to his dissatisfaction with that response, however, the Police have pointed out that Mr Smith's request for review indicated that he was dissatisfied that he had not received "*a copy of a certificate*".
24. Having considered the submissions made by the Police, I am of the view that the Police's response to Mr Smith's request for review should be considered to be appropriate in the particular circumstances of this case. Section 20(3)(c)(ii) of FOISA requires that an applicant specify the matter which gives rise to their dissatisfaction when submitting a requirement for review, and the Police are correct in arguing that Mr Smith's requirement for review can be considered to narrow the scope of his request to the provision of a single certificate.
25. Had Mr Smith's request for review accurately set out the precise nature of his dissatisfaction (as subsequently communicated to this Office), then it can be presumed that the Police's review would have been conducted on that basis. However, the Police have argued that the wording of Mr Smith's request for review led their review officer to review Mr Smith's request on a far more limited basis.



26. Given the wording of Mr Smith's request for review, I have no option but to agree that the response issued by the Police was appropriate. While it is clear that Mr Smith's original request sought broader information, his request for review was worded in such a way as to imply that his dissatisfaction resulted only from the fact that a single copy of a certificate had not been provided.
27. It might be argued that, under section 15 of FOISA (Duty to provide advice and assistance) the Police should have sought clarification from Mr Smith where they were uncertain with regard to the scope of his request for review. However, it is clear from the Police's submissions that the reviewing officer handling this case saw no need to do so and I am inclined in the circumstances to accept that it was unnecessary. Had Mr Smith's request for review referred back more clearly to the terms of his initial request, then this might have prompted the reviewing officer to seek such clarification. However, the omission of a clear reference back to his original request served only to increase the likelihood of his request for review being misinterpreted.
28. I am therefore of the view that the Police's response to Mr Smith's request for review in relation to question 11 was reasonable and appropriate within the context of that request.
29. As I am of the view that the Police responded to Mr Smith's request for review appropriately, it does not fall within the scope of this investigation to consider any concerns Mr Smith may have had with regard to the information which was subsequently provided to him following the intervention of my Office. Indeed, it should be noted that, given that I consider that the Police responded to Mr Smith's request for review appropriately, such material will have been provided outwith the scope of the FOISA request under consideration.
30. In his application to me, Mr Smith has also expressed his dissatisfaction with the fact that the Police initially referred him to Intoximeter UK Ltd in order to obtain the information requested under Question 11, as opposed to providing the information directly. However, as stated above, Section 20 of FOISA provides applicants with a right of redress in relation to such concerns, and Mr Smith subsequently exercised this right through the submission of his request for review of 11 September 2005.
31. The Police did, however, commit a technical breach of FOISA in their handling of Mr Smith's initial request. Specifically, I note that the Police have stated in its submissions to this Office that they considered that they "*had not applied any exemptions throughout this case*". On the other hand, it is clear that by referring Mr Smith to Intoximeter (which is not a Scottish public authority and therefore has no obligations under FOISA) rather than responding to his request, they were in effect refusing that request.



32. The Police should note that, if a request is to be refused, then they are required to set out, in terms of Part 1 of FOISA, why that request is being refused. This may, for example, be because the information is not held by the authority (section 17), because the cost of responding to the request is excessive (section 12) or because the information is subject to an exemption (section 2). In this case, relevant information was clearly held by the Police, and the cost of responding was not excessive. The Police should, therefore, have set out, in accordance with section 16(1) of FOISA, the reasons why they considered that Mr Smith's request should be refused, specifying the exemption(s) they considered to apply.
33. In failing to do so, I find that the Police failed with regard to their obligations under section 16(1) of FOISA.
34. Mr Smith has also correctly pointed out, in his submissions to my Office, that the Police's response to his initial request stated that any request for review should be made to the Police within 40 days of his receipt of its response, as opposed to the 40 *working* days required by section 20(5) of FOISA. I would strongly advise that the Police review their correspondence in future in order to ensure that all information regarding FOISA timescales and procedures is presented accurately.
35. Mr Smith has also stated that he is aware that the Police discussed the processing of his application with a neighbouring police force, and has indicated his belief that the fact that this discussion took place suggests that the Police were fully aware of what was required to respond to his requests.
36. However, while authorities may routinely engage in discussions on freedom of information matters, it is ultimately the responsibility of each authority to independently interpret and respond to the requests they receive, as it is that authority which will be accountable should their response place them in breach of FOISA. As set out above, I have concluded that, in relation to this case, the Police's response to Mr Smith's request for review was appropriate in terms of the relevant requirements of FOISA, and I therefore conclude that the Police acted in accordance with Part 1 of FOISA in dealing with Mr Smith's request.
37. Finally, I wish to conclude by commenting briefly on the fact that this case clearly highlights the importance of clarity and the precision on the part of applicants when drafting both initial requests and requests for review for submission under FOISA. In general, an authority will be deemed to have responded to an information request appropriately where it can be demonstrated by the authority that its response was made in good faith, and was based on a reasonable interpretation of the applicant's request (seeking clarification wherever it is deemed necessary).





38. In relation to this case, I cannot help but conclude that way in which the request for review was drafted contributed significantly to the subsequent problems which arose. I would recommend, therefore, that applicants take care in drafting requests for information and review with the requirements of FOISA in mind, in order to ensure that the problems such as those which have arisen in this case are not repeated. In this connection, I would remind the public generally of the resources and advice available from my Office, and also that it will often be helpful to discuss a proposed request with the authority concerned before submitting it.

## **Decision**

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I find that Fife Constabulary (the Police) responded to Mr Smith's request for review appropriately in terms of Part I the Freedom of Information (Scotland) Act 2002 (FOISA).

I also find, however, that the Police committed a technical breach of section 16(1) of FOISA in their failure to respond appropriately to Mr Smith's initial request.

I do not require the Police to take any remedial action in relation to this failure.

## **Appeal**

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Should either Mr Smith or the Chief Constable of Fife Constabulary 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 notice.

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



## APPENDIX

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### Relevant Statutory Provisions

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

##### 20 Requirement for review of refusal etc.

(1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.

(2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".

(3) A requirement for review must-

(a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

(b) state the name of the applicant and an address for correspondence; and

(c) specify-

(i) the request for information to which the requirement for review relates; and

(ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

##### 16 Refusal of request

(1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-



- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

(2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

(3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.