

Report of a Complaint Handling Review in relation to Grampian Joint Police Board

under section 35(1) of the Police Public Order
and Criminal Justice (Scotland) Act 2006

Summary and Key Findings

The applicant's complaint arises from an officer of Grampian Police disclosing personal information to a third party. The Deputy Chief Constable decided not to pursue misconduct proceedings against the officer concerned and the applicant thereafter complained to Grampian Joint Police Board about this decision.

The Commissioner found that the complaint was not handled reasonably by Grampian Joint Police Board but, for the reasons given in the report, made no recommendation in this connection.

The Commissioner's role

Section 35 of the Police Public Order and Criminal Justice (Scotland) Act ("the Act") gives the Commissioner the power to examine the manner in which a policing body has dealt with a "relevant" complaint, as defined in the Act.

The Commissioner is independent of the police service and performs his functions in a fair and impartial manner. Before considering a complaint, the Commissioner's office obtains all papers held by the policing body against which the complaint has been made. These papers are considered alongside information provided by the applicant. The Commissioner then assesses whether the policing body's handling of the complaint was reasonable in all the circumstances. The Commissioner will look at the entire handling process, from the initial investigation by the policing body to the final response issued to the applicant. Among the factors which the Commissioner takes into account are the following:

- whether the policing body's response to the complaint is supported by all material information available;
- whether in dealing with the complaint the policing body has adhered to all relevant policies, procedures and legal provisions;
- where the complaint has resulted in the policing body identifying measures necessary to improve its service, whether these measures are adequate and have been implemented;
- whether the policing body's response to the complaint is adequately reasoned; and
- whether the policing body has communicated with the applicant in a reasonable manner.

Background

In late September 2002, the applicant's son was convicted of rape. A crown witness subsequently reported to the police that, following the trial, the applicant had attended at her home and place of work. The witness declined to make a formal complaint about the matter.

Detective Inspector A subsequently submitted a report to Superintendent B concerning the alleged actions of the applicant. In his report, Detective Inspector A asked that consideration be given for a suitable officer, unconnected to the enquiry into the applicant's son, to contact the applicant to advise against any further contact with civilian witnesses.

Superintendent B reached the view that, had the witness formally complained about the applicant, the matter would have been investigated as a potential breach of the peace. Consequently, Superintendent B contacted Solicitor C (who he thought represented the applicant) advising him that the witnesses did not wish to be contacted by the applicant.

On 18 August 2003, the applicant made a number of complaints concerning the way in which Grampian Police conducted the investigation into the allegations against her son. Included in these was a complaint that Superintendent B had acted unprofessionally in issuing the applicant with a "friendly warning" through a solicitor who did not act for her.

On 16 December 2003, Deputy Chief Constable D requested that Northern Constabulary undertake an independent investigation into the applicant's complaints.

Following Northern Constabulary's investigation, the then Deputy Chief Constable of Northern Constabulary (Deputy Chief Constable E) sent a report of his findings to Deputy Chief Constable

D. The report made 19 recommendations intended to improve procedures within Grampian Police. The recommendations were accepted in full by Grampian Police.

On 31 January 2005, Deputy Chief Constable F formally responded to the applicant's complaints. The complaint against Superintendent B was found not to be substantiated. Deputy Chief Constable E provided the following response in this connection:

"Superintendent [B]'s efforts were intended to be conciliatory and, given all the circumstances, I believe they were reasonable and proportionate. I am sorry that they were not perceived as such by you."

On 22 February 2005, the applicant e-mailed Grampian Police asking the following question:

"Have the Investigating Team concluded that [Superintendent B]'s actions do not breach the statutory provisions of the Data Protection Act 1998? Or did they not consider such an issue?"

On 12 April 2005, the applicant wrote to Grampian Police stating the following:

"The Information Commissioner has informed me that [Superintendent B] has breached The Data Protection Act and therefore regard the answer to my complaint as totally unacceptable."

During this time, the applicant applied to the Information Commissioner's Office ("ICO") in connection with her belief that Superintendent B's actions had breached the Data Protection Act 1998 ("DPA"). On 23 August 2005, the ICO wrote to the applicant stating that her complaint had been upheld and that Superintendent B's disclosure was "unlikely to have been made in compliance with the first data protection principle." However, the ICO also found that the applicant had suffered no adverse effects as a result of Superintendent B's actions and did not recommend any further action.

Following the conclusion of her complaint about the police, the applicant requested that Her Majesty's Inspectorate of Constabulary for Scotland ("HMICS") undertake a review of the manner in which her complaints had been dealt with. In September 2005, HMICS reached the following conclusion:

"... Grampian Police has, by arranging for an external force enquiry, facilitated a thorough, fair and impartial investigation into this complaint. This adhered to relevant regulations, standard procedures and, allowing for the extent and complexity of investigation, reasonable timescales ... In addition, the DCC has reasonably determined that formal misconduct proceedings against any of the officers involved in the case are not merited."

In respect of her complaint against Superintendent B, the applicant wrote to HMICS on 11 November 2005 stating the following:

"... I cannot understand how the investigating team did not even consider this was a breach of the Data Protection Act as they obviously knew about the Act as they had to ask our son's permission so that they could approach his new solicitor ... to obtain information concerning him and the case ... What action do Grampian Police plan in taking in regard to their Head of their Professional Standards in regard to his breach of the Data Protection Act?"

On 24 October 2006, the applicant wrote to Deputy Chief Constable F asking what "disciplinary course of action" had been taken against Superintendent B following the ICO's determination.

On 8 December 2006, the applicant wrote to Deputy Chief Constable asking again if any action had been taken regarding Superintendent B's "unlawful action" and whether the matter had been reported to the Procurator Fiscal.

The applicant continued to write to HMICS seeking its view on whether the breach of the DPA constituted misconduct in terms of the Police (Conduct) (Scotland) Regulations 1996. On 20 March 2007, HMICS provided the following response:

"I do not believe that consideration of [the ICO's letter of 23 August 2005] would have led to any recommendation by HMIC for Grampian Police to re-examine the circumstances of this breach with a view to possible disciplinary or misconduct proceedings."

Following further correspondence, HMICS provided the following further response:

"... For the avoidance of doubt I can confirm that HMIC views the force's decision in this matter as reasonable given the particular circumstances and the fact that the officer involved appeared to have acted in good faith and that there was no malicious intent in his actions

... If it helps your consideration of this matter I would point out that an honest mistake does not necessarily infer misconduct."

On 25 July 2008, the applicant made the following comments within her letter to the Chief Constable of Grampian Police:

"... Contrary to [Deputy Chief Constable F's] misplaced assertions, he has acted on an ultra vires basis by informing me that he had the discretionary power to decide whether misconduct had occurred. How a person with a Degree in Law could reach such a conclusion is beyond belief, unless he was perhaps purposefully trying to cover-up for a fellow senior police officer? To my knowledge, police officers do not have any form of derogation from the Laws of Scotland and are not 'above the law' regardless of where you are positioned within the Grampian Police Force mechanistic structure. For avoidance of any doubt whatsoever, the [Police (Conduct) (Scotland) Regulations 1996] very clearly states that misconduct has occurred when it is likely to bring discredit on the police force. I sincerely hope that you consider this unlawful act, resulting in the publication of this decision in the public domain, as bringing 'discredit' to Grampian Police Force."

The applicant also claimed that Superintendent B had "breached a confidence" and asked Deputy Chief Constable F to consider whether Superintendent B's actions had been "oppressive or improper."

On 20 November 2008, the applicant wrote to the Cabinet Secretary for Justice asking the following question:

"If a Police Officer is found to have breached the Data Protection Act by the Information Commissioner, does this constitute misconduct as defined by The Police (Conduct) (Scotland) Regulations?"

On 17 December 2008, the Cabinet Secretary for Justice responded as follows:

"... If a Police Officer is found to have breached the Data Protection Act this may constitute misconduct as defined by the Police (Conduct) (Scotland) Regulations. Where there is a misconduct issue to be addressed the procedures are set out in the Police (Conduct) (Scotland) Regulations 1996. As set out above, all matters of conduct are a matter for Chief Constables and it would not be appropriate for me to comment."

On 4 April 2009, the applicant wrote to Grampian Joint Police Board (“the Board”) in the following terms:

“It is a matter of public record that I have lodged a complaint against [Superintendent B] ... found by the Independent Information Commissioner’s Office to have breached the Data Protection Act 1998. This unlawful act has not been recognised by the force as being ‘misconduct’ as clearly defined within the Police Regulations.

... The application of such ‘misconduct’ is not to be exercised on a discretionary basis as intimated by the former [Deputy Chief Constable F]. [Grampian Police] are operationally responsible for adherence with such legislation as confirmed by the Justice Minister. Can the Board and [the Commissioner’s office] please investigate why [Grampian Police] are not complying with the Laws of Scotland regulating police complaints and misconduct.”

The Complaints

Based upon the contents of the application form, the correspondence received from the applicant and the information received from Grampian Joint Police Board, the Commissioner has identified a single complaint, namely that Deputy Chief Constable F misinterpreted the Police (Conduct) (Scotland) Regulations 1996.

The Commissioner’s Review

This section sets out the Commissioner’s views on the manner in which the applicant’s complaint was handled by the Board.

On 19 February 2010, the applicant wrote to the Board complaining about Grampian Police’s interpretation of the Police (Conduct) (Scotland) Regulations 1996 (“the conduct regulations”). The applicant stated the following in the letter:

“I have brought to your attention that Grampian Police Force employee [Superintendent B], Head of Professional Standards had been found guilty by the Independent Commissioner’s Office (ICO) of breaching the Data Protection Act 1998 by disclosing to another party without my knowledge or consent my personal data. No disciplinary action has been taken by the Senior Management Team colleagues of the Force on the basis that they have a ‘discretionary’ power whether to deal with such matters or not.

My interpretation of the Police (Conduct) (Scotland) Regulations Act [sic] are that the Senior Management Team within the Force have no locus to do so – they are there to ‘operationally’ comply with the legislative requirements, not make this up as they go along”

Internal Handling

On 22 March 2010, the Depute Clerk to the Board submitted a report to the sub-committee with responsibility for dealing with complaints about senior officers. The report described the complaint as follows:

“The complaint which forms the subject of this Report appears to relate to the Force’s complaint handling responsibilities ...

[The applicant] states that the Information Commissioner found that Superintendent [B] breached the [Data Protection Act 1998] by releasing information relating to [the applicant], and that as a consequence, he is guilty of misconduct in terms of the Police (Conduct) (Scotland) Regulations 1996. As such, Grampian Police should have taken disciplinary

action against Superintendent [B]. By not doing so, the Force (i.e. the Chief Constable and/or Deputy Chief Constable) exercised a discretion which it does not have.”

The Deputy Clerk made the following further comments in the report:

“The disclosure consisted of Superintendent [B] informing a Solicitor of a set of circumstances in an effort to prevent a breach of the peace. The matter was subject to a Criminal Investigation and Misconduct Investigation by Northern Constabulary and was considered by the Area Procurator Fiscal and the Deputy Chief Constable respectively. The outcome of these investigations was that there were no grounds for criminal proceedings against Superintendent [B]. Nor were there any matters of conduct to be pursued.”

The Depute Clerk advised the sub-committee that it had the following options in relation to the complaint:

“(i) To conclude that it cannot draw a reasonable inference from the complaint that misconduct on the part of a chief officer of Grampian Police has been committed, or

(ii) To conclude that disciplinary action is taken against a chief officer of Grampian Police, in respect to the allegations made in this case.”

On 30 April 2010, the Clerk to the Board issued the applicant with the following response to the complaint:

“The Board having considered your complaint resolved that it could not draw a reasonable inference from your complaint that a disciplinary offence or misconduct had been committed.

In relation to the issues around the Data Protection Act, the Board noted that this matter had been considered on several occasions and as part of external reviews. The Board is satisfied that no further action is necessary, a view which was put forward by the Information Commissioner at the time of your original complaint in respect of the breach of the Data Protection Act. In addition, the Board has no power to investigate the actions of [Superintendent B] as he is not a chief officer. As such, it would be a matter for the internal disciplinary procedures of Grampian Police.”

Consideration

The Commissioner notes that the external investigation carried out by Northern Constabulary found no evidence that the actions of Superintendent B constituted misconduct, as defined within the conduct regulations. This view was affirmed by Deputy Chief Constable F who believed that Superintendent B's actions were “reasonable and proportionate.” HMICS found this decision to be reasonable.

However, subsequent to these views being expressed, the ICO found that Superintendent B had breached the DPA. According to the applicant, by virtue of his having been found to have breached the DPA, Superintendent B is automatically guilty of misconduct. In this connection, the applicant believes that Superintendent B's actions amount to a breach of confidence as set out in the conduct regulations.

Following the ICO's decision, the applicant wrote to Grampian Police asking that it revisit its decision that Superintendent B was not guilty of misconduct. The applicant complains that, in his interpretation of the conduct regulations, Deputy Chief Constable F acted “ultra vires” (i.e. beyond the scope of his powers).

Although the Depute Clerk to the Board correctly identified the applicant's complaint, the response provided by the Clerk is cursory and fails to explain why the sub-committee found as it did. Consequently, the Commissioner does not consider that this complaint was dealt with in a reasonable manner. As the Commissioner has stated on many previous occasions, it is not sufficient merely to advise a complainer of the decision that has been made in respect of their complaints. Policing bodies must provide complainers with sufficient information properly to inform them of how key conclusions were reached in relation to their complaints. Only then can decisions be subject to appropriate scrutiny.

Regulation 4 of, and Schedule 1 to, the conduct regulations together define "misconduct". Regulation 4 states the following:

"For the purposes of these regulations, an act or omission of a constable shall amount to misconduct on the part of the constable if it falls within any of the kinds of conduct described in Schedule 1."

Paragraph 1 of Schedule 1 to the regulations states the following:

"Conduct likely to bring discredit on the police force or service, including-

(a) insubordination or incivility;

(b) corrupt practice;

(c) breach of confidence;

(d) drinking any intoxicating liquor while on duty or being unfit for duty through such liquor;

(e) suppression of complaints;

(f) wilful or careless damage to, or loss of, property belonging to the police authority or within the care of the police;

(e) disorderly conduct; or

(f) acting towards, or treating, any person in an oppressive or improper manner."

As noted above, the applicant believes that, given the terms of paragraph 1(c), Deputy Chief Constable F had no discretion in deciding whether Superintendent B's actions amounted to misconduct.

In the Commissioner's view, irrespective of whether Superintendent B's actions can be classed as a breach of confidence, the initial question to be determined by the Deputy Chief Constable is whether Superintendent D's actions were likely to bring discredit on Grampian Police or the police service in general. Given the circumstances of the disclosure, the Commissioner does not believe that Superintendent D's actions can be regarded as likely to have done so. Specifically, the Commissioner does not consider that in disclosing the information Superintendent D displayed criminal intent or that he otherwise acted maliciously, or in some other way that was likely to bring discredit upon Grampian Police or the wider police service.

The Commissioner considers that the following passage within HMICS's response to the complaint conveys the position well:

"... If it helps your consideration of this matter I would point out that an honest mistake does not necessarily infer misconduct."

Accordingly, in the Commissioner's view it is not the case that by disclosing the information Superintendent B was "automatically" guilty of misconduct. For the reasons given, the Commissioner does not consider that, in deciding not to pursue misconduct proceedings against Superintendent D, the Deputy Chief Constable misinterpreted the conduct regulations or acted beyond his powers in this connection.

Given that the substance of the complaint is addressed above, the Commissioner does not consider it necessary to recommend further action by the Board.

Conclusions, Recommendations and Learning

In the Commissioner's view, the manner in which this complaint was dealt with by Grampian Joint Police Board was not reasonable. However, for the reasons given, the Commissioner makes no recommendation in this connection.

Learning Point

Police authorities should provide complainers with sufficient information to properly inform them as to how key conclusions were reached in the determination of their complaints.

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