

# Decision Notice



Decision 260/2013 Mr David Milne and the Chief Constable of the Police  
Service of Scotland

Alleged criminal offence at Menie Estate

Reference No: 201301139  
Decision Date: 19 November 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

On 3 March 2013, Mr Milne asked the Chief Constable of Grampian Police (the Police) for a range of information relating to an alleged incident at the Menie Estate, Balmedie in October 2010. The Police disclosed some information to Mr Milne, informed him that they did not hold some of the information, and informed him that other information was exempt from disclosure under exemptions in sections 34(1) and 38(1)(b) of FOISA.

Following an investigation, the Commissioner found that the Police had generally dealt with Mr Milne's request for information in accordance with Part 1 of FOISA. However, the Commissioner was not satisfied that the Police had responded appropriately to one of Mr Milne's requests in accordance with Part 1 of FOISA. She required the Police to provide an alternative response to Mr Milne.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1)(a) (Time for compliance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority); 34(1)(a)(i) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

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.

Note: Mr Milne's information request was made to the Chief Constable of Grampian Police. However, the decision has been issued in the name of the Chief Constable of the Police Service of Scotland as the statutory successor to the Chief Constable of Grampian Police under the Police and Fire Reform (Scotland) Act 2012. For convenience, both Chief Constables are referred to in this decision as "the Police".

## Background

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1. On 3 March 2013, Suzanne Kelly, acting on behalf of Mr Milne, emailed the Police requesting a range of information in connection with an alleged incident at the Menie Estate in Balmedie in October 2010. Any reference to correspondence with Mr Milne in this decision is a reference to correspondence with Ms Kelly acting on Mr Milne's behalf.



2. In his application to the Commissioner, Mr Milne did not express dissatisfaction with the Police's response to some of his requests; therefore, these responses have not been considered by the Commissioner. In addition, Mr Milne reduced the number of requests to be considered by the Commissioner during the course of the investigation. Those requests which are the subject of this decision are reproduced below along with their original numbering.
- (1) Please provide any and all relevant correspondence and notes created by the attending officers, the police force solicitor who decided there was not going to be a prosecution, the Trump Organization and its employees, local authorities and councillors concerning this specific incident.
  - (2) Please specify under what procedure, law, statutes and discretionary powers your solicitor decided not to pursue a prosecution.
  - (4) If it was not solely the police solicitor who was involved in the decision not to prosecute, then please advise who else was involved, and supply copies of any notes or correspondence on this matter and parties involved in deciding not to prosecute.
  - (5) Please confirm what laws and statutes would be broken when someone enters someone else's property, causes damage, removes fencing, and removes other goods.
  - (6) Grampian Police previously contacted me with their stated policy for policing the Menie Estate, which was:-  
  
*"...in Spring 2009, following the announcement of a number of strategic economic and infrastructure developments, Grampian Police established a short life Critical Incident Preparation Group (CIPG).  
  
"... a generic, local strategy, relevant to Menie Estate (was) developed. This has been determined as; Maximise safety; minimise disruption; facilitate lawful protest; deter, detect, detain and report those responsible for unlawful behaviour."*
    - (a) In light of this stated policy, does the police consider that its handling of the incident at the Milne property in October 2010 fits in with the strategy of "...detect, detain, and report those responsible for unlawful behaviour"?
    - (b) If the policy was not applied to the trespass, theft and damage at the Milne property, then whose decision was it that the policy did not apply?
  - (7) Mr Milne may want the theft case re-opened and a prosecution brought; how should he proceed?
  - (11) How many claims/complaints of vandalism, theft, trespass and/or damage made by the Trump Organization and/or its employees (since 2010) resulted in "police cautions" being handed out?



3. The Police responded on 29 March 2013. The Police disclosed some information to Mr Milne and provided explanations and answers to some requests. The Police gave notice (in terms of section 17(1) of FOISA) that certain information was not held by them. The Police stated that certain information was exempt from disclosure under the exemptions in sections 34(1)(a)(i), 34(1)(b) and 38(1)(b) of FOISA. The Police also stated that they were not prepared to respond to certain parts of the request until Mr Milne had provided a mandate stating that Ms Kelly was authorised to act on his behalf.
4. Mr Milne subsequently provided confirmation to the Police that Ms Kelly was acting on his behalf.
5. On 11 April 2013, Mr Milne wrote to the Police requesting a review of their decision. Mr Milne did not accept that certain information was exempt from disclosure, disagreed that certain information was not held by the Police and stated that certain requests had not been answered.
6. The Police notified Mr Milne of the outcome of their review on 10 May 2013. The Police indicated that they now considered some information could be disclosed. However, as this information comprised Mr Milne's own personal data, the Police indicated that they intended contacting him separately seeking his views on the disclosure of his own personal data.
7. On 10 May 2013, the Police wrote to Mr Milne seeking his permission to disclose his personal data in response to the request.
8. On 12 May 2013, Mr Milne wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. On 20 May 2013, Mr Milne emailed the Police informing them that he was content for his personal data to be disclosed in response to his request.
10. On 19 June 2013, the Police disclosed some additional information to Mr Milne relating to certain aspects of request (1).
11. The application of 12 May 2013 was validated by establishing that Mr Milne made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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12. On 22 May 2013, the Police were notified in writing that an application had been received from Mr Milne, and were asked to provide the Commissioner with any information withheld from him. The Police responded with the information requested and the case was then allocated to an investigating officer.



13. The investigating officer subsequently contacted the Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested. They were also asked to explain how some information was recorded and how they had retrieved some of the information sought by Mr Milne.
14. The Police responded on 10 September 2013, providing submissions on why they considered some of the requested information was exempt from disclosure in terms of sections 34(1)(a)(i) and (b) and 38(1)(b) of FOISA. The Police also provided additional comments on their handling of certain aspects of the request.

## Commissioner's analysis and findings

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15. 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 Milne and the Police. She is satisfied that no matter of relevance has been overlooked.

### **Section 34(1) of FOISA - Investigations by Scottish public authorities and proceedings arising out of such investigations - Requests (1) and (4)**

16. The Police withheld the information sought by Mr Milne in requests (1) and (4) under the exemptions in section 34(1)(a)(i) and 34(1)(b) of FOISA.
17. Section 34(1)(a)(i) provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence. Section 34(1)(b) provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
18. The exemptions in sections 34 are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
19. The Police submitted that the withheld information was held in files of investigations into allegations of criminal conduct which were carried out under the statutory obligations of the Police (Scotland) Act 1967.



20. In this case, having considered the submissions presented by the Police, the Commissioner accepts that they held the withheld information for the purposes of an investigation covered by section 34(1)(a)(i) and 34(1)(b) of FOISA. Consequently, she must conclude that the exemptions apply.

*Public interest test*

21. As noted above, the exemptions in section 34 are subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors favouring both disclosure of the information and the maintenance of the relevant exemption. The Commissioner must then carry out a balancing exercise. Unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, she must order the information to be disclosed (unless she considers that the information can be withheld under one or more other exemptions in FOISA).
22. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public".
23. The Police stated that the disclosure of the requested information would entail releasing information gathered for the purposes of an investigation, which would involve details of investigatory processes and other issues considered as a matter of course during an investigation. In their view, there could be a public interest in the public having a greater awareness of how police investigations are carried out and, therefore, the ability to make a judgement on their effectiveness. However, they considered this had to be balanced with ensuring the Police are not hampered in their investigations of alleged criminal offences. In the Police's view, disclosure of the information would reveal processes showing how allegations are investigated which could prove useful to criminals and those intending committing a crime.
24. The Police argued that, although Mr Milne had a personal interest in this matter, there was no significant wider public interest. They considered Mr Milne's personal interest had been satisfied by the disclosure to him of his personal data which had been gathered as part of the investigation. The Police took the view that this provided sufficient information regarding the matters considered as part of the investigation and its outcome.
25. Finally, the Police stated their conviction that the disclosure of the contents of the investigation file would be detrimental to investigatory and criminal justice processes.



26. Mr Milne argued that the public interest in the events at the Menie estate had been evidenced by a petition signed by over 18,500 people<sup>1</sup>. Mr Milne also submitted that the refusal to disclose the information added to a public perception that policing at the Menie Estate was not being carried out even-handedly. Mr Milne was convinced that it was in the public's best interests to know about many aspects of the incident and why the Police handled it in the way they did.
27. In this case, the Commissioner accepts that there is a general public interest in disclosure of the information under consideration, so that the actions of the Police might be scrutinised, and to contribute to transparency and accountability. She also recognises that some public interest would be served by disclosure since it would aid understanding of the police investigation of the case.
28. The Commissioner also recognises that Mr Milne, for personal reasons, has a strong interest in the disclosure of the information. Additionally, given the significant media coverage that events at the Menie Estate have attracted, she recognises that there is a wider public interest in providing some insight into police methods and general policies applied in relation to policing in the area.
29. As mentioned in previous decisions, the Commissioner also recognises that the inclusion of section 34 in FOISA reflects an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in ensuring that the various investigatory processes making up the criminal justice system are not hampered in any way.
30. The Commissioner accepts that there are strong arguments supporting the view that it is in the public interest to preserve the confidentiality of information held in relation to the investigation of a crime or potential crime. She considers that, in general, it will not be in the public interest to disclose information if this would undermine the confidence of the public in that part of the justice system or the confidence of police officers gathering information for such investigations.
31. In this case, the Commissioner considers there to be a stronger public interest in maintaining the exemptions contained in section 34 of FOISA in relation to the withheld information. She considers that there is considerable public interest in ensuring that the steps taken by the police to conduct a thorough investigation and the procedures which are followed during an investigation should be protected.
32. The Commissioner believes it is strongly in the public interest that the public maintains confidence in the criminal justice system. She considers that disclosure under FOISA of the information sought by Mr Milne would hamper the Police in their investigation of alleged criminal offences by revealing the processes followed in such investigations. The Commissioner does not consider it would be in the public interest to do so.

<sup>1</sup> <http://you.38degrees.org.uk/petitions/public-inquiry-into-handling-of-the-trump-resort>



33. Having considered carefully the particular circumstances of this case, the Commissioner has concluded that the public interest in disclosure of the information in question is not sufficiently significant to outweigh that in withholding the information. The Commissioner therefore concludes that the Police were correct in their application of section 34(1)(a)(i) and (b) of FOISA to withhold the requested information.
34. Having reached this conclusion, she is not required to consider the application of section 38(1)(b) of FOISA which was also applied by the Police to documents (1) and (4).

### **Section 17 of FOISA - Information not held - Requests (2) and (6)**

35. Under section 17(1) of FOISA, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect.
36. In this case, the Police informed Mr Milne that they held no information falling within the scope of request (2). This was on the basis that the decision not to pursue a prosecution was not made by their solicitor, but by the officers investigating the matter, who considered that the incident was not a criminal matter.
37. In their submissions to the Commissioner, the Police confirmed that the final decision as to whether a crime report should be marked as “no crime” lay with the enquiry officers.
38. The Commissioner notes that this request asked specifically for the basis on which the police solicitor decided not to pursue a prosecution. The Commissioner is satisfied that, although advice may be provided to officers by a police solicitor, the decision on how to proceed is the responsibility of the investigating officers. Accordingly, the Commissioner is satisfied that the explanation provided to Mr Milne by the Police was accurate and the Police were correct to give notice in terms of section 17(1) of FOISA that the information sought in request (2) was not held by them.
39. In relation to request (6), the Police also gave notice to Mr Milne in terms of section 17(1) of FOISA, that they held no recorded information which would answer this request. The Police informed Mr Milne that, where requested information is not held, there is no obligation on an authority under FOISA to create such information.
40. In his request for review, Mr Milne did not express dissatisfaction with the Police’s response to part (a) of the request. In relation to part (b), he reiterated that he wished to know who had taken the decision that the policy to which he referred did not apply in this case.
41. In their submissions to the Commissioner, the Police reiterated that a decision had been taken by the enquiry officers in this case to mark the crime report as “no crime” and consequently, no report had been submitted by them to the Procurator Fiscal.



42. The Commissioner has considered the terms of Mr Milne's request and the response from the Police. In the Commissioner's view, a conclusion reached by police officers that no crime had been committed in a specific instance does not equate to a decision that a specified policy should not apply. The Commissioner disagrees with Mr Milne's view that a decision had been taken to disapply a specified policy and is satisfied that the Police were correct to notify Mr Milne, in terms of section 17(1) of FOISA, that they did not hold information falling within the scope of request (6).

#### **Response to request (5)**

43. In their response to request (5), the Police explained to Mr Milne that each case was dealt with based on the individual circumstances of the case and it was not possible to provide a response to his hypothetical question without more details being known.
44. Mr Milne submitted that this was not a hypothetical question and that the Police ought to possess a definition of what constitutes theft. Mr Milne considered that the Police must have applied criteria when declining to pursue the criminal complaint in this case and in making an accusation of theft in another similar case.
45. The Commissioner has considered Mr Milne's submissions carefully and notes his view that the Police ought to hold recorded information which would enable them to respond to this request. Nonetheless, the Commissioner agrees with the Police that this was essentially a hypothetical question rather than a request for recorded information. In the Commissioner's view, the question posed by Mr Milne was broad and could apply to many different situations. She concurs with the Police that it would not be possible to provide an accurate response without knowing the precise details of an individual allegation.

#### **Response to request (7)**

46. In their response to this request, the Police provided advice to Mr Milne about what he should do if any new information or evidence had come to light since the original incident.
47. In the Commissioner's view, request (7) is simply a request for advice and is not a request for recorded information under section 1 of FOISA. Accordingly, the Commissioner has concluded that the Police did not breach Part 1 of FOISA by responding to this request in the way that they did.

#### **Response to request (11)**

48. In their response to this request, the Police informed Mr Milne that no police cautions had been issued.
49. In his request for review, Mr Milne provided the Police with a link to, and quote from, a newspaper article from July 2010. This suggested that a formal police warning had been issued to an individual in 2010. Mr Milne expressed dissatisfaction with the Police's assertion that no such cautions had been issued.



50. In their submissions to the Commissioner, the Police stated that they had interpreted the request seeking information “since 2010” as meaning from 1 January 2011. The Police provided the Commissioner with additional background information concerning the matter reported in the newspaper article, which the Commissioner is unable to summarise here without danger of breaching section 45 of FOISA.
51. In the Commissioner’s view, the Police have incorrectly interpreted the request as one seeking information only from 1 January 2011. Whilst the Commissioner accepts that the phrase “since 2010” can be interpreted in this way, she considers it can also be interpreted as meaning inclusive of 2010. In this case, within his request for review, Mr Milne included a reference to a newspaper article in 2010. In the Commissioner’s view, this clearly indicates that Mr Milne intended his request to include information from 2010.
52. Consequently, the Commissioner has concluded that the Police failed to comply with section 1(1) of FOISA in responding to request (11). She now requires the Police to respond to Mr Milne, the response to be inclusive of information in 2010.

#### **Compliance with timescales**

53. In his application to the Commissioner, Mr Milne expressed dissatisfaction that the Police had taken the maximum length of time to respond to his request and requirement for review.
54. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case. This means that the Police were required to respond to Mr Milne’s request no later than 1 April 2013. (29 March 2013 was a specified bank holiday and therefore did not count as a “working day” for the purposes of FOISA.)
55. In this case, the Police responded to Mr Milne on 29 March 2013. The Commissioner therefore finds that they complied with the timescale allowed in section 10(1) of FOISA in responding to Mr Milne’s request.
56. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case. This means that the Police were required to respond to Mr Milne’s requirement for review no later than 10 May 2013 (6 May 2013 was a specified bank holiday and therefore did not count as a “working day” for the purposes of FOISA).
57. In this case, the Police responded to Mr Milne’s requirement for review on 10 May 2013. The Commissioner finds therefore that they complied with the timescale allowed in section 21(1) of FOISA in responding to Mr Milne’s requirement for review.
58. In both cases, the 20 working days are the maximum period allowed. However, the requests from Mr Milne are wide ranging and the Commissioner considers that the time taken by the Police to respond to Mr Milne’s requests and requirement for review was reasonable.



## DECISION

The Commissioner finds that the Chief Constable of the Police Service of Scotland (the Police) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Milne.

The Commissioner finds that the Police were entitled to withhold the information sought in requests (1) and (4) under the exemptions in section 34(1)(a)(i) and 34(1)(b) of FOISA.

The Commissioner finds that the Police were correct to give notice that the information sought in requests (2) and (6) was not held by them.

The Commissioner finds that the Police were entitled to respond to requests (5) and (7) by treating them as a hypothetical question and request for advice respectively, and were not required to respond in terms of FOISA.

The Commissioner also finds that the Police responded to Mr Milne's request and requirement for review within the respective timescales laid down by sections 10(1) and 21(1) of FOISA.

However, the Commissioner finds that the Police incorrectly interpreted request (11) as one seeking information from 1 January 2011. She therefore requires the Police to respond to request (11) by including information from 1 January 2010 by 3 January 2014.

## Appeal

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Should either Mr Milne or the Chief Constable of the Police Service of Scotland 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.

**Margaret Keyse**  
**Head of Enforcement**  
**19 November 2013**



## 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- ...



**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) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

**34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
- (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
    - (i) should be prosecuted for an offence; or

...

- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...