

Report of a Complaint Handling Review in relation to Dumfries and Galloway Constabulary

under section 35(1) of the Police Public Order

Summary and Key Findings

The applicant is currently serving a sentence within a Scottish prison. His complaints arise from an alleged theft of documents from his cell by prison staff.

Of the two complaints considered, the Commissioner found that both were dealt with in a reasonable manner. No recommendations were made 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

On 19 December 2009 Mr A contacted Dumfries and Galloway Constabulary ("D&G") on behalf of the applicant to report the alleged theft of documents from the applicant's cell by prison staff. Constable B and Sergeant C visited the applicant and found that the alleged stolen material consisted of print-outs from the prison computer which had been given to the applicant by a member of prison staff. The applicant also alleged that during the search of his cell legally privileged correspondence was read by prison staff.

Further enquiries established that the applicant had on a number of previous occasions requested from the Scottish Prison Service the information contained in the print-outs, but that these requests had been refused. The applicant subsequently asked another member of staff for this information and on this occasion the information was given to him. The member of staff who gave the applicant the print outs did so without the authority of the prison governor who, under the terms of the Data Protection Act 1998, was the data controller. When prison staff became aware of this a search of the applicant's cell was conducted and the print-outs were confiscated.

Enquiries by D&G found that prison staff are entitled to search cells and remove items if deemed appropriate. In this case the print-outs were found to be the property of the Scottish Prison Service. The police enquiry concluded that no criminal offence had been committed.

The Complaints

Based on the contents of the application form, the correspondence received from the applicant, and the information obtained from D&G, the Commissioner has identified the following complaints:

(1) that the police enquiry did not deal with the material facts or refer the case to the Procurator Fiscal; and

(2) that the applicant was not advised of the conclusions of the police investigation.

The Commissioner's Review

This section sets out the Commissioner's views on the manner in which the complaints were handled by D&G. Each complaint is set out in turn and is followed by details of D&G's handling of it and the Commissioner's views on this.

Complaint 1: Alleged inadequate investigation

The applicant described this complaint as follows in his letter to D&G of 26 April 2010:

"I wish to complain about the handling of the police investigation of the unlawful confiscation and destruction of my personal property by prison officers at [prison].

There is a set procedure regulating allegations of criminality – to my knowledge this matter has not been referred to the Procurator Fiscal's Office for their consideration as part of the 'Separation of Powers' process in accordance with established procedure ...

The investigation has not dealt with the material facts, as there is readily available evidence to support my position that criminality has taken place."

The applicant also described other areas of dissatisfaction concerning the alleged treatment he had received within the prison in question.

Internal Handling

Inspector D was appointed to investigate the applicant's complaints. On 17 May 2010, Inspector D contacted Scottish Prison Service's Freedom of Information Officer concerning the information confiscated. Inspector D states that he was informed that the provision of this information to the applicant amounted to a breach of policy and might have resulted in prison safety being compromised. Inspector D established, however, that the applicant would have been entitled to certain information under the Freedom of Information (Scotland) Act 2002 had he paid the appropriate fee to the prison. Inspector D also considered the rules and legislation concerning the removal of property and the reading of privileged correspondence.

Inspector D submitted a report on his findings to the Head of Professional Standards on 11 June 2010. In respect of this complaint, Inspector D concluded as follows:

"[The complaint] may appear to relate to criminal acts however, under various statutes which the Prison adheres to under the guidance and instruction from the Governor, there are certain occasions where Prison staff are perfectly entitled to search cells and removed items there from ... In the letter provided to [the applicant] I have referred to various legislation which I consider to show that the Prison service acted entirely appropriately and, as a consequence, there has been no criminality conducted ..."

On 11 June 2010 Inspector D met with the applicant to provide him with the conclusions of his enquiry. Inspector D states that he explained to the applicant that he was content that no acts of criminality had occurred and that the property removed from his cell was removed legitimately by prison staff under the instruction of the prison governor. On the same date Inspector D wrote to the applicant regarding this complaint, stating:

“Following receipt of your complaint, [Constable B] made appointments to interview prison staff and sought advice from the Freedom of Information Officer as to the legitimacy of the information in your possession. Based on the information provided it was considered that there was no substance to your complaint and that prison staff had acted entirely appropriately.

... I have reviewed the circumstances and would like to draw your attention to the following legislation:-

The Data Protection Act 1998

To obtain information held electronically on one’s respect, is not an offence if the information is obtained legitimately. I understand that you enquired on a number of occasions for a print-out held within the Prison Computer system commonly referred to as a PR2. In essence the PR2 is the property of the Scottish Prison Service and should not have been supplied to you

I believe the information itself would have been available if the correct procedures had been followed under the Freedom of Information Act and the appropriate fee had been paid by you. However, in the format it was provided, it may have led to a breach of the functionality of the prison service computer system.

... Unless the information which you had in your possession (PR2) was provided with the consent of the Data Controller, who in this instance is the Prison Governor, then you have no lawful right to possess it. I understand that this information was not provided to you by the Prison Governor; therefore, it was unlawfully obtained regardless of whether a Prison Officer supplied it to you.” [emphasis in original]

In relation to the applicant’s allegation that his personal correspondence was read during the search of his cell, Inspector D commented as follows:

“The Prisons and Young Offenders Institutions (Scotland) Rules 2006, provide, under certain circumstances, Prison staff have the legal right to search correspondence whether sent or received from a Legal Advisor ...

Searching of prisoners’ property and cells

109 – (1) *Any item of property belonging to a prisoner may be searched by an officer at any time.*

(2) *the room or cell of every prisoner, including any item of property kept in it, shall be searched at such times as the Governor considers necessary.*

My interpretation therefore is that the Prison officers under the instruction of the Prison Governor are entitled to search any documentation found in your cell which includes Solicitor/client confidentiality material, under certain circumstances.” [emphasis in original]

Consideration

The applicant’s main area of concern is that the police investigation did not deal “with the material facts” and that a report was not submitted to the Procurator Fiscal. In his correspondence to the Commissioner’s office, the applicant alleged that Scottish Prison Service staff had breached guidance and protocol in relation to the provision and destruction of information to which he believes he was entitled. The applicant believes that these alleged breaches support his position that criminality has occurred and that Constable B’s investigation did not take these facts into account.

In relation to reporting the matter to the Procurator Fiscal, D&G must first have been satisfied that there was evidence of criminality on the part of prison staff. In this connection, Constable B found that the officer who provided the information to the applicant had no authority to do so and that the format in which the information had been given “may have led to a breach of the functionality of the prison service computer system”. Consequently, the information was retrieved by prison staff. Put simply, Constable B found that the information in question belonged to the Scottish Prison Service, not the applicant, and that prison staff were therefore entitled to recover this.

Whilst the applicant claims to have a right to the property, the Commissioner believes that the applicant is essentially complaining about the way in which prison rules and guidance have been implemented. However, simply because the applicant disagrees with the explanations he has been given does not make the actions of prison staff criminal. In this connection, the Commissioner considers that Constable B’s conclusion that no criminality occurred was reasonable. It follows that the decision not to report the matter to the Procurator Fiscal was justified. In any event, the applicant’s complaint is effectively one regarding a failure on the part of prison staff to follow procedure. In these circumstances, the appropriate avenue for the applicant is to challenge the actions of the prison officers through the Scottish Prison Service’s complaints system.

In respect of the applicant’s concern that privileged correspondence was read by prison staff, Constable B found that, under the Prisons and Young Offenders Institutions (Scotland) Rules 2006 (“the Rules”), prison staff were entitled to search the applicant’s cell and that, under certain circumstances, are entitled to read privileged correspondence. Having had regard to the Rules, the Commissioner can confirm that prison staff may, in exceptional circumstances, read privileged correspondence. Again, however, the applicant’s complaint is effectively one against prison staff for failing to follow procedure. The remedy open to the applicant in these circumstances is set out above.

Complaint 2: Update upon conclusion of investigation

The applicant stated the following in his letter to D&G of 26 April 2010:

“The officers handling the police investigation have not advised me of the conclusions of the investigation.”

Internal Handling

On 11 June 2010 Inspector D met with the applicant and told him the following in respect of this complaint:

“I then moved to the issue of him not being provided with a verbal update by the enquiry Officer, [Constable B], and had to accept that under the circumstances it would have been more appropriate for the Officer to have taken the time to personally attend and inform him of the rest of his enquiry. I apologised to [the applicant] on behalf of Dumfries and Galloway Constabulary and advised him that I had personally spoken to the Officer concerned.”

Inspector D stated the following in his letter of 11 June 2010:

“[Constable B], having concluded his investigation, notified the Prison who [sic], on his behalf, informed you of the result of the enquiry. I appreciate that you are unhappy with this arrangement and I apologise if it has caused you any unnecessary concern.”

Consideration

This complaint was substantiated by D&G, Constable B given advice and the applicant provided with a written and verbal apology from D&G.

The Commissioner considers that this was an appropriate response to this complaint and as such D&G has handled the complaint in a reasonable manner.

Conclusions, Recommendations and Learning

Complaints 1 and 2

In the Commissioner's view, the manner in which these complaints were dealt with by D&G was reasonable. Accordingly no further action is required in this connection.

John McNeill
Police Complaints Commissioner for Scotland

Hamilton House
Caird Park
Hamilton
ML3 0QA