

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 complaints dealt with in this report arose following the arrest of the applicant in respect of an incident at her former husband's home. The applicant subsequently complained about the circumstances of her arrest.

The Commissioner considered two applications comprising a total of three complaints. The Commissioner found that two of the complaints were not dealt with reasonably. Two 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.

Case Reference PCCS/00445/10/PF-L&B

Background

On 17 May 2010 the applicant received a letter regarding the ongoing financial arrangements arising from her divorce from Mr A, a serving officer with Lothian and Borders Police. The applicant was upset by the terms of the letter and on the same date she attended at Mr A's home, accompanied by her two teenage daughters (Ms L and Ms M) intending to discuss the content of the letter. An argument thereafter occurred between the applicant and Mr A and his partner, Ms B. Following the applicant's departure, Ms B called the police. According to Mr A and Ms B the applicant had assaulted Mr A during the incident and had also been shouting abuse at Ms B.

Constables C and D attended the incident and noted statements from Mr A and Ms B. They thereafter attended the applicant's home, arrested her and took her into custody where she was held overnight pending a court appearance the following day.

According to the applicant, after being cautioned within her home she denied the allegations against her and told Constable D that she could explain the matter. The applicant's daughter, Ms L, also told the officers that the applicant had not done anything wrong.

In January 2011 the applicant was convicted of charges of assault (with a domestic aggravation) and breach of the peace arising from the incident.

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 neither the applicant nor her daughter was permitted to give statements to the police about the events of 17 May 2010; and

(2) that the police misled the applicant by saying that she was being taken to one police station where discussion about the situation would take place with an Inspector, when in fact she was being taken to another station where no such discussion was to take place.

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: Not permitted to give statements

In the statement she provided in connection with the investigation into her complaints, the applicant denied that she had punched Mr A and claimed that she had "touched him in the face" as she thought he was going to hit her or head-butt her. The applicant went on to set out her complaint in this connection:

"The two officers that arrested me did not listen to my side of the story or listen to [Ms L] who told them that was not what happened. They told me that under Scottish Law, they had two witnesses to an assault incident and that was all that they required. They didn't need my side of the story. They simply cautioned me and said I didn't need to say anything and anything I said would be noted.

The two officers did not take statements from my daughters who were present at the incident ..."

Internal Handling

Inspector F was appointed to conduct enquiries into the applicant's complaints, assisted by Sergeant G. As part of their enquiries into the present complaint, statements were obtained from the applicant, Constables C and D, Ms L and Ms M.

In his report Inspector F made the following findings:

"... both [Constables C and D] state [that] on arrival at the house the complainer's daughter, [Ms L], informed them that her mother had not done anything ..."

The officers state that they explained to the complainer they had sufficient evidence from 2 witnesses to arrest her for assault and a breach of the peace and there was no requirement for her to be interviewed. Constable [C] states that [Ms L] was visibly upset and in no fit state to provide a statement at the time, however, a defence statement could be obtained from her at a later date if required. This infers that Constable [C] was aware that [Ms L] had information that would assist the complainer and that she had perhaps considered taking a statement from her. What prevented this appears to be the assessment by the police that [Ms L] was too upset to give this statement.

The officers remained in the complainer's house for about an hour or more while awaiting the arrival of a relative to look after the children. This time could have been used to have the daughters interviewed. It is recognised that because of their ages, an appropriate adult would be required, however, this should have been arranged.

The officers have not taken into consideration the full circumstances, as there was exculpatory evidence available to them from the complainer's daughters, particularly [Ms L] The important time to gather this evidence was at the time as this was central to the officers' decision-making process regarding the progression of the investigation. The evidence from the complainer's daughters might have had some bearing on this as it contradicts the version of events given by [Ms A and Ms B] ...

... it is evident that the officers went to the complainer's house with the pre-conceived intention of arresting her. The officers have stated that they had evidence from two witnesses and in 'Scots Law' this was all they required. The officers did not, however, take cognisance of the evidence of the complainer or her daughters, all of which might have cast doubt on the allegations of assault and breach of the peace ...

The guidelines in respect of domestic abuse are comprehensive and are there to assist officers in respect of any investigations. They are still, however, guidelines and reasoned judgement about how best to proceed with a case is still required from the investigating officer or supervisor. It is important that before any decision is made with regard to domestic abuse, officers must take all necessary steps to ensure they are in possession of the full facts, including all exculpatory evidence. This should be re-iterated to [Constables C and D].

In his response to the applicant dated 14 December 2010 the Deputy Chief Constable said:

"It is correct that under 'Scots Law' two witnesses to an incident will, in many cases, provide a sufficiency of evidence during an investigation. It is incumbent on the police, however, to ensure that any matter is investigated rigorously and all necessary evidence, including exculpatory evidence, is gathered. That is not to say that the officers would have altered their decision to arrest you, but given the circumstances, a more practical alternative might have been to detain you for interview first.

You also said that the officers did not take statements from your daughters who were present in [street], when the incident occurred. I understand that the officers who arrested you did not take statements when they attended at your house, nor did they arrange for these to be taken by other officers.

As stated the police should ensure that all available evidence is gathered and the acquisition of statements from your daughters, who were witnesses to the incident, should have been taken. I understand that the Procurator Fiscal subsequently requested such a statement to be taken from your eldest daughter [Ms L]. That said, the fact that these statements were not obtained at the time does not necessarily mean that the officers would have decided against arresting you.

However, with regards to the above, I find both allegations substantiated and the officers have received corrective advice.

... I apologise that on this occasion in your dealings with Lothian and Borders Police you felt the need to complain. I trust that any future dealings you may have with officers of this Force give you no cause for concern."

Consideration

In assessing the handling of this complaint, it is important to consider the terms of the Joint Protocol between the Association of Chief Police Officers in Scotland (ACPOS) and the Crown Office and Procurator Fiscal Service (“the Joint Protocol”); as well as Lothian and Borders Police’s General Order 03/09 dealing with domestic abuse (“the General Order”).

The Joint Protocol contains the following passages:

“3. When investigating incidents of domestic abuse, the police will ensure that all possible lines of enquiry are rigorously pursued and all available evidence is secured. Where appropriate, consideration will be given to the detention and interview of alleged perpetrators in order to secure further evidence ...

4. Where there is sufficient evidence available, the Police will take appropriate action, whether or not the victim makes a complaint, and will arrest the offender and report the circumstances without delay to the Procurator Fiscal ...”

The General Order states the following:

“5.2.2 ... A thorough investigation must be carried out and all lines of enquiry rigorously pursued ...

5.4.2 Where appropriate, consideration should always be given to the detention of the suspect under Section 14 of the Criminal Procedure (Scotland) Act 1995. This legislation affords the opportunity to conduct further investigations, interview suspects and secure further evidence ...

5.5.1 Police responding to domestic abuse incidents may be confronted with conflicting accounts of what has taken place ... Officers should seek to identify the primary aggressor ... Arrests should not be made for acts which officers have reasonable cause to believe were committed in self defence.”

The Commissioner takes the following from these provisions:

- that instances of alleged domestic abuse must be rigorously investigated and all available evidence secured;
- that suspects will be arrested when there is sufficient evidence to justify this;
- that, in appropriate circumstances, officers should always consider detaining suspects under section 14 of the Criminal Procedure (Scotland) Act 1995

In the present case, the officers clearly had sufficient evidence (the accounts of two eyewitnesses) to justify arresting the applicant. However, as the Deputy Chief Constable acknowledges, what the officers failed to do was to investigate the allegations fully and secure all the available evidence. As a result of this, the information presented to the Procurator Fiscal consisted almost solely of the accounts given by Mr A and Ms B. Although reference was made to the applicant’s responses to caution and charge, and to the fact that Ms L also witnessed the incident, there was no indication in the report that Ms L also disputed the allegations. This is despite the fact that both officers acknowledge that they were made aware of Ms L’s position on entering the applicant’s home to arrest her.

The Commissioner shares the Deputy Chief Constable’s view that Constables C and D did not properly investigate these allegations, although it is clear that the deficiencies were remedied following the Procurator Fiscal’s involvement. The Commissioner also shares the Deputy Chief

Constable's view that, even if accounts had been taken from applicant and Ms L at the time, this did not necessarily mean that the applicant would not have been arrested. As noted above, regardless of her own position and that of Ms L, there was clearly sufficient evidence to justify the applicant's arrest.

Where the Commissioner disagrees with the Deputy Chief Constable is in relation to the nature of the apology he provided to the applicant in his letter of response. As noted above, the Deputy Chief Constable apologised to the applicant that she had "felt the need to complain" about her dealings with Lothian and Borders Police. In the Commissioner's view, such a general expression of regret did not reflect the nature of the Deputy Chief Constable's finding, namely that Constables C and D failed to investigate properly the allegations made by Mr A and Ms B. The apology was ambiguous and unlikely to achieve the resolution normally achieved by such means.

In light of this, the Commissioner does not consider that this complaint was dealt with in a reasonable manner. The Commissioner recommends that Lothian and Borders Police issues to the applicant an explicit apology for the deficiencies in its original investigation of the offences.

Complaint 2: Misleading of the applicant

The applicant stated the following in her statement:

"The officer [Constable D] said he was taking me to [Police Station X] to discuss the matter.

Prior to leaving, I arranged for my sister ... to come ... to look after my kids I was still under the impression that I was going to the station to discuss the incident with an Inspector and would be back home after that. My sister arrived at the house and asked what was happening. She was told briefly what was happening and the male officer told her that I was going to [Police Station X] to discuss the matter with an Inspector ...

I feel I was misled and not given the chance to explain what had happened and give my side of the story."

Internal Handling

Ms L stated the following in this connection:

"I remember the male officer telling [the applicant] that she was only going to [Police Station X] to speak to a Sergeant. I think it was a Sergeant anyway. The Sergeant would decide on whether she would get to come home or not."

Ms M stated the following:

"[The applicant] asked where they were going and 1 of them replied that she was going to [Police Station X]"

Constable C did not explicitly address this complaint in her statement. However, the following passages are of relevance:

"[Constable D] and I explained to the [applicant] that a complaint had been made against her and due to obtaining statements from 2 witnesses, we had sufficient evidence to arrest her ...

During the journey to [Police Station Y] expectations were set to the [applicant] as she was under the impression that she had not done anything wrong and that she would be returning home that evening. I explained that it was not a case of merely an assault due to there being a domestic element to it. I advised that the force procedure for domestic assault was to be

detained in custody and appear at court the following day but that since she was querying this, I would confirm this with the duty Inspector.”

Constable D stated:

“... whilst in the presence of Constable [C], I arrested and cautioned the [applicant] ... Thereafter it was explained to her that she would be conveyed to [Police Station Y]. At no point was the [applicant] told that she would be going to [Police Station X].”

Inspector F stated the following in his report:

“... there is a difference of opinion with regard to where the complainer was to be taken. The complainer and her daughters, claim that she was informed she was being taken to [Police Station X] to speak to an Inspector. The officers took her straight to [Police Station Y] where [Constable C] consulted [Inspector E] by telephone to inform him of the circumstances of the arrest. It was [Inspector E] who ultimately decided that the complainer would be detained in custody, although it is apparent from the actions of the officers that this was their intention from the outset.

... As far as the officers were concerned, there was no need to interview [the applicant], as they believed they had a sufficiency of evidence from two witnesses and if she was being kept in custody, there was no requirement to take her anywhere else other than [Police Station Y]. This conforms to Force Policy with regard to the custody of female prisoners.

It is not whether the complainer should have, or should not have, been arrested in the first place that is in question here. It is whether or not the officers told the complainer that she was to be taken to [Police Station X] to be interviewed by an Inspector, rather than [Police Station Y]. The officers had already informed the complainer she was arrested and that there was no need to interview her. In the full circumstances there is insufficient to show that the officers intended to take the complainer anywhere other than [Police Station Y], therefore, this allegation is unsubstantiated.”

The Deputy Chief Constable provided the following response:

“You stated that when the officers arrived at your house, they arrested you and informed you that there was no need to interview you as they had a sufficiency of evidence from two witnesses. If what you say is correct, then there was no reason why the officers would take you to [Police Station X], as there was no intention to interview you. Further, Force policy dictates that all female custodies will be taken to [Police Station Y], therefore, I can see no reason why the officers would take you elsewhere.

I am aware that one of the arresting officers spoke to an Inspector officer from [Police Station X] to have your continued detention authorised and it was perhaps a misinterpretation of what you were told. In considering all the circumstances, I find this allegation unsubstantiated.”

Consideration

The issue raised by this complaint is whether Constables C and D misled the applicant by telling her that she was being taken to Police Station X to discuss the matter with a more senior officer, when in fact she was being taken to Police Station Y to be held in custody.

In the Commissioner's view, the Deputy Chief Constable failed to address this issue in his response. Instead he focussed on whether the officers would have had any *reason* to take the applicant to Police Station Y given that there was no intention to interview her. As noted above,

however, the issue is not whether the officers would have had any reason to take her to Police Station X: it is whether they misled the applicant as to what they intended to do.

Both the Deputy Chief Constable and Inspector F sought to support the position they adopted by stating that the applicant's being taken directly to Police Station Y conformed to Lothian and Borders Police's policy. The policy in question (the Prisoner Security and Welfare Manual) states the following:

"Unless a Duty Inspector ... can justify otherwise, all female prisoners will be initially processed at a local custody centre or suite.

*In all cases, when it is known that an arrested female will be held for appearance at court, she should be transferred to [Police Station Y] custody suite **after** initial processing. Unless circumstances dictate otherwise, female prisoners will not be detained unnecessarily at any other police station."* [emphasis in original]

As there is no evidence in the complaints file that a duty Inspector justified a departure from this provision in the applicant's case, the applicant should in fact have been initially processed at a local custody centre (e.g. Police Station X) *before* being transferred to Police Station Y.

Given the failure to provide the applicant with a response to her specific complaint, and what appears to have been a misinterpretation of the above policy, the Commissioner does not consider that this complaint was dealt with in a reasonable manner.

With regard to the substance of the complaint, there are three witnesses (the applicant, Ms L and Ms M) who claim that the applicant was told she was being taken to Police Station X. As noted above, had the officers processed the applicant at Police Station X before taking her to Police Station Y, this would have been consistent with Lothian and Borders Police's policy.

Against this, Constable D states that at no time was the applicant informed that she was going to Police Station X. As noted above, Constable C does not address the complaint explicitly in her statement.

Accordingly, the weight of the available evidence favours the applicant's position that she was initially told she was being taken to Police Station X. It is, however, unclear from the evidence what the applicant was told regarding the purpose of her being taken to Police Station X. On the one hand, the applicant appears to have believed that this was in order that she could provide her own version of events. However, this is not consistent with other comments she made in her statement to the effect that the officers told her they did not need her side of the story. In addition, Ms L recalls that the purpose of taking the applicant to Police Station X was to allow a Sergeant to decide whether she would be allowed to return home.

Clearly the proper determination of this complaint is hampered by the fact that Constable C did not explicitly address the complaint in her statement. In addition, no statement was taken from the applicant's sister who appears also to have been a witness to what the officers said in this connection. The Commissioner therefore recommends that Lothian and Borders Police obtains the account of the applicant's sister as to what the officers told her about where the applicant was being taken and the purpose of this; and that a further statement is sought from Constable C explicitly addressing this complaint. Once these accounts have been obtained, a further response should be issued to the applicant reflecting the evidence as a whole.

Conclusions, Recommendations and Learning

Complaint 1: Not permitted to give statements

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 issues to the applicant an explicit apology for the deficiencies in its original investigation of the offences.

Complaint 2: Misleading of the applicant

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 obtains the account of the applicant's sister as to what the officers told her about where the applicant was being taken and the purpose of this; and that a further statement is sought from Constable C explicitly addressing this complaint. Once these accounts have been obtained, a further response should be issued to the applicant reflecting the evidence as a whole.

Case Reference PCCS/00111/11/PF – L&B

Background

On 17 May 2010 the applicant was arrested in relation to an allegation that she had assaulted her former husband, Mr A, and had committed a breach of the peace outside his home.

On arrival at the police station the applicant was processed into custody. In compliance with the legislative requirement in place at that time, the applicant was advised that she was entitled to have intimation of her arrest sent to a solicitor. It appears that the applicant initially declined this offer on the basis that she understood at that time that she was not going to be detained in custody. However, when she became aware that she was going to be held in custody she asked that a solicitor be contacted.

The applicant's position is that no contact was made with her solicitor; whereas Lothian and Borders Police maintains that a solicitor was indeed contacted.

The Complaint

Based on the content of the application form, the correspondence received from the applicant and the information obtained from Lothian and Borders Police, the Commissioner has identified a single complaint namely that on 17 May 2010, while detained at a police station, the applicant's request for a solicitor was refused.

The Commissioner's Review

This section sets out the Commissioner's views on the manner in which the complaint was handled by Lothian and Borders Police.

Internal Handling

As part of her enquiries into the complaint Inspector H obtained a copies of the applicant's custody record as well as records of telephone calls made from the police cell area.

On 23 May 2011, Superintendent J provided the following response to the applicant's father, Mr N:

"The allegation you made was that [the applicant] requested a solicitor be contacted regarding her detention in custody on 17 May 2010 and that this was not done, or she was not informed that it had been done.

I believe it was explained to you by Inspector [H] that this was before new legislation regarding solicitor access was introduced. Consequently your daughter's right at that time, in relation to a solicitor, was to have a solicitor informed. As explained to you, this does not mean this is a right for a solicitor to be spoken to, only that they must be informed. If the telephone call is out with social hours it is routine for answer machine messages to be left.

Your daughter's custody record, which cannot be amended retrospectively, has an entry showing that at 02.27 hours on 18 May 2010 a solicitor was contacted. The solicitor's details were shown as [Mr K] The Scottish Legal Board has confirmed this solicitor was the duty solicitor for the area your daughter lives in at that time. Telephone records from Lothian and Borders Police have recorded that at 02:26:42 a call was made from a telephone within the cells complex to Mr K's office. I cannot confirm this was the call regarding your daughter, but it is extremely likely.

I believe you were informed that the Police Custody Security Officer who updated the custody record stated they could not specifically recall making a telephone call to the solicitor. However, they also stated that it was extremely unlikely the custody record would have been updated as such, unless the call was made, as both are usually done simultaneously. It is also not routine for people in custody to be informed that the call has been made after the fact, particularly during the night. They are merely informed when they request a solicitor that one will be informed. They are asked to provide details of a solicitor and if they do not name a specific solicitor the duty solicitor is contacted.

I cannot provide any further comment regarding this allegation, and find it unsubstantiated based on the evidence available.”

Consideration

At the time of the applicant's arrest the rights of arrested persons were set out in section 17 of the Criminal Procedure (Scotland) Act 1995. This provided that an arrested person was entitled – immediately upon his/her arrest – to have intimation of this sent to a solicitor. Section 17 did not, however, stipulate that the police must inform the arrested person that such intimation had been sent.

According to the applicant's custody record a solicitor, Mr K, was contacted at 2:27 am on 18 May 2010. This is supported by the telephone records from the cell area which establish that a telephone call was made to Mr K, the relevant duty solicitor, at approximately 2:26 am. The person responsible for making the entries in the applicant's record has no recollection of doing so, which given the number of custodies processed at any one time, is not surprising. In the Commissioner's view, the evidence strongly indicates that a call was made to Mr K regarding the applicant's arrest and a message left on an answering machine.

The applicant's position is that she requested a solicitor as soon as she realised that she was being detained in custody, which coincided with her being placed in a cell. The call to the solicitor was not, however, made until over four hours after the applicant was processed into custody. Prior to the call being made the applicant was visited in her cell on four occasions, was seen by a doctor at approximately 12.10 am and had her fingerprints and photograph taken at 2.14 am. The custody record contains details of all these events but does not contain any entry as to when the request was made for a solicitor to be contacted. Based on the evidence supplied to the Commissioner, it is therefore not possible to determine when this request was made.

As noted above, however, the applicant's complaint that no solicitor was contacted is undermined by the evidence which strongly indicates that Mr K was contacted. In addition, the statutory obligation in place at the time did not require Lothian and Borders Police to inform the applicant that such intimation had been made.

For the reasons given, the Commissioner considers that this complaint was dealt with in a reasonable manner.

Conclusions, Recommendations and Learning

In the Commissioner's view, the manner in which this complaint was dealt with by Lothian and Borders Police was reasonable. Accordingly the Commissioner makes no recommendation.

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