

Report of a Complaint Handling Review in relation to Lothian and Borders Police

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

Summary and Key Findings

The applicant's complaints arise from his involvement in a protest on a bus.

Of the three complaints reviewed, the Commissioner found that two were not handled reasonably. Four 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

The applicant is a member of a body which organised a political protest on the upper deck of an open top tourist bus. Approximately ten protestors boarded the bus and unveiled a banner which was hung over the side of the upper deck. The applicant did not board the bus during the protest but followed in his car.

On seeing the banner, a tour guide, Mr A, asked the protestors to take it down for "health and safety reasons". Mr A then made the conductor, Mr B, and driver, Mr C, aware of what was happening. Mr A and Mr B then agreed with the protestors that they could display the banner as long as it remained inside the bus.

The bus then continued on its journey until Mr C saw a van from the same bus company. Mr C stopped the bus and informed the driver of the van, Mr D, who was a supervisor, of the protest that was taking place. The applicant thereafter exited his car. Mr A states that, at this time, the applicant was "being pretty loud on the pavement shouting about the treatment of the Palestinians."

Mr D noticed a police vehicle nearby and informed the occupant (Constable E) that he may require assistance in removing the protestors from the bus. According to Mr D, Constable E told him that he would arrange for other police officers to attend. A short time later Sergeant F and Constables G, H, J and K attended the scene. According to Mr A, the applicant was shouting and "seemed to be the main spokesman for the group".

Constables G, H and K state that they were asked by Sergeant F to obtain the details of persons near to the bus. According to the statements of Constables G and H, when they asked for the

applicant's details he said "I am declining" and when asked if he was refusing to provide his details he repeated this phrase. The statements of Constables G and H confirm that Constable G then informed the applicant that he was being detained for failing to provide his details under section 13 of the Criminal Procedure (Scotland) Act 1995. According to Constable G, he took hold of the applicant's arm, at which point the applicant "tried to pull his arm away and continued to resist". Handcuffs were then applied to the applicant and he was removed to a police vehicle.

The applicant recalls the events as follows:

"One officer whom I recognised and who recognised me asked me for my details, name and address, as soon as he had arrived ... He was the only officer I exchanged words with and no officer spoke to me at any other time. When I remarked as far as I could see this doesn't seem to be a police matter he said nothing. I suddenly found myself seized from the side or behind, not sure, with substantial force, making it impossible for me to move."

Having been removed to a nearby police vehicle, the applicant's handcuffs were loosened at his request. The applicant was then taken to a police station where he was arrested for a breach of the peace due to his conduct during his detention at the scene. In the days following the incident the applicant visited his GP (Dr L) who found that the applicant had sustained an injury to his wrists.

The Procurator Fiscal took no proceedings against the applicant.

The Complaints

Based on the contents of the application form, the correspondence received from the applicant, and the information obtained from Lothian and Borders Police, the Commissioner has identified the following complaints:

- (1) that the applicant was arrested by police;
- (2) that the handcuffs were not applied properly; and
- (3) that a letter to the applicant from the Deputy Chief Constable contained factual inaccuracies.

The Commissioner's Review

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

Complaint 1: The applicant's detention

The applicant's solicitor raised the following complaint in a letter dated 28 August 2008:

"... [the applicant] avers that he was standing by the side of the road when he was approached by an officer and asked for his name. Upon enquiring why he was required to do so, the attending officers appear to have escalated matters and arrested [the applicant] without explanation. The reason for [the applicant's] arrest remains unclear. The manner of his arrest has been described by all those present as wholly unsatisfactory."

Internal Handling

Upon receipt of the applicant's letter of complaint, Chief Inspector M was appointed to conduct enquiries, assisted by Inspector N. Statements were obtained from the applicant; other protestors;

Mr A, Mr B, Mr C, Mr D; Sergeant F and Constables G, H and K; and a member of the public who witnessed the applicant's detention. The applicant's detention was captured on video footage recorded by a protestor and on CCTV recovered from the bus company. This footage was viewed during the course of the investigation.

On 18 March 2009, Chief Inspector M submitted a report of his findings regarding the applicant's complaints. In respect of this complaint, Chief Inspector M stated the following:

"Police Constables [G and H] approached [the applicant] who was standing on the east footpath, and believing him to be part of the protest group they asked him to provide his personal details. The complainer declined to do so stating that in his view the incident was not a police matter. [Constable G] then informed him that he had reasonable grounds to believe that a breach of the peace may have taken place and as such a further requirement was made to [the applicant] to provide his details under section 13 of the Criminal procedure (Scotland) Act 1995. He declined to provide the necessary information.

... Unwilling to cooperate to the satisfaction of the police [the applicant] was then advised that he was being detained under the same legislation.

*... It is the reporting officer's view that the [protest group] were aware that the bus protest would push the boundaries of lawful protest, but accepted that the element of surprise would allow for a visible display before any challenge to their behaviour was raised. As such any risk of prosecution could reasonably be mitigated, by complying with the instructions of the bus staff. In this instance as there has been a partial agreement reached during the journey to allow banners to be displayed, only for this position to be fully rescinded on the arrival of the operations supervisor, who raised the police, the situation is somewhat complex from the position of unlawful behaviour. Ultimately taking all circumstances into consideration including the wishes of the bus staff and the response from the tourists no person other than [the applicant] was charged in connection with this incident ... In this regard it is not unreasonable however for the police officers that were summoned, to properly believe that they were dealing with an incident where a potential breach of the peace had occurred. Although not a member of the bus party [the applicant] through his engagement with others was believed to be involved with, or have information relating to the demonstration, and by his own agreement has had a part to play by following and filming proceedings. **In this regard it is the reporting officers view that the complainers details could legitimately be requested under Section 13 of the Criminal Procedure (SCOTLAND) Act 1995.**" [emphasis in original]*

On 25 September 2009 the Deputy Chief Constable responded to the applicant's complaints. In respect of this complaint he stated the following:

"On their arrival, the officers encountered protestors still on board the bus and a group including [the applicant], standing on the pavement adjacent to it. As it was suspected that members of this group were connected with the protest and as there was a suggestion that a criminal offence may have taken place officers were deployed to note details of these individuals. On [the applicant] being asked on a number of occasions to provide his name he refused to do so. As a consequence of him failing to provide his details, and in the officers view, committing an offence contrary to Section 13 of the Criminal Procedure (Scotland) Act 1995, he was detained.

I accept that on this occasion the officers have misinterpreted the provision of section 13 of the aforementioned Act in that a power of detention does not exist and that a person commits an offence under this section may be arrested. Notwithstanding this, I am satisfied that in the circumstances the officers would have been justified in arresting [the applicant].

I acknowledge that the proper procedure has not been followed and I therefore find this allegation substantiated and apologise to [the applicant] for the officers' shortcomings. The officers concerned will be given corrective advice in this regard."

On 8 December 2009 the applicant wrote to Lothian and Borders Police disputing a number of points within, and challenging the factual accuracy of, the Deputy Chief Constable's letter. On 31 December 2009 the Deputy Chief Constable wrote to the applicant stating the following:

"... On his arrival ... Sergeant [F] established the circumstances and formed the view that a possible Road Traffic offence had taken place in relation to the protest on the bus. He instructed the officers under his command to obtain details of the persons suspected of committing the offence under the Criminal Procedure (Scotland) Act, 1995. The officers detailed to obtain your particulars were Constables [G] and [H].

Section 13 of the Act states that where a police officer has reasonable grounds for suspecting that an offence is being or has been committed at any place, they may require that person to give their name and address, date of birth, place of birth and nationality, and are entitled to ask that person for an explanation. The Act also requires the person to remain with the police officer while they verify their name and address and note any explanation given. Failure without reasonable excuse for a person to give their name and address, date of birth, place of birth and nationality or to remain with the police officer when required to do so constitutes an offence for which they may be arrested ..."

Consideration

Section 13(1) of the Criminal Procedure (Scotland) Act 1995 empowers a constable, where he has reasonable grounds for suspecting that a person has committed or is committing an offence at any place, to require certain information from the person (including his name and address and date of birth). Under section 13(5)(a), a constable must, when making this requirement, inform the person of his suspicion and of the general nature of the offence which he suspects the person has committed or is committing.

A similar power to obtain personal details exists where a constable believes a person has information relating to the offence. Again, in order to use this power the constable must have reasonable grounds for suspecting that a person has committed or is committing an offence. Under section 13(5)(b), a constable must, when making this requirement, inform the witness of his suspicion, of the general nature of the offence which he suspects has been or is being committed, and that he believes the person has information relating to the offence.

As noted above, according to Chief Inspector M's report Constable G suspected that a possible breach of the peace had occurred. However, this finding is not reflected by Constable G's statement in which he gives the following account of his dealings with the applicant:

"Sergeant [F] asked myself and other officers to note the details of persons near to and on the bus, while he ascertained what had taken place. I approached the accused (I know now as [the applicant]) and explained that an incident had occurred and that enquiries are being made to ascertain what offence if any had been committed and all details of persons at the locus were to be noted."

Sergeant F provides the following account:

"On arrival, I saw the bus concerned but no banner was displayed. Several persons were milling around on the footway on the east side of the street and I asked the officers present to obtain their details as, at that stage, it could not be easily identified who were tourists and who, if any, were protestors. It was my intention to ascertain who the group were, what they were protesting about/against and what their intention was in order that I could

perhaps facilitate this, bearing in mind that a possible Road Traffic offence had been committed.”

Accordingly, whilst Sergeant F believed that a possible road traffic offence had been committed, Constable G's position is that he explained to the applicant that enquiries were being made to ascertain “what offence *if any* had been committed”. Contrary to Chief Inspector M's assertion, there is no evidence that Constable G suspected that a breach of the peace had occurred.

As noted above, in order to use the powers available under section 13, the constable concerned must have reasonable grounds for suspecting that an offence has been or is being committed. In terms of his statement, however, at the material time Constable G did not appear to know whether an offence had been committed at all, or if one had, the nature of this. In the Commissioner's view, this level of uncertainty indicates that at the material time Constable G did not have a reasonable suspicion that a person had committed or was committing an offence.

In addition, in terms of section 13(5), at the time when Constable G required the applicant's details, he was obliged to inform the applicant of his suspicion and of the general nature of the offence which he suspected had been committed. Again, given that Constable G did not know whether an offence had occurred, or if one had, the nature of this, it would not have been possible for him to provide the applicant with the information to which he was entitled under section 13(5). Indeed, according to Constable G's statement he merely informed the applicant that enquiries were being made to ascertain what, if any, offence had been committed. In the Commissioner's view, this information did not satisfy the requirements of section 13(5).

In these circumstances, while there is nothing to suggest that Constable G acted in anything other than good faith, the Commissioner does not consider that the requirements of section 13 were adhered to. In the Commissioner's view, it follows that the applicant was under no obligation to provide Constable G with the details requested of him; and Lothian and Borders Police had no proper basis for detaining (or arresting) him.

Although the Deputy Chief Constable has apologised to the applicant, this was on the technical basis that the applicant was detained when, in the Deputy Chief Constable's view, he ought to have been arrested. As noted above, the Commissioner does not consider there to have been any lawful basis for detaining or arresting the applicant for failing to provide his details. In the Commissioner's view, the Deputy Chief Constable's response to this complaint was mistaken and did not reflect the available evidence.

The Commissioner therefore does not consider that this complaint was dealt with in a reasonable manner. The Commissioner recommends that Lothian and Borders Police acknowledges to the applicant that, in terms of the evidence, there was no proper basis for his detention or arrest for failing to provide his details; and apologises to him in this connection.

Complaint 2: Application of handcuffs

The applicant's solicitor described this complaint as follows:

“[The applicant] was handcuffed to the rear after being physically restrained by several officers. This was despite there being no attempt to resist arrest, a fact which [the applicant] stated repeatedly and very audibly. The manner in which the handcuffs were applied very obviously caused [the applicant], a man of 62 years of age, a tremendous amount of pain and distress.”

The applicant also stated that he had been injured as a result of his being handcuffed.

Internal Handling

As part of his investigation into this complaint, Inspector N obtained a statement from the applicant's GP, Dr L in which he was asked for his opinion as to how the applicant could have come by his injuries. Constable P, the lead Officer Safety Instructor with Lothian and Borders Police, was asked to review the video footage of the applicant's handcuffing and to provide his opinion on whether the officers adhered to procedure.

Chief Inspector M stated the following in his report:

“[Constables G and H] report that once [Constable G] went to control [the applicant] he immediately tensed his body and tried to pull his arm away. [Sergeant F] becomes aware of the situation and moves to intervene and as an officer safety instructor reports that in his view [the applicant] was actively resisting arrest and was found to be both strong and fit. The officers maintain that the recognised techniques were then used and the handcuffs applied and double locked and subsequently checked for tightness. It is the complainer's position that in the absence of provocation and without warning he was seized with substantial force handcuffed to the rear and marched to the police vehicle causing him excruciating pain.

The CCTV footage [from the bus] shows [Constables G and H] attempting to place handcuffs on the complainer. The body language displayed by all suggests that there is resistance in [the applicant's] efforts to this happening. He is then led away in an appropriate manner. The DVD supplied by the complainer only shows activity after the first handcuff has been applied to [the applicant's] right hand. At this time in the brief footage before the restraints are fully applied he appears to be tensed, apparently attempting to prevent the officers from bringing his arms to his sides. [The applicant] is heard to be shouting loudly that he is not resisting and when the handcuffs are applied screams loudly in pain. [Sergeant F] can be heard giving instruction for the cuffs to be double locked before the complainer is walked to the police vehicle. The restraints are checked for tightness before the complainer is placed in the vehicle.

... It is the reporting officer's view that the detaining officers have sought to use the appropriate level of force to bring [the applicant] under control adopting the recognised techniques.” [emphasis in original]

The Deputy Chief Constable provided the following response to the complaint:

“I note from the Investigating Officer's report that he has viewed CCTV footage of the incident and interviewed witnesses unconnected with the protest, who are of the view that [the applicant] was being deliberately un-cooperative with the officers and was behaving in a 'theatrical' manner before, during and following his arrest, with the intention of drawing attention to his plight and that he was resisting the officers' attempts to apprehend him. The opinion of a recognised police expert in restraint techniques was also sought and he confirms that, having reviewed the case and viewed CCTV footage of the incident, that the officers acted in a proper and proportionate manner in their use of officer safety equipment and the officers acted within the realms of their training. He added that such injuries would not occur to a prisoner that was compliant.

I note that [the applicant] attended his GP, [Dr L], who noted tenderness to his right wrist, compatible with compression and two small abrasions on the back of his wrist. On [the applicant] giving his explanation of how these injuries were caused, [Dr L] offered the view at that time that the injuries may have been caused by undue force, incorrect application of the handcuffs or a fault in training. Later, having learned of the procedure for administering handcuffs, [Dr L] added that the reasons for the injuries could have included [the applicant] struggling or resisting the application of handcuffs.

In view of the evidence available to me, I have concluded that the officers acted proportionately, did not use excessive force and that the handcuffs were applied appropriately and in accordance with the training given to officers. I therefore find this allegation unsubstantiated.”

Consideration

As noted above, in terms of the evidence the Commissioner does not consider there to have been any lawful basis for the applicant's detention or arrest for failing to provide his details under section 13. It follows that the applicant should not have been handcuffed and that the injury sustained by the applicant was avoidable. In light of this, the Commissioner recommends that Lothian and Borders apologise to the applicant for the fact that he was handcuffed and for the injury he sustained as a result of this.

During his investigation Chief Inspector M considered in detail the manner in which the applicant was handcuffed and whether the officers in question adhered to standard practice. The applicant's GP, Dr L, was of the view that the following factors could have caused the applicant's injuries:

- (1) undue force;
- (2) incorrect application of the handcuffs;
- (3) a fault in training;
- (4) the applicant struggling/resisting the application of the handcuffs; and
- (5) the shape of the applicant's wrists.

In relation to factors (1) and (2), Constable P considered the officers' actions to have been within the realms of their training and that they made every effort to "control a resisting subject as safely as possible and reduce the risk of injury to all parties involved." Having had regard to the video footage of the incident, the Commissioner considers Constable P's assessment to be reasonable.

In relation to factors (3) and (5), Inspector N explained to Dr L that, having applied handcuffs, officers check only the front and rear aspect of the wrists for tightness. In light of this, Dr L made the following comments in his statement:

"... My observation is that although there is room at the front and back it does not eliminate compression at the sides.

... Inspector [N] explained the protocol and procedure for administering rigid handcuffs. I then added that additional factors could have been [the applicant] struggling/resisting the application or the shape of his wrists may have been such that even when correctly applied the tightness or compression to the side of his wrist would still be likely to cause the injury sustained by [the applicant]. Perhaps the summary of this incident would be to review standard procedures by the Police Surgeon."

Dr L's suggestion was highlighted within Inspector N's account of the meeting. Inspector N stated the following:

"[Dr L] ... firmly believes that the agreed principles for administering the handcuffs may also have to be reviewed because in his opinion the correct method for administering will not alleviate the potential for compression to the branch of the radial nerve at the sides. The tightness check conducted by Officers is at the front and the rear and not at the sides where this branch of the radial nerve passes ... I do believe there is rationale for bringing

this issue to the attention of our Officer Safety Liaison Officer with a view to assessing the tightness check. The information supplied by [Dr L] shows the issue surrounding the potential injury to the branch of the radial nerve at the side, which is not part of the tightness check.”

Chief Inspector M's report also included the recommendation that “due consideration be given to alerting the Officer Safety Training liaison officer to [Dr L]'s view on the effectiveness of handcuff tightness checks as they apply to the structure of the wrist and in particular the radial nerve.”

Based on the information supplied to the Commissioner's office, it does not appear that Chief Inspector M's recommendation has been progressed by Lothian and Borders Police. In so far as it has not been progressed, the Commissioner recommends that this now be done. The Commissioner also recommends that, once the Officer Safety Training liaison officer has provided his view on the matter, a further response should be issued to the applicant in light of this. In the event that consideration has already been given to Chief Inspector M's recommendation, the Commissioner recommends that Lothian and Borders Police writes to the applicant explaining the outcome of this.

In respect of factor (4), the footage shows that, despite his belief to the contrary, the applicant was not compliant with the officers' attempts to place him in handcuffs. Accordingly, it is possible that the applicant's injury was sustained as a result of his non-compliance. In his response, the Deputy Chief Constable refers to Constable P's view that the applicant's injuries would not have occurred if he had been compliant. However, Constable P's consideration of the officers' actions was confined to whether they had acted in accordance with procedure. No comment was made by him as to whether the applicant's injury was sustained as a result of his non-compliance. There is accordingly no factual basis for the Deputy Chief Constable's remark in this connection.

For the reasons given, the Commissioner does not consider that this complaint was dealt with in a reasonable manner.

Complaint 3: Letter contained factual inaccuracies

Following receipt of the Deputy Chief Constable's letter of 25 September 2009 the applicant wrote to Lothian and Borders Police complaining that the letter contained factual inaccuracies. Specifically, he stated:

“With respect [the letter] contains a number of factual inaccuracies.

- 1. It deals with many issues as ‘fact’ of which your depute can have no objective direct knowledge, he not having been there. He can report that ‘X say this or that’ but not, with respect to the police actions of May 17th, 2007, that ‘X did or did not happen’.*
- 2. Who gave your depute the power or authority to resolve disputed fact as though he and only he could be correct as to fact when he was not present?”*

Internal Handling

As noted above, the Deputy Chief Constable wrote to the applicant on 31 December 2009 responding to each of the points raised by the applicant in this connection.

Consideration

Despite describing his concerns as “factual inaccuracies”, the applicant is essentially disputing Lothian and Borders Police's findings. With the exception of the deficiencies already highlighted in this report, the Commissioner considers the Deputy Chief Constable's response to have been reasonable.

With regard to the applicant's concern about the language used by the Deputy Chief Constable in his letter, the Commissioner is of the view that the Deputy Chief Constable was merely stating Lothian and Borders Police's position in respect of the complaints. While the applicant may disagree with that position, the Commissioner does not consider that the letter was inappropriately worded.

In light of this, the Commissioner considers that this complaint was dealt with in a reasonable manner.

Conclusions, Recommendations and Learning

Complaint 1: The applicant's detention

In the Commissioner's view, the manner in which this complaint was dealt with by Lothian and Borders Police was not reasonable. The Commissioner recommends that Lothian and Borders Police acknowledges to the applicant that, in terms of the evidence, there was no proper basis for his detention or arrest for failing to provide his details; and apologises to him in this connection.

Complaint 2: Use and application of handcuffs

In the Commissioner's view, the manner in which this complaint was dealt with by Lothian and Borders Police was not reasonable. The Commissioner makes the following recommendations:

(1) that Lothian and Borders Police apologises to the applicant for the fact that he was handcuffed and for the injury he sustained as a result of this.

(2) that Lothian and Borders Police implements Chief Inspector M's recommendation, namely that due consideration be given to alerting the Officer Safety Training liaison officer to Dr L's view on the effectiveness of handcuff tightness checks as they apply to the structure of the wrist and, in particular, the radial nerve.

(3) that in the event that consideration has already been given to Chief Inspector M's recommendation, Lothian and Borders Police writes to the applicant explaining the outcome of this.

Complaint 3: Letter contained factual inaccuracies

In the Commissioner's view, the manner in which this complaint was dealt with by Lothian and Borders Police was reasonable. Accordingly, no further action is required in this connection.

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