



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER

British Columbia  
Canada

July 28, 2000

Don E. Morrison  
Police Complaint Commissioner  
Office of the Police Complaint Commissioner  
900-1111 Melville Street  
Vancouver, B.C. V6E 3V6

Dear \_\_\_\_\_ and Don Morrison:

**Re: Request for Review between \_\_\_\_\_ (“applicant”) and the Office of the Police  
Complaint Commissioner (“public body”) - OIPC file 10766**

## **1.0 BACKGROUND**

The issue in this inquiry as stated in the Notice of Written Inquiry is whether, under s. 3(1)(c) of the *Freedom of Information and Protection of Privacy Act* (“Act”), records in the custody or under the control of the public body are outside the scope of the Act. In its initial submission, the public body raised s. 66.1 of the *Police Act*. The applicant responded to this issue in his reply submission. On July 25, 2000 I wrote to the parties and informed them that, based on my review of the parties’ submissions, and particularly in light of section 66.1 of the *Police Act*, the threshold issue in this inquiry is whether I have jurisdiction to proceed. The public body did not use s. 66.1 of the *Police Act* in its response to the applicant’s requests and this office did not identify it in the Notice of Written Inquiry. However, as the public body has raised the issue of my jurisdiction, and the applicant has responded, I must answer this issue before proceeding further in this inquiry. For the following reasons, I have decided that I do not have any jurisdiction to proceed with the inquiry.

In letters dated February 7 and 9, 2000 the applicant submitted requests to the public body for all records held by the public body concerning his complaint against the Vancouver Police Department and his complaint against the New Westminster Police Department. On February 11, 2000, the public body responded to the applicant’s requests by saying that under s. 3(1)(c) of the Act “the OPCC is unable to provide access to the records”.

## **2.0 PARTIES’ ARGUMENTS**

In its initial submission, the public body argued the Act “does not apply to a record which is created by or for, or which is in the custody or control of the Police Complaint Commissioner if that record relates to the exercise of the Police Complaint Commissioner’s functions under the Act.”

In partial support of this argument, the public body cited section 66.1 of the *Police Act*. In an affidavit attached to the public body's initial submission, William MacDonald, investigator with the public body, deposed that the applicant's two files in the custody of the public body "relate to complaints he has made under the *Police Act* relating to the conduct of police officers within two municipal police departments." In addition, he stated that the files "relate solely to the processing of [the applicant's] complaints under Part IX of the *Police Act*...[and that both complaint files] relate to conduct complaints under Part IX of the *Police Act*."

For his part, the applicant argued that "[n]o public body or Officer of the Legislature should use such legislation to withhold information that relates to criminal conduct affecting the applicant." The applicant stated that the public body had requested that he conduct interviews with witnesses. He therefore asserted that I should view his complaints as relating to criminal matters rather than conduct complaints.

### 3.0 DECISION

**3.1 Exclusion of the Act By the *Police Act*** — Section 66.1 of the *Police Act* reads as follows:

Except as provided by this Act, the *Freedom of Information and Protection of Privacy Act* does not apply to any record that

- (a) arises out of or is otherwise related to the making, submitting, lodging or processing of a conduct complaint under this Part, and
- (b) is created on or after the conduct complaint is made, submitted or lodged.

This section, in my view, applies to a record which:

- (a) arises out of or is otherwise related to a "conduct complaint" under Part IX of the *Police Act*;
- (b) arises out of or is otherwise related to the making, submitting, lodging or processing of the conduct complaint; and
- (c) was created on or after the conduct complaint is made, submitted or lodged.

If section 66.1 of the *Police Act* applies to a record, the Act does not apply to the record. I interpret this section as meaning that all sections of the Act do not apply, including the right of access to a record under the Act, the authority to conduct a review under s. 52 of the Act and the power to hold an inquiry under s. 56 of the Act.

Section 46 of the *Police Act* defines three types of complaints: internal discipline complaints, public trust complaints and service or policy complaints. This distinction is important, since section 52.1(1) of the *Police Act* requires the recipient of a complaint to characterize the type of complaint received and since this characterization must be reviewed by the police complaint commissioner.

The term "conduct complaint" is defined in s. 46 of the *Police Act* to mean an internal discipline complaint or a public trust complaint. Therefore, s. 66.1 of the *Police Act* does not apply to

service or policy complaints as defined in the *Police Act*. In addition, it does not apply to records created before a conduct complaint has been made.

In this case, the affidavit evidence of the public body identifies the applicant's complaints as "relating to the conduct of police officers within two municipal police departments." In a further affidavit submitted in reply, William MacDonald deposed that the applicant alleged misconduct of police officers.

Further, the affidavit evidence is clear that the records in the files relate "solely to the processing" of these conduct complaints under Part IX of the *Police Act*." I note that the public body plays an active role in this under Division 3 of Part IX of the *Police Act* – titled "Processing of Complaints".

Were the requested records created on or after the conduct complaint was made, lodged or submitted? In his affidavit, William MacDonald deposed that "both files were opened upon receipt of the conduct complaint from [the applicant]". He also deposed that both complaint files "relate to conduct complaints under Part IX" of the *Police Act*. Based upon this evidence, it is reasonable to conclude that responsive records in the files were created on or after the receipt of the conduct complaint.

The applicant asked that I reclassify his complaints, since they allegedly relate to with criminal matters and not complaints under the *Police Act*. The evidence before me is clear that the complaints are conduct complaints under Part IX of the *Police Act* and I have, in any case, no authority to do what the applicant asks me to do.

I find that the three parts of s. 66.1 of the *Police Act* have been met. Since s. 66.1 of the *Police Act* applies to the records requested by the applicant, I find that I have no jurisdiction under the Act to proceed with the inquiry, including to make any order under s. 58 of the Act. Section 66.1 of the *Police Act* is a clear expression of the Legislature's decision that certain aspects of the *Police Act* complaint processes are not to be subject to the access rights otherwise afforded under the Act. Since the circumstances here fit within s. 66.1, I have no alternative but to find that s 61.1 prevents me from proceeding with respect to records created on or after the making, submitting, lodging or processing of the applicants conduct complaints.

In his reply submission, the applicant requested that I consider the application of s. 25(1)(a) or (b) of the Act to the records. As I have found I do not have the jurisdiction to proceed further, I am not able to consider the application of s. 25 of the Act to the records.

**3.2 Exclusion Under the Act** — There may be circumstances where a conduct complaint file in the custody of the public body may contain records, or copies of records, created before the conduct complaint was made, submitted or lodged. For example, a complaint file may contain copies of operational records created by a police department, in the ordinary course, before the complaint was made, submitted or lodged. Such records would not be excluded from the Act's operation by s. 66.1 of the *Police Act*. In its response dated February 11, 2000, the public body based its decision on s. 3(1)(c) of the Act. The applicant and the public body have made submissions on the application of this section to the records.

In this light, I must consider the application of s. 3(1)(c) of the Act in this case to any records which may have been created before the conduct complaint, but are now in the custody of the public body.

In order to determine whether s. 3(1)(c) of the Act applies to records in the files in this matter and excludes them from the Act, I need further evidence and argument. Therefore I request the public body to provide me with the following:

1. Copies of any records in the files which were created prior to the time the conduct complaints were made, submitted or lodged;
2. Further submissions in relation to the application of s. 3(1)(c) of the Act to the records identified in paragraph 1; and
3. A further affidavit sworn by a knowledgeable person confirming that all the other records in the files referred to in the affidavits of William MacDonald were created on or after the conduct complaints were made, submitted or lodged.

I request the public body provide me with the above before August 18, 2000. The applicant will have the opportunity to respond; he will be given not less than 21 days from the date of dispatch to him from this Office of his copy of the public body's further material.

Sincerely,

**Original signed by**

David Loukidelis  
Information and Privacy Commissioner  
for British Columbia