

August 2010

MEMORANDUM OF UNDERSTANDING

between

THE POLICE COMPLAINTS COMMISSIONER FOR SCOTLAND

and

THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Purposes of this Memorandum

1. The purposes of this memorandum are to:
 - (a) confirm the steps that the Police Complaints Commissioner for Scotland ("PCCS") should take in the event that any complaint about a police officer he receives, either at the outset of his review, or subsequently, contains a statement which consists of or includes an allegation of an act or omission which constitutes a crime.
 - (b) ensure that the PCCS does not in any way, in the course of discharging his functions, prejudice any criminal investigation by the Crown Office and Procurator Fiscal Service ("COPFS") while at the same time ensuring that the PCCS is able to perform his statutory functions.

Role of the PCCS

2. The PCCS was created by section 33(1) of the Police, Public Order and Criminal Justice (Scotland) Act 2006 ("the 2006 Act"). The PCCS has the functions set out in sections 34 – 47 of, and Schedule 4 to, the 2006 Act. The PCCS assumed his complaint handling functions on 1 April 2007.
3. In terms of section 35(1) of the 2006 Act, the PCCS may investigate complaints from members of the public and their representatives about the manner in which complaints about the police have been handled by the police service¹. Such an investigation is referred to as a "complaint handling review".

¹ "police service" for the purposes of this memorandum means the 8 Scottish territorial police forces, Police Authorities in Scotland, Joint Police Boards in Scotland, the Scottish Crime and Drug Enforcement Agency, the Scottish Police Services Authority and all employees thereof. As at the date of signing of this memorandum, it also includes by formal agreement the British Transport Police, the United Kingdom Border Agency, the Civil Nuclear Constabulary, the Ministry of Defence Police and the Serious and Organised Crime Agency.

4. In addition, the PCCS, in terms of section 42 of the 2006 Act has a number of general functions. The PCCS must secure the maintenance by the PCCS and by the police service of suitable complaint handling arrangements. This includes ensuring that such arrangements are efficient and effective, contain and manifest an appropriate degree of independence and are adhered to. The PCCS must also keep under review all such complaint handling arrangements and make recommendations for the amendment of such arrangements, if deemed necessary or desirable.
5. In terms of section 35(3) and (4) of the 2006 Act, on the completion of a complaint handling review, the PCCS must send a report of his findings to the relevant police body. The PCCS must also inform the complainer and, if identified, the person subject to the complaint, of his conclusions and any action he proposes to take.
6. In terms of section 35(5) of the 2006 Act the duties imposed on the PCCS by sections 35(3) and (4) are subject to such exceptions as may be prescribed by regulations made by the Scottish Ministers. However, the Scottish Ministers are to make such regulations only to the extent that they consider it necessary for the purpose of, among other things:
 - (a) preventing the premature or inappropriate disclosure of information that is relevant to any criminal proceedings or prospective criminal proceedings; or
 - (b) preventing the disclosure of information in any circumstances in which it has been determined in accordance with the regulations that its non-disclosure is for the purposes of the prevention or detection of crime or the apprehension or prosecution of offenders.

Role of the COPFS

7. The COPFS is the sole prosecuting authority in Scotland, which, in the public interest, ensures that all crimes reported to the Procurator Fiscal are investigated and that effective and consistent use is made of the range of options for proceedings.
8. COPFS has the sole discretion for determining in any case whether there is sufficient evidence in a case and whether that evidence is of a quality which justifies further investigation or the institution of proceedings in respect of that matter.

Examples in the 2006 Act where there is a potential interaction between the work of the PCCS and the COPFS

9. Although, section 35(1) of the 2006 Act gives the PCCS power to review the manner in which complaints about the police have been handled by the police, section 34(3)(b) excludes from the definition of a relevant complaint "a statement which consists of or includes an allegation of an act or omission which constitutes a crime".

10. Such complaints remain a matter for the COPFS and will be investigated by the police service for and on behalf of the COPFS before being reported to COPFS.

Practical procedures relating to referrals by the PCCS to the COPFS

11. The COPFS will treat the PCCS as one of its "reporting agencies".
12. If the PCCS receives a complaint about a police officer or member of police staff which in his view consists of or includes an allegation of an act or omission which constitutes a crime, the PCCS will advise the Deputy Crown Agent of the allegation in writing as soon as is practicable. The PCCS may also notify the complainer and the police body concerned that it has taken this step.
13. If, during the carrying out of a complaint handling review or reconsideration direction², information becomes available to the PCCS from which it can reasonably be inferred that a criminal offence may have been committed, the PCCS will advise the Deputy Crown Agent of this in writing as soon as is practicable. The PCCS may also advise the complainer and the police body concerned that it has taken this step.
14. If it becomes clear to the PCCS that a complaint to the PCCS inferring criminality has already been the subject of investigation by the police and the COPFS, and that the COPFS has considered the matter and advised the police of a determination, the PCCS will advise the complainer that the PCCS will not consider that aspect of the complaint. In such circumstances, the PCCS need not report the allegation to the Deputy Crown Agent under paragraph 12 above.
15. Notwithstanding a referral to the COPFS under paragraph 12 above, the PCCS may continue to review the manner in which the police body has dealt with any non-criminal complaints which the complainer may also have made. However, the PCCS will only issue the report of its complaint handling review to the complainer and relevant police body if the PCCS and COPFS are satisfied that this will not prejudice COPFS's consideration of the referral or any criminal proceedings arising from it.
16. Notwithstanding a referral to the COPFS under paragraph 13 above, the PCCS may continue to review the manner in which the police body has dealt with any non-criminal complaints which the complainer may also have made. However, the PCCS will only issue the report of its complaint handling review to the complainer and relevant police body if the PCCS and COPFS are satisfied that this will not prejudice COPFS's consideration of the referral or any criminal proceedings arising from it.
17. Where the COPFS is involved in criminal proceedings or prospective criminal proceedings and becomes aware that the PCCS is also dealing with non-criminal complaints about the police relating to the same incident(s), the COPFS will inform

² In terms of section 35(7) of the 2006 Act

the PCCS of its involvement in the case. This will ensure that the PCCS is in a position to adhere to the terms of paragraphs 15 and 16 above.

18. Should the COPFS require sight of the PCCS' files, the APF will make a request in writing specifying the particular documents s/he requires to see. The PCCS will then consider the request, taking into account the provisions of section 46 of the 2006 Act and, in particular, section 46(5). Where the PCCS intends to withhold a requested document from the APF he shall not do so without discussing the matter with the APF or the Deputy Crown Agent.

General

19. The PCCS, as a "listed authority" in terms of Schedule 1 to the Freedom of Information (Scotland) Act 2002, and as a "data controller" in terms of the Data Protection Act 1998, is subject to the provisions of these Acts and will discharge his functions in accordance with these Acts and any other relevant legislation.
20. This memorandum of understanding may, by mutual discussion and agreement be amended to meet the needs of the PCCS and the COPFS as their working relationship develops.
21. Representatives of the COPFS and PCCS will meet annually on a date to be agreed to discuss the operation of this memorandum and issues of mutual interest and any requirement to amend the terms of this memorandum of understanding.
22. Nothing in this memorandum of understanding prevents the PCCS and COPFS adopting alternative practical arrangements should circumstances dictate or should this be necessary in light of any regulations passed by the Scottish Ministers under the 2006 Act.
23. The undersigned agree to work together in furtherance of the provisions of this memorandum of understanding.