

# Report of a Complaint Handling Review in relation to Fife Constabulary

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

## **Summary and Key Findings**

This applicant's complaints arise from an alleged drink driving incident.

Of the six complaints reviewed, the Commissioner found three were handled reasonably while the remainder were not. Three 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

In the early hours of 5 April 2010, at the conclusion of a social evening, the applicant and three of his friends (Miss A, Mrs B and Mr C) left the venue in the applicant's car. The applicant states that he had been experiencing symptoms of an ongoing medical condition and that he started to feel uncomfortable whilst driving. The applicant stopped his vehicle and began walking back to the venue with his friends.

Constables D and E were on patrol in a police car nearby and witnessed what occurred. According to Constable D, he found the behaviour strange and decided to check the vehicle and its occupants. The officers were not sure, however, who had been driving. Constables D and E approached the applicant and his friends and formed the opinion that all four were intoxicated. According to Constable D, he informed the applicant of this and told him that he needed to identify the driver of the vehicle in order to establish whether a road traffic offence had been committed. The identity of the driver was not forthcoming.

Constable D requested assistance and Constables F and G attended at the location shortly thereafter. The applicant and his passengers were all questioned in terms of section 172 of the Road Traffic Act 1988 ("the 1988 Act") which requires persons to provide information as to the identity of the driver of a vehicle. The applicant admitted to being the driver; Mrs B and Mr C also said that the applicant had been driving. Miss A refused to divulge the identity of the driver and was charged with a contravention of section 172.

Constables D and E state that the applicant was then required to complete a preliminary breath test at the roadside. According to both officers, the applicant refused to do so until he had legal representation and was therefore arrested for a contravention of section 6 of the 1988 Act. He was

thereafter taken to a local police station. The applicant claims that he was only asked to go to the station to complete the breath test procedure and he denies having been arrested at the roadside. According to the applicant, however, the officers were not following correct procedure and he therefore asked if he could have legal representation. The applicant states that he was informed he would have access to legal representation at the police station.

The applicant was processed into custody and arrangements were made to inform the duty solicitor of his arrest. The applicant was thereafter taken to another area within the custody suite where he was required under section 7 of the 1988 Act to provide two specimens of breath for analysis. The applicant states that he was taken into a room and “requested to take a deep breath and blow hard into a plastic tube.” According to the applicant, he reminded the officers that he had been told he could have access to legal representation. He claims that in response to this he was told by Constable F that he and Constable D “don’t understand English”. According to Constables D and F, the applicant refused to provide the specimens until he was provided legal representation.

The applicant was thereafter cautioned and charged with a contravention of section 7 of the 1988 Act. He was subsequently convicted of this offence as well as of the breach of section 6 of the Act.

On 22 November 2010, the applicant made a number of complaints about the incident. Inspector H was appointed to investigate these.

## The Complaints

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

- (1) that officers did not follow the correct procedures at the roadside and within the police station;
- (2) that Constable D invited the applicant to attend at a police office under false pretences;
- (3) that Constable E provided the applicant with false information;
- (4) that Constable F made an insulting comment to the applicant;
- (5) that the police report inaccurately recorded the time when Miss A was cautioned and charged; and
- (6) that the police inaccurately recorded the date on which Mrs B was questioned.

## The Commissioner’s Review

This section sets out the Commissioner’s views on the manner in which the complaints were handled by Fife Constabulary.

### Complaint 1: Failure to follow procedure

The applicant described this complaint as follows in his letter of 22 November 2010:

*“... I was asked by the first male officer if I would do a breath test back at the station, I informed the officer I would, and could I have legal representation, to which his [sic] responded that would be available back at the station. (It is very important to state that I was not offered a breathalyser, nor was I arrested or charged or any rights read to me).*

*As I was aware the officers were not adhering to procedure this was my reason for requesting legal representation.*

*... I was then escorted into a small room and requested to take a deep breath and blow hard into a small tube. (This is not the correct procedure for taking the test)."*

### *Internal Handling*

As the applicant does not live in Scotland, Inspector H agreed with him not to meet in order to obtain a statement. Instead, Inspector H would use the applicant's letter of complaint as a basis for his enquiries and would seek clarification if required. The applicant later provided clarification.

Inspector H obtained operational statements from the officers concerned, as well as the statements these officers had prepared in respect of the criminal proceedings taken against the applicant. Inspector H also obtained a copy of the applicant's custody record and the form used by Fife Constabulary at police stations in respect of cases involved suspected drink driving offences (FORM 1). CCTV footage was not available due to the lapse of time between the incident and the applicant lodging his complaints. Inspector H did not obtain statements from the applicant's friends due to them living in a different part of the country.

On 1 January 2011, Inspector H submitted a report detailing his findings. In respect of this complaint, Inspector H noted the following:

*"... The officer's statements highlight that the complainer was offered a roadside breath test however refused. Likewise the officer's statements clearly state that the complainer was placed under arrest when he refused to provide a roadside specimen. The complainer was cautioned and charged with a contravention of Section 6 and 7 of the Road Traffic Act 1988 whilst at [the police station]. This has been recorded on the FORM 1. The complainer has stated that he was of the opinion that the officers were not following correct procedure therefore this is the reason he requested legal assistance at the scene. Again, Cellfile records highlight that the complainer requested that a legal representative be contacted and that this was done.*

*... Statements provided by [Constables D and F] state that the complainer was required to provide intoximeter samples as per the instructions on FORM 1. The complainer has stated that [Constable F] asked him to blow hard into the mouthpiece connected to the machine which would record his personal riding [sic]. This is correct practice."*

On 3 January 2011, Chief Inspector J wrote to the applicant in response to his complaints. In respect of this complaint, Chief Inspector J stated:

*"As it was the opinion of the officers present that you were under the influence of alcohol, you were subsequently required to provide a specimen of breath for a breath test. This is a legal requirement under Section 6 of the Road Traffic Act, 1988.*

*... I believe you were again required to provide a specimen of breath but again you refused intimating you would not provide a specimen until you had legal representation.*

*Having failed to provide the required specimen of breath you were thereafter informed by [Constable D] that you were under arrest for a contravention of Section 6 of the Road Traffic Act, 1988. You were thereafter conveyed to [a police station].*

*... you were then taken to another part of the custody area where an 'approved device' known as the intoximeter was in use for the purpose of analysing the proportion of alcohol in your breath.*

... Inspector H has recovered the relevant documentation used to record this part of the process and I note at Part 1 you were asked the following question:

*'Do you agree to provide two specimens of breath for analysis and if not, what is your reason for refusing?'*

*It is recorded that you answered 'NO' to that question and that you refused to provide a reason for refusal at that point.*

*[Constables D and F] ... intimidated in their respective statements ... that you intimidated you were refusing to provide any specimens of breath until you were afforded legal representation, please accept my assurances there is no legal obligation or requirement to allow for legal representation at this part of the process. It is the position of both [Constables D and F] that they explained this to you at the time, as well as providing clear instruction on how to provide relevant specimens of breath. Apparently not willing to accept the explanations being given, you declined to provide the relevant specimens of breath, which was a contravention of Section 7 of the Road Traffic Act 1988. Again this is all clearly recorded on the relevant documentation and at Part 2, the caution and charge is detailed where it is recorded that you understood the charge against you but declined to make any comment. The documentation is thereafter signed by both officers at the relevant part.*

*... both [Constable D and Constable F] are adamant they provided clear instruction on how to provide the required breath specimens. I understand on being asked to clarify this matter with Inspector [H] during a subsequent telephone conversation you intimidated [Constable F] asked you to blow hard into the mouthpiece attached to the intoximeter. This is correct practice and appropriate advice. However, as it appears from the evidence presented to me that you never attempted to provide a specimen, continuing to refuse until you were afforded legal representation, I find this aspect of your complaint unsubstantiated."*

On 27 March 2011, the applicant responded by e-mail to a number of the responses he had received from Chief Inspector J. In relation to this complaint, the applicant stated the following:

*"[Constable F] did give me incorrect instructions in taking the required breath test, you confirm that blowing hard into the mouthpiece of the intoximeter **is the correct procedure**, if this procedure is carried out the intoximeter will not record an accurate reading, furthermore there is a high risk that you will not blow for the required time. The correct procedure is to take a deep breath and blow steadily until told to stop or the appropriate light appears."* [applicant's emphasis]

On 5 April 2011 Chief Inspector J wrote to the applicant referring him to his earlier response, stating that he had nothing further to add.

## *Consideration*

### *Roadside breath test and arrest*

The applicant's position is that he was not asked by Constable D to complete the preliminary breath test at the roadside and that he was not arrested. According to the applicant, he recognised that this was not the correct procedure and therefore requested legal representation.

Section 6 (1) of the 1988 Act empowers a constable to require a person to cooperate with the preliminary breath test. Section 6 (6) provides the following:

*“A person commits an offence if without reasonable excuse he fails to co-operate with a preliminary test in pursuance of a requirement imposed under this section.”*

Constables D and F are clear in their statements that the applicant failed to co-operate with the above requirement and was consequently arrested. In the Commissioner’s view, the weight of the evidence indicates that the applicant was indeed arrested at the roadside for a contravention of section 6 of the 1988 Act.

#### *The “intoximeter” test*

Section 7 (1) of the 1988 Act empowers a constable to require a person suspected of driving or being in charge of a motor vehicle with alcohol concentration above the prescribed limit, to provide two specimens of breath for analysis. Section 7 (6) provides the following:

*“A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence.”*

Constables D and F state that the applicant refused to provide the required specimens on the basis that he had not been provided with legal representation. The applicant does not dispute this. Consequently, the applicant was cautioned and charged in terms of section 7 (6). In light of this, the question of whether the applicant was advised to “blow hard” into the device had no material impact on the outcome of the proceedings against him.

The applicant claims, however, that in asking him to “blow hard” into the device the officers concerned did not follow the correct procedure. Specifically the applicant states that blowing hard into the device will produce an inaccurate reading and may result in the suspect not blowing for a sufficient time. Constables D and F make no reference in their statements to whether they advised the applicant to blow hard; however, both Inspector H and Chief Inspector J reached the conclusion that such advice would have been correct. The Commissioner has had regard to the instructions contained within FORM 1 in relation to this matter. Under the heading “Explanation” (to the person required to provide the specimen) the form states:

*“The display will indicate to you when to commence blowing into the mouthpiece and you must blow continuously until the device indicates that it has sufficient breath for analysis.”*

In the Commissioner’s view, the terms of this instruction provide some support for the applicant’s position. In particular, the instructions contain no reference to the need for suspects to “blow hard”: the requirement is for suspects to blow continuously until the device indicates that it has sufficient breath for analysis. As it does not appear that the terms of these instructions were considered during Inspector H’s enquiries, overall the Commissioner does not consider that this complaint was dealt with in a reasonable manner. The Commissioner recommends that Fife Constabulary provides the applicant with a substantive response to the concerns raised by him in his email of 27 March 2011 (quoted above).

## **Complaint 2: Invitation to the police office under false pretences**

The applicant stated the following in his letter of 22 November 2010:

*“[Constable D] invited me to do a breath test at [local] Police Station under false pretences stating I would have legal representation when I arrived.”*

### *Internal Handling*

Inspector H made the following comments in his report:

*“Cellfile records reveal that, during the booking in process the complainer requested that a legal representative be informed of his arrest. The records also reveal that this was carried out.”*

Chief Inspector J provided the following response in his letter of 3 January 2011:

*“... You had no alternative but to attend the police station with the arresting officers, as you were legally under arrest for a contravention of Section 6 of the Road Traffic Act, 1988. For clarity, you were not ‘invited’ but were required to attend the police station.*

*... There is no evidence presented by Inspector [H] that [Constable D] or the other officers involved in this matter misled you ‘under false pretences’ in so far that you would have access to legal representation at the police station. All the officers concerned refute the suggestion but in any event, you had no alternative but to attend the police station as you were under arrest and intimation of your arrest was sent to the Duty Solicitor, as per your request. The police have thereafter completed their obligation in that respect.*

*... Taking all the foregoing information and evidence into account, I find this aspect of your complaint to be unsubstantiated.”*

### *Consideration*

As noted in respect of complaint 1, the weight of the evidence indicates that the applicant was in fact arrested at the roadside for a contravention of section 6 of the 1988 Act. Accordingly, contrary to the impression he formed, the applicant had no choice but to accompany Constables D and E to the station. It follows that the applicant was not “invited” to the police station under false pretences.

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

### **Complaint 3: Provision of false information**

The applicant stated the following in his letter of 22 November 2010:

*“I then requested [Constable E] to identify all attending officers. This she did on Fife Constabulary paper, she failed to identify [Constable D] as being present and substituted his name with another officer who was not present. (I am in possession of this information, which is in the officer’s handwriting).”*

### *Internal Handling*

On 10 December 2010 Inspector H wrote to the applicant asking him to provide the name of the officer supplied to him by Constable E and his views on why Constable E did not provide him with this. The applicant provided the following response on 13 December 2010:

*“Prior to being escorted to the Police cell I deposited all my belongings as requested to the attending officer, in doing so I informed the said officer of the names that were submitted to me by the female officer on Fife Constabulary paper ... to which he requested a copy, I approved his request.”*

Inspector H commented as follows in his report:

*“When asked, [Constable E] has stated that she cannot recall providing the complainer with details of officers who were present at the incident. The complainer has stated that he was*

*provided with all officers details written down by [Constable E], however she has substituted [Constable D]'s details with a different officer."*

Chief Inspector J provided the following response:

*"[Constable E] cannot recall providing you with officer details. While she accepts she may well have done so, she has no recollection of providing you with this information.*

*... Accepting the officer has no recollection of this but equally accepting your position that you were provided with this information, there does not appear to be any malice on behalf of the officer and it is suggested by Inspector [H] this would purely have been an error on her part if she has omitted to include [Constable D]. There is no operational or evidential reason this information could not have been provided to you and accepting your position you were provided with inaccurate information, I am satisfied that this was simply a genuine error by the officer concerned. I am equally satisfied this apparent misinformation had absolutely no bearing on the case against you and as such I do not intend to take any further action in that regard."*

### *Consideration*

Even assuming that Constable E provided the applicant with a list of the officers' names and that this misrepresented the name of one of those present, there is no evidence to indicate that this was done with any sinister motive. The Commissioner agrees with the terms of Fife Constabulary's response.

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

### **Complaint 4: Insulting comment**

The applicant stated the following in his letter of 22 November 2010:

*"I reminded the attending officers that they had informed me I would have legal representation to which [Constable F] clearly said in an aggressive manner 'We don't understand English'. I reinforced my request [for a solicitor], which was originally promised by [Constable D], to which I received the following response 'Just be a man and do the honest thing'. I replied by saying 'In my job you have to be honest due to the nature of my work'. [Constable F] then said in an aggressive manner 'We will take that as a refusal, you are in the cell'."*

### *Internal Handling*

Constable F stated the following in respect of this complaint:

*"Due to the fact [the applicant] continued to repeat the same question, i.e. requesting legal representation and seemed unable to understand our replies, I asked him if he understood English."*

Constable D gave the following account:

*"Due to the complainer failing to provide a specimen of breath, [Constable F] explained the FORM 1 fully and asked accused if he understood his English however due to accused intoxicated state he again agreed and refused to provide."*

Inspector H commented as follows in his report:

*"Whilst within the Intoximeter room [Constable F] asked the complainer if he understood his English."*

Chief Inspector J provided the following response:

*"It appears that [Constable F] has questioned why you would not accept the fact that no legal representation would be forthcoming, coupled with your refusal to provide a breath specimen until legal representation arrived this created a 'Catch 22' scenario leading to [Constable F] stating words similar to: 'Do you not understand English' in an effort to clarify if you fully understood the procedures which were being explained to you. Whilst I can understand your concerns that you found this to be insulting, I can equally understand the officers concerns that you appeared to not accept what you were being told and the explanations being given on how to provide the required breath specimens."*

The applicant stated the following in his email of 27 March 2011:

*"In your answer you state that [Constable F] did say the following 'Do you not understand English', at my trial he denied this comment, does this not put [Constable F]'s evidence into question."*

In a further response dated 5 April 2011 Chief Inspector J said:

*"... I am not in a position to comment on what was or was not said at your subsequent trial. I do not have access to this information therefore I am not in a position to dispute what [Constable F] did or did not say. It would certainly have been pertinent for your solicitor to have challenged this evidence at your trial, if it is your position that [Constable F]'s evidence required to be brought 'into question'. As such I do not intend to take any further action in regard to this particular issue."*

### *Consideration*

Although the witnesses differ as to the precise words used, Constable F acknowledges that he asked the applicant if he "understood English". There is no indication in the evidence that the applicant is anything other than a native English speaker.

The weight of the evidence therefore indicates that Constable F made what could readily be perceived as a sarcastic remark to the applicant. Indeed, Chief Inspector J stated in his response that he could understand if the applicant had found the comment insulting. While the circumstances may have been trying for the officers, the Commissioner considers that this complaint ought to have been substantiated and an apology given to the applicant. The Commissioner therefore recommends that Fife Constabulary issues an apology to the applicant for the remark made to him by Constable F.

### **Complaint 5: Inaccurate records**

The applicant stated the following in his letter of 22 November 2010:

*"I would like to draw your attention to Fife Constabulary Summary of Evidence, it states 'About 03.00 hours on 5/04/2010 ... [Constable D] in the presence of [Constable E] cautioned and charged accused A with the offences shown'."*

*Miss [A] was not at the said location at the stated time or near that time, therefore [Constables D and E] would not have been able to caution and charge Miss [A] as claimed."*

### *Internal Handling*

Inspector H commented as follows in his report:

*“The caution and charge section of the SPR states that [Miss A] was cautioned and charges [sic] at 0300hrs. All other reports of the caution and charge state that this occurred at 0200hrs. This has clearly been a typing error on the SPR. I would recommend that the complainer is advised that this has been identified as a typing error, however all other references to the time of caution and charge has been entered correctly.”*

Chief Inspector J provided the following response:

*“... Inspector [H] has examined the original Standard Police Report and the original statements submitted by the officers involved in this matter. As a result it has been confirmed that one section of the Standard Police Report states that ‘Miss [A]’ was cautioned and charged at 0300hrs. All other reference to that particular caution and charge states it occurred at 0200hrs. There appears to be little doubt this is simply a typographical error on that one occasion. All other reference to the caution and charge of ‘Miss [A]’ has been recorded correctly ...”*

### *Consideration*

All other references to Miss A indicate that she was cautioned and charged at around 2 am. It seems clear therefore that the reference in one section of the police report to her being cautioned and charged at about 3 am is simply a typographical error. Again, the Commissioner agrees with Fife Constabulary’s response to the complaint.

The Commissioner therefore considers that this complaint was dealt with in a reasonable manner.

### **Complaint 6: Inaccurate records**

The applicant stated the following in his letter of 22 November 2010:

*“My solicitor has advised me that the Police statements regarding the date [of the incident at the roadside] do not coincide.”*

### *Internal Handling*

Inspector H commented as follows in his report:

*“All police statements submitted to the Procurator Fiscal have been checked and all are marked with the correct date of the offence which was under investigation. I would recommend that the complainer be informed that all statements have been checked and do reflect the correct date of offence.”*

Chief Inspector J’s letter of 3 January 2011 provided the following response:

*“Through his investigation, Inspector [H] has examined all police statements and reports submitted to the Procurator Fiscal in regard to the case against you. He has failed to discover any anomalies with the recorded dates and all relevant documentation is marked with the correct date of the offence which was under investigation.”*

The applicant stated the following in his email of 27 March 2011:

*“You state that Inspector [H] has examined all statements and found them to be of the correct date.*

*[Constables F and G] have recorded the date 5<sup>th</sup> May when questioning Mrs [B], this is the wrong date, which can be verified by my solicitor.”*

In response, Chief Inspector J stated:

*“Inspector [H] has carried out a further check of the statements compiled by [Constables F and G] and has confirmed that the recorded date is 4<sup>th</sup> April and not 5<sup>th</sup> May 2010 as highlighted by you. I therefore am unable to shed any further light on why there is an apparent discrepancy between the officers’ statement held at the police station and the statements you and your solicitor have had access to or have viewed.”*

### **Consideration**

In his report Inspector H referred to the statements submitted to the Procurator Fiscal and recorded that all were marked with the correct date of the offence libelled. This formed the basis of the responses provided to the applicant by Chief Inspector J.

During the course of the review reference was made to the terms of Ms B’s statement (marked as “Full Witness Statement”). On page 1, under the heading “Provenance (Section 2)” the date is given as “05-05-2010”. On page 2, under the heading “Statement (Section 3)” the date is given as “5<sup>th</sup> May 2010”. On that basis the applicant is entirely correct in his assertion that Ms B’s statement contains the wrong date. By way of contrast the statement relating to Mr C, noted within 10 minutes of Mrs B’s statement and at the same location, records under the corresponding headings “05-04-2010” and “5<sup>th</sup> April 2010”: the correct date. In all other documentation relating to the statements of Mrs B and other witnesses, the correct date is recorded. It therefore appears that the reference in Ms B’s statement to 5 May 2010 is simply a typographical error.

As there is support for the applicant’s position, the Commissioner does not consider that this complaint was dealt with in a reasonable manner. Normally in circumstances involving a simple typographical error, the Commissioner would not recommend any further action. However, Fife Constabulary has had two opportunities to examine the statements and have given two separate assurances to the applicant that these contain the correct dates. The Commissioner therefore recommends that Fife Constabulary writes to the applicant acknowledging the typographical errors within the statement and apologising for the errors contained within its responses to the complaint.

## **Conclusions, Recommendations and Learning**

### **Complaint 1: Failure to follow procedure**

In the Commissioner’s view, the manner in which this complaint was dealt with by Fife Constabulary was not reasonable. The Commissioner recommends that Fife Constabulary provides the applicant with a substantive response to the concerns raised by him in his email of 27 March 2011.

### **Complaints 2, 3 and 5:**

In the Commissioner’s view, the manner in which these complaints were dealt with by Fife Constabulary was reasonable. Accordingly no further action is required in this connection.

#### **Complaint 4: Insulting comment**

In the Commissioner's view, the manner in which this complaint was dealt with by Fife Constabulary was not reasonable. The Commissioner recommends that Fife Constabulary issues an apology to the applicant for the remark made to him by Constable F.

#### **Complaint 6: Inaccurate records**

In the Commissioner's view, the manner in which this complaint was dealt with by Fife Constabulary was not reasonable. The Commissioner recommends that Fife Constabulary writes to the applicant acknowledging the typographical errors within the statement and apologising for the errors contained within its responses to the complaint.

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