OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 331-1999

INQUIRY REGARDING VANCOUVER POLICE BOARD'S REFUSAL TO DISCLOSE COMPLAINT-RELATED RECORDS

David Loukidelis, Information & Privacy Commissioner
December 21, 1999

Order URL: http://www.oipcbc.org/orders/Order331.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: VPB refused on several grounds to release records relating to complaints by applicant against police. Act held to apply to records relating to *Police Act* proceedings. No evidence that *in camera* VPB meeting was involved in relation to some records; records did not reveal substance of deliberations in any case. No evidence information received from B.C. government was received in confidence. Solicitor client privilege held to apply to communications between VPB and its lawyer. Solicitor client privilege held not to apply to report from lawyer retained as investigator under *Police Act*. Solicitor client privilege held not to apply to correspondence between VPB's lawyer and other lawyers. Identity of police officer about whom applicant had complained ordered disclosed to applicant.

Key Words: Scope of legislation – prosecution – *in camera* meeting – substance of deliberations – law enforcement matter – exercise of prosecutorial discretion – received in confidence – solicitor client privilege – personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 3(1)(h), 8(1), 12(3)(b), 14, 16(1)(b), 21(1)(b), 22(1), 22(2)(f) and 22(3)(b).

Authorities Considered: B.C.: Order No. 8-1994, Order No. 13-1994, Order No. 39-1995, Order No. 48, 1995, Order No. 62-1995, Order No. 81-1996 and Order No. 114-1996, Order No. 182-1997, Order No. 290-1999; Order No. 323-1999. **Ontario:** Order P-263, Order P-278, Order P-368, Order P-1014, Order M-844.

Cases Considered: *Police Board (Matsqui)* v. *Matsqui Policemen's Assn., Local 7* (1987), 39 D.L.R. (4th) 676; *Aquasource Ltd*. v. *British Columbia (Information and Privacy Commissioner)* (1996), 45 Admin L.R. (2d) 214 (aff'd at (1998), 58 B.C.L.R. (3d) 61), 8 Admin. L.R. (3d) 236; *Susan Hosiery Ltd.* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33-34; *Hodgkinson* v. *Simms* (1989), 55 D.L.R. (4th) 577 (B.C.C.A.); *Northwest Mettech Corp.* v. *Metcon Services Ltd.*, [1996] B.C.J. No. 1915; *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.); *Hercules Incorporated* v. *Exxon Corporation* (1977) 434 Fed. Supp. 136.

1.0 INTRODUCTION

By a letter dated October 22, 1998, the applicant made an access to information request to the Vancouver Police Board ("Board"), which is a "local public body" under the *Freedom of Information and Protection of Privacy Act* ("Act"). The applicant had earlier made a number of complaints under the *Police Act* against officers of the Vancouver Police Department ("VPD). Some or all of these cases had made their way to appeals before the Board. His access request was for copies of

> … all and any records pertaining to communications between the Vancouver Police Board and its counsel ... and all the attorneys who have been involved in my cases in any capacity.

Having named some of the lawyers involved in the applicant's cases, the applicant went on to specify that the request was for "correspondence, notes of telephone conversations, desk diary notes, and the like."

The Board's response came in a November 17, 1998 letter. The applicant was told that information had been withheld under ss. 12(3)(b), 14, 16(1)(a) and 22(3) of the Act. The applicant was also told that all "records relating to ongoing prosecutions" had been withheld under s. 3(1)(h) of the Act. The Board withheld 23 pages of records and disclosed 158 pages. The Board also withheld all of the correspondence between the Board and its lawyer, Robert Walker, regarding the applicant's cases. By a letter dated December 8**,** 1998, the applicant asked for a review, under s. 52 of the Act, of the Board's decision.

On March 3, 1999, the Board asked this office to "stay, adjourn or otherwise postpone" this inquiry. The Board made this request because it believed the outcome of an application for judicial review of Order No. 290-1999 was relevant to the s. 3(1)(h) issue in this case. This request was denied on March 4, 1999.

In its reply submission in this inquiry, the Board applied for an order under s. 43 of the Act authorizing the Board and the VPD to disregard access requests from the applicant. By a letter dated August 26, 1999, the parties were told that the Board's s. 43 request would proceed as a separate matter, in accordance with this office's published guidelines for such requests.

2.0 ISSUES

The central issues in this inquiry are as follows:

1. Was the Board correct in deciding that the Act does not apply to some of the requested records by virtue of s. 3(1)(h)?
2. Was the Board authorized to apply ss.12(3)(b), 14 and 16(1)(b) of the Act to other requested records?

3. Was the Board required by s. 22(1) of the Act to withhold personal information from some of the requested records?

As to the burden of proof, s. 57(2) provides that the applicant has the burden of establishing that disclosure of information to which the Board has applied s. 22 would not unreasonably invade the privacy of any affected third party. Section 57(1) requires the Board to establish that it was authorized under the other exceptions it invoked to withhold information. It is also incumbent upon the Board to establish the applicability of s. 3(1)(h) to any of the requested records.

3.0 DISCUSSION

3.1 Board's Request For Postponement – The Board argued in its initial submissions that this inquiry should not proceed at all until the VPD's judicial review application regarding Order No. 290-1999 has been decided (and, presumably, the 30-day appeal period has expired). This repeats the Board's earlier request for a postponement. That request is again rejected. The launching of a judicial review challenge to Order No. 290-1999 is not, in my view, reason to postpone this inquiry. For the reasons given below, I have decided that, if the s. 3(1)(h) issue decided in Order No. 290-1999 had come to me as a matter of first impression, I would have reached the same conclusion as did my predecessor. Like him, I have decided that s. 3(1)(h) does not apply to a proceeding under the *Police Act*.

3.2 Applicant's Submissions – Since the applicant's submissions succinctly dealt with all of the substantive issues in this inquiry, it is convenient to summarize his submissions before examining the issues one by one.

In the applicant's view, because he was "a party to all the complainant [*sic*] in the proceedings in question", he was "entitled to receive copies of all communications between the Board and the lawyers representing the other parties". He indicated that he was after correspondence between the Board and lawyers representing other parties to the *Police Act* proceedings and between the Board's lawyer and those other lawyers.

The applicant said he could not see how ss. 3, 12, 14, 15 or 16 of the Act applied to the records in dispute here. He repeated this contention in his reply submission. Because of the applicant's confusion about which sections of the Act the Board had relied upon, he addressed s. 15 of the Act, even though the Board had not relied on that section in its response to the applicant (or in its initial submission in this inquiry). I return to this issue below.

As for personal information withheld under s. 22, the applicant said it was "not sufficient to mention subsection 22(3) of the Act without specifying the paragraph relied on as well". For this reason, the applicant declined to "speculate" on which aspect of s. 22(3) the Board thought applied. The applicant's reply submissions did not deal with s. 22 further, although I note that the Board in its initial submissions specified s. 22(3)(b) as the provision it had relied upon. (It should be noted here that the Board's response letter to the applicant did not give any reasons for its decision regarding this record, despite its duty to do so under s. 8(1) of the Act. To say the least, this made it difficult for the

applicant to meet the burden of proof on him in this inquiry respecting the personal information in question.)

3.3 Clarification of Which Records Are In Issue – My initial consideration of this case led me to conclude there was some confusion as to which records the applicant had actually sought. For that reason, on September 22, 1999 I wrote to the parties for clarification. First, I asked the applicant to confirm whether correspondence between the Board and its counsel, Robert Walker, was, in fact, covered by his access request. The applicant confirmed in writing that his request did not cover such correspondence and, accordingly, in this decision I have dealt no further with the status under the Act of this correspondence.

Second, I sought clarification on the search for communications between the Board (or counsel on its behalf) and other lawyers involved in the applicant's cases. The Board stated that it had conducted a second search for responsive records, and submitted a new affidavit, sworn on October 13, 1999, by Beth Nielsen. That affidavit explains why the Board's second search for responsive records turned up 11 new pages of records. I accept that these pages had been inadvertently overlooked in the first search because they were placed in a file relating to an earlier access to information request made by the same applicant.

The Board provided me with copies of the newly discovered records, but argued they are, for the most part, excepted from disclosure under various provisions of the Act. Since those exceptions are the same as those initially applied by the Board, I have dealt with those 11 pages of records in the discussion below. There is one exception to this. Pages 2 and 3 of the newly discovered records are not responsive to the applicant's access request at all, especially in light of the clarification provided by the applicant in response to my September 22, 1999 letter. Those pages comprise a letter written by someone who was neither a lawyer for the Board nor a lawyer for any party to complaint proceedings initiated by the applicant. That letter, because it was not responsive to the applicant's request, should not have been provided to me. I have therefore returned it to the Board.

3.4 Are Some Records Excluded From the Act? – In the Board's view, s. (3)(1)(h) of the Act excludes some of the records in issue from coverage by the Act because they are records relating to a "prosecution". Section 3(1)(h) says the Act does not apply to "... a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed". The Board takes this position with respect to pp. 68-71 of the records responsive to the applicant's access request.

The word "prosecution" is defined in Schedule 1 to the Act as "the prosecution of an offence under an enactment of British Columbia or Canada". The question, therefore, is whether proceedings under the *Police Act* qualify as the "prosecution" of an "offence" under a British Columbia statute. The material before me indicates, at paragraph 12 of the Board's initial submission, that "public inquiries" are under way under the *Police Act* in connection with various complaints made by the applicant. Some further information on this was given in the Board's October 13, 1999 supplemental submission. In any case, I have decided that the precise nature of the proceedings under the *Police Act* does not matter. I agree with my predecessor on this point, as is indicated below.

In Order No. 290-1999, my predecessor decided that the word "prosecution" in s. 3(1)(h) of the Act did not encompass either a "public inquiry" or "disciplinary default" under the *Police Act*, as it stood before July 1, 1998. He held that the Act applied to the records in issue there and ordered the public body – in that case, the VPD – to process the applicant's access request.

The same s. 3(1)(h) issue arises in this inquiry. It is evident from the material before me that the *Police Act* proceedings in issue here – which apparently are still underway - arose before the *Police Act* was substantially amended effective July 1, 1998. This means the Board's decision that s. 3(1)(h) applies to some of the records here must be dealt with under the old *Police Act*, as was the case with Order No. 290-1999.

As to the substance of the s. 3(1)(h) argument, the Board relies, as it did in the inquiry that led to Order No. 290-1999, on the 1988 British Columbia Court of Appeal decision in *Police Board (Matsqui)* v. *Matsqui Policemen's Assn., Local 7* (1987), 39 D.L.R. (4th) 676. The Board's position is summarized in the following passage from p. 2 of its initial submission:

> The B.C. Court of Appeal has held [in *Police Board (Matsqui)* v. *Matsqui Policemen's Assn., Local 7*] that a disciplinary default proceeding such as a *Police Act* Public Inquiry is a prosecution[,] as a disciplinary default under the *Police Act* is an offence[,] and a prosecution under the *Freedom of Information and Protection of Privacy Act* is defined as the prosecution of an offence.

It appears the Board considers the *Matsqui* case to be decisive on the s. 3(1)(h) argument here. It is unnecessary to repeat what was said in Order No. 290-1999 about *Matsqui*. Having read Order No. 290-1999 carefully, and having read all of the cases referred to in that order and all relevant statutes, I fully agree with the reasoning in that order and I apply it here. I would have reached the same conclusion on this issue as a matter of first impression.

I would add one observation about the Board's reliance on *Matsqui*. By way of emphasizing what was said in Order No. 290-1999, it is important to note that the statutory context within which the word "offence" appeared in *Matsqui* is different from the statutory context with which we are dealing here. As the Court of Appeal noted in *Matsqui*, the statutory context within which a word appears is relevant to its interpretation. At p. 681of *Matsqui*, Carrothers J.A. noted that neither the *Offence Act* nor the *Police Act* defined the word "offence". He concluded that

> ... [t]his absence of definition indicates legislative intent that the word "offence" is to be coloured differently from statute to statute, as to its precise meaning and connotation, by the context and nature of its use within the framework of the particular statute under review.

We are concerned here with the meaning of the word "offence" in the context of the Act's definition of "prosecution". The *Matsqui* case dealt with the meaning of the same word in a different statutory context, *i.e.*, the *Police Act*. The context within which that

word appears in the Act is, as was pointed out in Order No. 290-1999, quite different from the *Police Act* context. There are a number of contextual clues to the Legislature's intention in using the word "offence" in the Act which support the conclusion that the word "offence" in the Act does not encompass *Police Act* proceedings in the way advanced by the Board. For this reason, I agree with my predecessor that the meaning given by the Court of Appeal in *Matsqui* to the word "offence" in what was then s. 54.1 of the *Police Act* is not determinative of its meaning in this province's freedom of information legislation (the legislative purposes of which are found in s. 2(1) of the Act).

It follows, therefore, that pp. 68-71 of the responsive records are not excluded from the ambit of the Act by s. 3(1)(h). The Board must consider the applicant's access request in relation to those records.

3.5 Information Received in Confidence from the Province

Records In Dispute – Pages 65 through 67 of the responsive records were withheld by the Board under s. 16 of the Act.

In its response letter to the applicant, the Board referred to s. 16(1)(a) of the Act, but the decision grid given to the applicant by the Board referred to s. 16(1)(b). Although reference to s. 16(1)(a) was repeated in a heading in the Board's submissions in this inquiry, the submissions themselves addressed s. 16(1)(b) of the Act. The applicant's submissions also addressed s. 16(1)(b). Section 16(1)(a) applies only to conduct by the British Columbia government of relations with other governments. Section 16(1)(b) authorizes a public body to withhold information if its disclosure could reasonably be expected to

> ... reveal information received in confidence from a government, council or organization listed in paragraph (a) [of s. 16(1)] or their agencies.

It is clear, therefore, that the section to be considered here is s. 16(1)(b).

The record in question is a two-page memorandum, dated June 6, 1996, which recites certain facts. Even if one assumes – as I do, without deciding the issue – that this record qualifies as information received from a source mentioned in the section, *i.e.*, the British Columbia government, the onus remains on the Board to establish that the information in the memorandum was received in confidence. Section 16(1)(b) clearly requires the information to have been received in confidence before it can be withheld.

Analysis of Section 16(1)(b) – This is the first time s. 16(1)(b) has been considered in an inquiry. I accept, first, that because the British Columbia government is referred to in the first line of s. 16(1)(a), it qualifies for the purposes of s. 16(1)(b) as a government listed in paragraph (a) of s. 16(1).

The next issue is the meaning of the phrase "received in confidence" in s. 16(1)(b). The concept of confidential information arises in other sections of the Act. Section 21(1)(b), for example, protects information that, among other things, has been "supplied in confidence" to a public body. Section 22(2)(f) says that one circumstance to be

considered in deciding whether someone's personal information can be released is whether that information was "supplied in confidence". The phrase used in s. 16(1)(b) differs from that used in ss. 21(1)(b) and 22(2)(f). It is an accepted rule of statutory interpretation that where different words are used in a statute, the Legislature intended each to have a different meaning. See R. Sullivan, *Driedger On the Construction of Statutes*, 3rd ed., (Butterworths: Toronto, 1994), at pp. 164-165, and the cases referred to there.

It is not necessary for the purposes of this inquiry to comment exhaustively on the meanings of the different phrases in ss. 16, 21 and 22. In my view, however, use of the word "supplied" in ss. 21 and 22 - which deal with information provided to a public body by a non-public body third party - focuses more on whether the supplier of the information expected it to be kept confidential. By contrast, I think s. 16 focuses on the intention of both the receiver and the supplier of the information. This does not mean the intention or understanding of the recipient of information is irrelevant to ss. 21 or 22. It simply means that the Legislature intended, to my mind, that the focus under those two sections should be more on the intention or expectation of the information supplier.

Turning to s. 16(1)(b), it is my view that – in almost all cases – the necessary element of confidentiality will not be established solely because the receiver of the information intends it to be confidential. For example, the intention of a local government to receive information in confidence from the provincial government cannot of itself turn otherwise non-confidential information into confidential information. This is true, even where the receiving local government does not wish others to know that it has been given information that is otherwise non-confidential.

In cases where information is alleged to have been "received in confidence", in my view, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. For example, it may be that if a public body asks the British Columbia government for information, and says the request is made in confidence, the information will have been received in confidence. But if the government declines at the outset to treat the supply as being confidential, the information will not have been received in confidence. This interpretation accords with what I think is the legislative policy underlying s. 16(1)(b), *i.e.*, to promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions.

This issue has come up in Ontario, under its *Freedom of Information and Protection of Privacy Act*. Section 15(b) of that statute says that an institution in Ontario may refuse to disclose information

> ... where the disclosure could reasonably by expected to ... reveal information received in confidence from another government or its agencies by an institution.

This section uses the same language, in all relevant respects, as s. 16(1)(b) of the British Columbia legislation. In several decisions under the Ontario freedom of information legislation, it has been decided there must be an expectation of confidentiality on the part of both the supplier and receiver of the information. In Order P-263 (January 24, 1992),

the Ontario commissioner agreed with the view that the legislative intention behind the section is to promote the free flow of inter-governmental information. At p. 16, Commissioner Wright concluded that the purpose of the exception is to "protect the free flow of information from other governments or their agencies to ... [public bodies] who are carrying out their respective 'governmental' functions". On the same page, he noted that other governments "might be unwilling" to supply information without having "protection from disclosure".

In Order P-278 (March 4, 1992), Assistant Commissioner Mitchinson concluded, at p. 9, that there "must be an expectation of confidentiality on the part of the supplier and the receiver of the information" before the Ontario equivalent to s. 16(1)(b) would apply. He noted, at p. 9, that the government bodies involved in that case had "provided no evidence to indicate that they expected them [some of the responsive records] to be treated confidentially by the [receiving] institution". Because there was no such evidence, he ruled that the exception did not apply to some records.

Since Order P-263 and Order P-278, some Ontario decisions about s. 15(b) appear to have focused more on the intention of the information supplier in deciding if the necessary element of confidentiality is present. For example, in Order P-368 (November 18, 1992), evidence that the RCMP supplied information with the intent that it be held in confidence was held to be sufficient. In Order M-844 (October 3, 1996), it was said, at p. 2, that

> ... it is the supplier of information's [*sic*] requirement of confidentiality that is the focus here, not a need of the recipient. It is only satisfaction of the former need which would have a bearing on the ability of the institution to obtain information from other governments. ... [T]he exemption is designed to protect the interests of the supplier.

I am not aware of any Ontario decision which explains the difference between the language of s. 15(b) of the Ontario Act and that found in ss. 17 and 21 of that statute. Those sections - which respectively deal with personal and commercial information - use variations on the phrase "supplied in confidence". I do not think Order M-844, or other orders referred to above, should be taken to focus exclusively on the intention of the supplier of information for the purposes of Ontario s. 15(b). In any case, s. 16(1)(b) of the British Columbia Act should not be interpreted in that way. Section 16(1)(b) requires public bodies to look at the intentions of both parties, in all the circumstances, in order to determine if the information was "received in confidence".

What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors - which are not necessarily exhaustive - will be relevant in s. 16(1)(b) cases:

1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?

2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?

Discussion of the Evidence Here – I have been able to glean from the material before me that the person to whom the record was addressed was the Executive Assistant to the Board. However, the Board's affidavit and other material filed in this inquiry contain no evidence about the origins or nature of this record, *e.g.*, why it was created, when it was received, why it was received, and whether it was received explicitly or implicitly in confidence. There is no evidence, even, as to the identity of the author of the record. In short, there is no direct basis on which I can conclude that information in the record was explicitly or implicitly "received in confidence".

That might not end the matter had I been able to infer from the material before me that information in the record was received in confidence by the Board. Had that been the case, I could have concluded that the necessary element of confidentiality was present. But despite careful consideration of this issue, in light of the above analysis of s. 16(1)(b), I am unable to reach such a conclusion. Nothing in the record itself – which consists largely of a summary of existing facts – indicates that it was of a confidential nature or that it was supplied in confidence. In my view, the Board has failed to establish that this record was received in confidence from the British Columbia government or one of its agencies. Section 16(1)(b) does not apply to this record.

3.6 *In Camera* Board Deliberations – Section 12(3)(b) of the Act allows a "local public body" such as the Board to withhold from an applicant any record the disclosure

of which "would reveal" the "substance of deliberations" of a meeting of its governing body

> ... if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

Meetings from which the public have been excluded are often referred to as *in camera* meetings. The existence of statutory authority for the holding of an *in camera* meeting is not enough to trigger s. 12(3)(b). For example, the fact that a municipal council is authorized – in circumstances authorized by the *Municipal Act* – to hold an *in camera* meeting is not of itself a basis for withholding information. The meeting in question must, in fact, have been held *in camera* in accordance with the *Municipal Act*. This much is clear from the policy underlying s. 12(3) and from s. 12(4)(a). This view is also consistent with that expressed in earlier orders dealing with s. 12(3)(b). (See, for example, Order No. 62-1995, at p. 10.)

In this case, the Board withheld p. 49 of the responsive records under s. 12(3)(b). The record is a one-page transmittal memorandum. It contains three numbered paragraphs. It lists items of correspondence – which apparently were appended to the original of the memorandum – for the information of memorandum recipients about an upcoming Board meeting. The Board did not provide copies of the attachments. The memorandum contains no discussion of the meeting topics, no background information, and no policy or factual material. Its subject line says "Re: Closed In Camera Meeting - 3 p.m. on June 26, 1996". The first line of its text refers to a "CLOSED In Camera Meeting". The memorandum does not indicate whether the attachments were intended for discussion at the meeting or whether they were for receipt by Board members for information only.

The Board's submission in this inquiry noted that s. 69(2) of the *Police Act*, R.S.B.C. 1996, c.367, and s. 69(2) of the *Police Act*, S.B.C. 1988, c. 53, both authorize a police board to meet *in camera*. The Board then made the following argument, at p. 6 of its initial submission:

> It is submitted that the Vancouver Police Board properly withheld from the Applicant page 49 of the records in issue in this inquiry as this document refers to matters discussed at an *in camera* meeting of the Board which was properly held *in camera* pursuant to s. 69(2) of both the current and the former *Police Act*.

The Board's affidavit evidence did not establish that the particular meeting to which the memorandum relates was held at all, much less that it was held without the public being present. The Board provided no evidence that the topics set out in the memorandum were discussed at any such meeting. The only material before me on this point is the passage from the Board's submission just quoted. Despite this absence of direct evidence, I have decided that the memorandum itself is a sufficient basis for concluding that this record relates to an *in camera* meeting of the Board. However, s. 12(3)(b) authorizes the withholding of information only where disclosure of the information "would reveal" the "substance of deliberations" of an *in camera* meeting of the Board. In a number of orders dealing with public bodies at the provincial level, and with local public bodies, my predecessor had to give meaning to the s. 12 phrase, "substance of deliberations". In the

context of Cabinet meetings and s. 12(1), he said the following, at pp. 9 and 10 of Order No. 8-1994:

> In my view, the "substance of deliberations" includes records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken. The "substance of deliberations" is what the B.C. Civil Liberties Association described as "the Cabinet thinking out loud" although its scope includes a range of records which would reveal what happened in Cabinet.
> ...
> What is meant to be protected is the "substance" of Cabinet deliberations, meaning recorded information that reveals the oral arguments pro and con for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.

The views expressed in Order No. 8-1994 were repeated by my predecessor when he re-issued that order, after judicial review proceedings, as Order No. 48-1995. The s. 12(1) interpretation just quoted was upheld by the British Columbia Court of Appeal in judicial review proceedings involving Order No. 48-1995. See *Aquasource Ltd*. v. *British Columbia (Information and Privacy Commissioner)* (1996), 45 Admin L.R. (2d) 214 (B.C.S.C.) (aff'd at (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.)).

The above analysis of s. 12(1) has been applied in relation to local public bodies under s. 12(3)(b). See, for example, Order No. 81-1996 and Order No. 114-1996. In Order No. 182-1997, it was said that s. 12(3)(b) protects more than just the minutes of *in camera* meetings. In Order No. 114-1996, however, it was held that correspondence from third parties and responses from the school board did not qualify for protection under s. 12(3)(b). It was noted, at p. 3, that the correspondence did not "reveal the actual discussions of the Board", and that the substance of the actual discussions was contained in the minutes of the school board's meetings. At p. 3, it was also noted that the "essence" of what is now s. 12(3)(b)

> ... is to protect what was said at a meeting about controversial matters, not the material which stimulated the discussion ... .

The record in dispute in this inquiry lists three items as attachments. It does not summarize the content of those items. It does not comment on those items. It does not offer advice on those items. The record merely enclosed those items and functioned as a transmittal memorandum. Whether or not the meeting in question was held *in camera*, the memorandum at best alerts the reader to topics that may have been or were considered at an *in camera* Board meeting. It does not reveal what Board members discussed at the meeting and it does not reflect the outcome of any such discussions. The Board did not provide any evidence to support a contrary conclusion. I conclude that the Board was not authorized by s. 12(3)(b) to refuse to disclose p. 49 of the responsive records.

Even if the Board could rely on s. 12(3)(b) respecting this record, the Board has not fulfilled its duty under s. 4(2) of the Act to sever information that can be withheld under s. 12(3)(b). Section 4(2) of the Act says that if information excepted from disclosure by a provision such as s. 12(3)(b) "can reasonably be severed" from information that can be

disclosed, the public body must do that. If it were necessary to do so, I would order the Board, under s. 58(2)(b) of the Act, to reconsider – in light of s. 4(2) of the Act – the Board's decision to withhold all of the record. The record would have to be severed and the remainder disclosed. Only the descriptions of the attachments could be severed and withheld.

3.7 Solicitor Client Privilege

Generally – Section 14 of the Act authorizes a public body to refuse to disclose to an applicant "information that is subject to solicitor client privilege." The courts have ruled, in a number of cases, that s. 14 incorporates the common law of solicitor client privilege and I have adopted this approach to the s. 14 issues raised in this inquiry.

Under s. 57(1) of the Act, the burden is on the Board to establish that solicitor client privilege applies to requested records. The Board must, therefore, provide evidence that establishes the existence of a solicitor-client relationship between it and a lawyer at all relevant times. The Board must also provide evidence establishing that a record was a confidential communication between the Board and its lawyer for the purpose of seeking or giving legal advice, or that it fell under the litigation brief privilege.

Records in Dispute – The applicant sought access to records relating to communications between the Board (or counsel on its behalf) and other lawyers involved in the applicant's police complaint cases. As noted earlier, communications between the Board and its counsel, Robert Walker (or anyone else who may have acted for the Board), were not requested. The access request also did not cover the Board's or its counsel's work product in a general sense; all that was sought was records pertaining to communications between the Board (or counsel on its behalf) and other lawyers (*i.e.*, for other parties involved with the applicant's cases). As a result, the records to which the application of s. 14 of the Act must be resolved fall into three groups. They consist of records held by Robert Walker as counsel for the Board (which have not been produced to me by the Board), of pp. 50-63 of the responsive records initially produced to me by the Board, and of pp. 4-11 of the later discovered records (which have been produced to me).

The Board conceded in its submissions that records held by Walker may be responsive to the applicant's access request, but argued that they would be excepted from disclosure under s. 14, either as communications between Walker and the Board for the purposes of seeking or giving legal advice, or as part of Walker's litigation brief on behalf of the Board. Since I have found that the access request does not cover records relating to communications between Walker and the Board, I need not analyze the status of such records held by Walker. Accordingly, my analysis will address only the issue of whether the responsive records held by Walker – correspondence between Walker and other lawyers involved in the applicant's complaints – would be excepted from disclosure by s. 14 of the Act under litigation brief privilege.

Pages 50-63 of the initial responsive records package consist, at pp. 50-60, of records relating to the Board's engagement under s. 50(2)(b)(ii) of the *Police (Discipline) Regulation*, B.C. Reg. 142/89, ("Regulation") of a lawyer to investigate the applicant's complaint against a VPD member. These records also consist, at pp. 61-63, of records

relating to legal advice sought by the Board, or given to it, by a lawyer other than Walker or the investigating counsel.

Pages 4-11 of the records which were later discovered by the Board also consist of records relating to legal advice sought by the Board, or given to it, by a lawyer other than Walker or the investigating counsel.

Records Held by Walker – Although the Board conceded in its submissions that parts of these records may be responsive to the applicant's access request, it also made it plain that it has neither searched for these files nor endeavoured to produce them in this inquiry. There is little doubt in my mind that the Board's lawyer's file is – subject perhaps to any solicitor's lien for unpaid legal fees – within the control of the Board, as client, for the purposes of the Act. The Board, in any case, has not argued that it does not have control of Walker's files; it has merely made it clear that it has not searched for them or attempted to produce them.

In other circumstances, I might find it necessary to order the Board to produce these records to me. I do not need to do so here because of the conclusion I have reached on the applicability of litigation brief privilege to the Board's function in relation to the applicant's cases under the *Police Act* and the Regulation.

Litigation privilege encompasses communications between a client, or his or her lawyer, and third parties for the dominant purpose of litigation that is then under way or is in reasonable prospect. The policy justification for solicitor client privilege – freedom to consult candidly and confidentially with one's lawyer – is different from the policy justification for litigation privilege, which is described as follows in J. Sopinka *et al., The Law of Evidence in Canada,* 2d ed., (Butterworths: Toronto, 1999) at p. 745:

> …it was founded upon our adversary system of litigation, by which counsel control fact-presentation before the court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.

The litigation privilege policy was also expressed as follows in *Susan Hosiery Ltd.* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33-34:

> A lawyer's preparation of his client's case must not be inhibited by the possibility that the materials he prepared can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. These materials might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest…. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases … would develop into a most unsatisfactory travesty of our present system.

See, also *Hodgkinson* v. *Simms* (1989), 55 D.L.R. (4th) 577 (B.C.C.A.).

Because the policy justification for litigation privilege rests with the nature of the adversarial trial system, litigation privilege lasts only as long as any relevant litigation. This is quite different from the enduring nature of solicitor client privilege. See R. Manes *et.al*., *Solicitor-Client Privilege In Canadian Law* (Butterworths: Toronto, 1993), at pp. 209ff.

In terms of establishing the required elements for litigation privilege, I accept that Walker and the Board were in a solicitor-client relationship. The Board chose not to submit any evidence as to the date on which Walker became its counsel, the scope of the retainer or (in even general terms) the matters in respect of which Walker represented the Board in relation to the applicant's cases. Even if one proceeds on the basis – which the material before me indicates is a reasonable one – that Walker acted for the Board in respect of its adjudicative role in those cases, I cannot see how the litigation privilege rule applies to his correspondence with other lawyers.

Where I see real difficulty is in respect of the requirement for pending or contemplated litigation. The "litigation" regarding the applicant's cases comprises his complaints and appeals under the *Police Act*. It may be an interesting question whether such administrative proceedings constitute "litigation" for the purpose of invoking this type of privilege. For this inquiry, I have assumed, without deciding, that the answer to this question is "yes". However, because the Board's role in the applicant's cases was, by statute, adjudicative and not adversarial, I do not see how litigation privilege would apply to communications between the Board (or Walker on its behalf) and other lawyers involved with those cases. It was not the role of the Board to build a case, for or against the applicant's complaints or appeals, in any adversarial sense. Nor was the Board's function prosecutorial, unlike the function of some other administrative bodies. Similarly, the type of third party communications sought here bear no relationship to the "in-gathering" of evidence or the engagement of experts which assist counsel in marshalling a litigation case and underlie the policy justification for litigation privilege.

The characterization of the Board's role as adjudicative is supported by the *Police Act*, the Regulation and the evidence before me, in the form of the Affidavit of Florence Wong, sworn March 15, 1999 and submitted by the Board. That affidavit speaks to important aspects of the Board's function respecting the applicant's various complaints. Paragraph 2 of her affidavit confirms that Ms.Wong is a member of the Board and has been a member since the spring of 1998. Her affidavit also establishes the following background. On October 28, 1998, a panel of the Board – which included Ms. Wong – convened to deal with three consolidated public inquiries arising out of complaints by the applicant against VPD members. None of those inquiries relate to the complaint dealt with below in connection with the investigation report found at pp. 50-60 of the responsive records. The panel reconvened on November 13, 1998 and on November 20, 1998 issued a written decision to terminate the consolidated public inquiries. On December 24, 1998, the applicant sought leave to appeal, to the B.C. Police Commission, the panel's decision to terminate his complaints. (The Commission had not, as of the date Ms. Wong's affidavit was sworn, set a date for the leave to appeal hearing.)

I have also not overlooked, here, the Board's reference to – and apparent reliance on – "litigation" in a wider sense, *i.e.*, as involving more than the applicant's cases before the Board. The Board argued, at p. 5 of its further submission that:

> Given the Board's experience with this particular Applicant, it was reasonable for the Board to assume that litigation and/or administrative processes would result from the Board's dealings with the Applicant.

The "Board's experience with the Applicant" appears to have been that he demonstrated himself to be a litigious person, in the sense that he readily brought multiple complaints against police officers and, in relation to his cases, readily challenged or appealed the decisions of the VPD and the Board. There is no evidence before me that the applicant sued anyone, much less the Board or any of its members. Furthermore, none of the cases cited by the Board on litigation privilege, nor any I could find, involved the characterization of an appeal or judicial review of a statutory tribunal's decision as litigation against the tribunal, *i.e.*, the Board. If that were so, any tribunal could be said to contemplate "litigation" about any of its decisions. Such an application of litigation privilege to adjudicative bodies appears to be unprecedented, as well as unsupported by the policy objective of this privilege.

As a result, and in summary, I find that the Board's function in relation to the applicant's complaints and appeals against VPD police officers under the *Police Act* and the Regulation did not entail an adversarial relationship and thus would not support the litigation privilege claimed. Section 14 of the Act, in the form of litigation privilege as argued by the Board, does not therefore apply to except these records from disclosure. The Board must search the Walker files and make disclosure to the applicant accordingly.

Records Relating to Engagement of A Lawyer As An Investigator – The question here is whether pp. 50-60 of the initial responsive records package – records relating to the Board's engagement of a lawyer as an investigator under s. 50(2)(b)(ii) of the Regulation – are privileged as solicitor client communications and thus excepted from disclosure by s. 14 of the Act. The Board did not rely at any stage in this inquiry upon litigation privilege or on any of the Act's other exceptions, such as s. 15, in relation to these records.

Section 50(2)(b)(ii) is found in Part 2 of the Regulation, which deals with complaints against chief constables and deputy chief constables. (Complaints against other police officers are dealt with in Part 1 of the Regulation. Part 1 investigations are carried out by "investigating officers", who are police officers appointed under ss. 8 or 9 of the Regulation.) Section 50(2)(a) says that an alleged disciplinary default by a chief constable or a deputy chief constable "shall be reported to the chairman of the [police] board". Section 50(2)(b) reads as follows:

> (b) the chairman of the board shall appoint one of the following to investigate the matter:
>
> (i) a chief constable from another municipal force;
> (ii) a counsel;

(iii) an investigator attached to or appointed by the Ministry of Attorney General.

Section 1 of the Regulation defines the term "counsel" as "a member in good standing with the Law Society of British Columbia".

Section 50(2)(c) says the investigation "shall be carried out in accordance with sections 10 and 11". Section 10 requires the investigator to obtain written statements from all witnesses and to give the police officer about whom the complaint was made an opportunity to give a written reply to the allegation. Section 11(1) says the investigator must make a completed report on the investigation. The report must, under s. 11(2), make a recommendation on how the matter should be disposed of. In the case of Part 2 investigations, s. 50(2)(d) says the investigation report must be made to the chairman of the police board. Section 50(2)(f) provides that, if the decision is made to lay charges, "the case shall be presented by counsel or agent". The same section provides that the officer charged may "be represented by counsel".

In the absence of explanatory evidence from the Board as to the nature of the relationship between the Board and the investigator engaged by it, or as to the nature and purpose of the communications between them, I have had to determine – from the *Police Act* and the Regulation, from the records themselves and from other evidence before me – whether these records are privileged solicitor-client communications.

Solicitor client privilege attaches only if certain conditions are met. To be privileged, a communication must be:

1. between a client and his or her lawyer;
2. confidential; and
3. for the purpose of obtaining or giving legal advice.

With respect to the first of these conditions, the records in issue confirm that they relate to the Board's retention of a lawyer as counsel, pursuant to s. 50(2)(b)(ii) of the Regulation, to investigate a complaint made by the applicant. The records are not marked confidential and suggest no relationship between the Board and the lawyer other than the engagement under s. 50(2)(b)(ii).

In my view, the fact that someone who is appointed as a statutory investigator also happens to be a lawyer is not sufficient to establish that solicitor client privilege attaches to communications between that person and those who appointed him or her. I have concluded, therefore, that the Board has failed to establish that it was in a solicitor-client relationship with the lawyer who was retained as an investigator under s. 50(2)(b)(ii) of the Regulation. On that ground alone, the Board's claim of solicitor client privilege for pp. 50 through 60 of the records fails.

Even if one assumes that the Board was in a solicitor-client relationship with the investigating lawyer, I find that the Board has not established that the records in question were confidential communications for the purpose of giving or seeking legal within such a relationship. The courts have, in a number of cases, held that, even if a solicitor and

client relationship exists, the lawyer must be acting as a lawyer and must be providing legal advice before the communication in question can be privileged.

For example, in *Northwest Mettech Corp.* v. *Metcon Services Ltd.*, [1996] B.C.J. No. 1915, Master Joyce ruled that communications from a lawyer to his client were not privileged because the lawyer, who was also a patent agent, was acting as a patent agent rather than as a lawyer with respect to those communications. A solicitor-client relationship existed between the lawyer and his client, but that was not enough. Master Joyce cited both Canadian and U.S. authorities for the proposition that communications between a lawyer and his or her client, in order to be privileged, must concern legal advice or representation. See, for example, the United States District Court decision in *Hercules Incorporated* v. *Exxon Corporation* (1977) 434 Fed. Supp. 136 (at p. 147):

> If the primary purpose of a communication is to solicit or render advice on non-legal matters, the communication is not within the scope of the attorney-client privilege. Only if the attorney is 'acting as a lawyer' – giving advice with respect to the legal implications of a proposed course of conduct – may the privilege be properly invoked. In addition, if a communication is made primarily for the purpose of soliciting legal advice, an incidental request for business advice does not vitiate the attorney-client privilege.

It appears that an appeal from the decision of Master Joyce was dismissed by Smith J. of the British Columbia Supreme Court. (This is alluded to in the judgment of Thackray J., on another aspect of the same case, in *Northwest Mettech Corp.* v. *Metcon Services Ltd.*, [1997] B.C.J. No. 2734.)

It might be argued that *Northwest Mettech* involved a special case, namely individuals who are both lawyers and patent agents and are assisting a client in obtaining or in otherwise dealing with a patent. I do not agree. In my view, the reasoning and result in *Northwest Mettech* are simply consistent with other cases, such as *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), which require the disputed communication to be for the purpose of giving or seeking legal advice before it will be privileged.

This issue has also been considered under Ontario's access to information law, in Order P-1014 (October 6, 1995). A harassment complaint was made against an employee of the Ontario Ministry of Attorney General. The Ministry conducted an investigation into the complaint under a workplace discrimination and harassment policy. A report outlining the investigator's findings was submitted to the Deputy Attorney General. The investigation was, to some extent, participated in by the Ministry's coordinator for the policy. That individual was a lawyer. The employee who was the subject of the investigation sought access to information gathered by the investigator and to all statements given by persons interviewed in connection with the investigation.

The Ministry's claim of solicitor client privilege under s. 19 of the Ontario *Freedom of Information and Protection of Privacy Act* was rejected on appeal. Although s. 19 of the Ontario legislation is somewhat broader than s. 14 of the British Columbia Act, Order P-1014 dealt with common law solicitor client privilege, which is protected by s. 14 of

our Act. The following passage – in which solicitor client privilege is referred to as "Branch 1" – appears at pp. 7 and 8 of Order P-1014:

> The purpose of the common law solicitor-client privilege (which is the basis for Branch 1 of the section 19 exemption) is to protect the confidentiality of solicitor-client relationships. Accordingly, it is my view that, in order for Branch 1 of this exemption to apply to a record, the person acting as "solicitor" must actually be retained and functioning as such. The mere fact that an individual acting in some other capacity also happens to be a lawyer is not sufficient to raise the application of this privilege.

Returning to the case at hand, s. 50(2)(b) of the Regulation contemplates the appointment of an investigator who may or may not be a lawyer. The mere fact that the investigator here happened to be a lawyer – and that the Regulation explicitly permitted the Board to choose a lawyer as investigator – does not mean the lawyer was acting as a lawyer when he conducted an investigation, created an investigation report as required by the Regulation, or delivered it to the Board. Even if a solicitor and client relationship had existed between the Board and the investigator, it is clear from the Regulation that the investigation report, and related communications, were not for the purpose of giving or seeking legal advice within that relationship. The Regulation stipulates what the investigator must do, in terms of fact-finding, and requires that the report include the investigator's findings and recommendations. Thus the components of an investigation and investigation report have a statutory aspect and function under the Regulation which are separate and distinct from legal advice provided by a lawyer, to his or her client, as to the legal implications of a proposed course of conduct or a state of affairs affecting the client's interests.

It also would be anomalous, I think, if the investigation report of a lawyer retained as an investigator under s. 50(2)(b)(ii) were privileged, but the investigation reports of investigators hired under either s. 50(2)(b)(i) or (iii) were not. Read as a whole, nothing in the Regulation, including Part 2, supports such a distinction. Nothing in the Regulation suggests that an investigation report generated by an investigation under Part 1 of the Regulation would be privileged in any sense. To my mind, s. 50(2)(b) of the Regulation permits a police board to choose, as an investigator, someone who also happens to be a practicing lawyer. But that does not mean that an investigation report prepared by such an investigator meets the conditions for solicitor client privilege.

Finally, the evidence before me does not establish the necessary element of confidentiality respecting the investigator's report and the communications related to it. Nor do I think that the element of confidentiality is established by the Regulation itself. Section 50 of the Regulation does not stipulate whether such investigation reports are confidential, much less privileged. Section 50(2) says that the principles in Part 1 apply to investigations carried out under s. 50. Section 13(3), found in Part 1 of the Regulation, provides that an accused police officer is not entitled to a copy of an investigation report or recommendations. Sections 17(1), 39(3) and 42(1) of the Regulation provide that *internal* discipline hearings and *internal* member appeals from those hearings are not open the public. However, if an internal discipline matter is also the subject of a public complaint – as appears to be the case here – the police board (or the police commission)

considers the matter in a broader sense and inquiries conducted for that purpose are open to the public (see ss. 61 and 65(5) of the Regulation).

My finding that solicitor client privilege under s. 14 of the Act does not apply to pp. 50 through 60 of the initial responsive records package can be summarized as follows:

1. the Board has not established that a solicitor-client relationship existed between it and the lawyer appointed as a statutory investigator under s. 50(2)(b)(ii) of the Regulation;
2. in any case, the investigator appointed under s. 50(2)(b)(ii) was not acting in his capacity as a lawyer providing legal advice; and
3. there is no basis for concluding that the disputed records were intended to be confidential.

Records Relating to Legal Advice Sought By or Given to the Board – In my view, pp. 61-63 of the initial responsive records package qualify for protection under s. 14 of the Act, as confidential communications between the Board and its lawyer for the purpose of seeking or giving legal advice. This conclusion is based partly on the Board's submission on this issue and partly on my examination of those records (including in the context of other associated records before me).

Records Newly Discovered By the Board – I have concluded that these records, pp. 4-11 of the subsequently discovered records, on their face also qualify for protection under s. 14 of the Act as confidential communications between the Board and its counsel for the purpose of seeking or giving legal advice.

3.8 The Law Enforcement Exception

Initial Issues Involving Section 15 – In its written submissions, the Board, for the first time, advanced ss. 15(1)(a) and (g) as grounds for withholding pp. 68-71 of the responsive records. Because the applicant's initial submission in this inquiry addressed the applicability of s. 15 to the records in issue, and because he also took the opportunity to reply to the Board's submissions, I have decided to allow the Board to raise ss. 15(1)(a) and (g) at this late date. Public bodies should be aware, however, that I will generally be reluctant to permit them to raise new exceptions at such a late date.

Harm To a Law Enforcement Matter – Section 15(1)(a) of the Act authorizes a public body to refuse to disclose information "if the disclosure could reasonably be expected to ... harm a law enforcement matter". The Board, therefore, must establish that the information relates to a "law enforcement matter", and that disclosure could "reasonably be expected" to harm the law enforcement matter.

The Board first argued that the *Police Act* proceedings initiated by the applicant against various VPD members qualify as "law enforcement" matters for the purpose of s. 15 of the Act and relied on Order No. 39-1995. More to the point than Order No. 39-1995 is the decision of the former commissioner in Order No. 13-1994. That order accepted that *Police Act* complaints proceedings qualified as "law enforcement" matters for the purposes of s. 15 of the Act. Since the Board's submissions indicate that *Police Act*

proceedings are still underway, I accept that a "law enforcement matter" is in issue here for the purposes of s. 15(1)(a). The question remains, however, whether s. 15(1)(a) applies in this case because of a reasonable expectation of harm flowing from disclosure of the information in question.

As I said in Order No. 323-1999, at p. 4, the "reasonable expectation" of harm test requires something more than a fanciful, contrived or imaginary harm. It must be possible for a reasonable person to conclude, based on sufficient evidence, that the identified harm is likelier than not to occur because of disclosure of the information. There must be a rational connection between the disclosure and the anticipated harm. The nub of the Board's case on harm is set out in the following paragraph, from p. 4 of its initial submissions:

> It is the further submission of the Vancouver Police Board that disclosure of all correspondence between Robert Walker, counsel for the Vancouver Police Board, and the Vancouver Police Board as well as pages 68 through 71 of the records at issue in this Inquiry would harm the *Police Act* matter currently before the B.C. Police Commission. Whether any release of records to the Applicant in the *Police Act* proceedings is ultimately deemed appropriate is a matter for the B.C. Police Commission to decide. Any release of these records in the context of this Inquiry would be premature and could harm the *Police Act* proceedings by fettering the discretion of that tribunal and compromising the confidentiality of those proceedings

I draw two points from this paragraph. First, the Board believes that the B.C. Police Commission has the responsibility for deciding whether "any release of records" is "appropriate". Since I have found that s. 3(1)(h) does not apply to these particular records, the Act applies to them. It is not, therefore, up to the B.C. Police Commission above to decide the release issue under the Act. The Board's submission, with respect, merely begs the question before me: is the applicant's right of access under s. 4 of the Act overcome by the exception found in s. 15(1)(a) of the Act? The Board's argument does not establish the necessary reasonable expectation of harm to a law enforcement matter.

The second point to be drawn from the above passage from the Board's s. 15(1)(a) submission is that release of records to the applicant "would be premature" and would harm the proceedings "by fettering the discretion" of the B.C. Police Commission and "compromising the confidentiality of those proceedings". On the latter point, the Board provided me with no evidence establishing that such proceedings are by law or custom "confidential". Certainly, as regards the applicant - who is the complainant in the appeal phase of those proceedings apparently now under way - it is not clear to me how the appeal would be confidential. Even if the Board had persuaded me those proceedings are confidential, I do not think the Board has proven a reasonable expectation of harm would exist. The Board's assertion that disclosure would "compromise the confidentiality of those proceedings" does not satisfy the harm test set out in s. 15(1)(a). What does "compromise" mean? In what way would there be a compromise in the proceedings? What is the nature of the harm encapsulated in this statement? These questions are not answered in the Board's submissions and no evidence was adduced by the Board to support this claim.

Last, it is not clear what is meant by the Board's argument that disclosure would somehow "fetter" the "discretion" of the B.C. Police Commission in the *Police Act* proceedings. Perhaps this means any discretion or power of the Commission respecting document disclosure would be affected by disclosure under the Act. Disclosure of information under the Act, however, is independent of disclosure processes under other legislation. I do not see how the Commission's "discretion" in *Police Act* proceedings – if the Commission truly has a discretion and not just a statutory power of decision – would be "fettered" if the applicant were to be given the records through the access to information process under the Act. Access would be pursuant to the Act, not the adjudicative authority of the Commission.

Prosecutorial Discretion – The next question is whether pp. 68 through 71 of the responsive records can be withheld under s. 15(1)(g) of the Act. That provision authorizes a public body to withhold information if its disclosure "could reasonably be expected to ... reveal any information relating to or used in the exercise of prosecutorial discretion". At p. 4 of its initial submissions, the Board said it had correctly withheld these records, "as these pages related to ongoing *Police Act* matters." The Board also made the following argument, at p. 4:

> In the further alternative, if the Commissioner does not accept the submissions of the Vancouver Police Board in paragraphs 2 through 13 above, the Vancouver Police Board submits that the disclosure of records relating to an ongoing *Police Act* matter could reveal any information relating to or used in the exercise of prosecutorial discretion and that all correspondence between Robert Walker, counsel for the Vancouver Police Board, and the Vancouver Police Board as well as pages 68 through 71 of the records at issue in this Inquiry were properly withheld from the Applicant pursuant to s. 15(1(g) of the *Freedom of Information and Protection of Privacy Act* as these pages related to ongoing *Police Act* matters.

The Board did not provide any more details as to how release of those records could reveal information described in s. 15(1)(g).

The key aspect of s. 15(1)(g), of course, is the phrase "exercise of prosecutorial discretion". The provision can be relied upon only if the information in question has been "used in the exercise of prosecutorial discretion" or if it is information "relating" to that exercise of discretion. Schedule 1 to the Act contains the following definition of the phrase "exercise of prosecutorial discretion":

> **"exercise of prosecutorial discretion"** means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (a) to approve or not to approve a prosecution,
> (b) to stay a proceeding,
> (c) to prepare for a hearing or trial,
> (d) to conduct a hearing or trial,
> (e) to take a position on sentence, and
> (f) to initiate an appeal.

I have carefully reviewed pp. 68 through 71 of the responsive records and have concluded that none of the information in those records qualifies for protection under s. 15(1)(g) of the Act. There is no evidence before me that the correspondence which forms pp. 68 through 71 has anything to do with the exercise of duties or powers under the *Crown Counsel Act*. In fact, as the above discussion indicates, this correspondence arose in the context of *Police Act* complaint proceedings. It follows that none of the information in any of those records in any way relates to the exercise, by Crown counsel or by a special prosecutor, of any duty or power under the C*rown Counsel Act*, including any of the duties or powers listed in paragraphs (a) through (f) of the above-quoted definition. Even if the necessary *Crown Counsel Act* context were present, my review of the records revealed no basis for concluding that they contain information "used" in the exercise of "prosecutorial discretion" as defined in the Act.

Accordingly, I find the Board was not authorized under s. 15(1)(a) or (g) to withhold pp. 68 through 71 from the applicant.

3.9 Personal Information – The Board argued that s. 22(3)(b) of the Act applied to personal information found in p. 64 of the responsive records, thus raising a presumption of an unreasonable invasion of personal privacy. Section 22(3)(b) of the Act says it is a presumed unreasonable invasion of a third party's personal privacy to disclose personal information – including an individual's name – if the personal information

> … was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The record in issue here is a letter from the Board's chair to a member of the VPD, stating that the applicant had made a complaint about the member's conduct. The Board did not present any evidence in this inquiry about whether it had considered all relevant circumstances, including those under s. 22(2), in deciding whether s. 22(1) required the personal information to be withheld. It simply submitted that p. 64 "was correctly withheld as third party personal information" under s. 22(3)(b).

In Order No. 13-1994, at p. 14, the previous commissioner agreed that the names of police officers against whom complaints had been made should be withheld, in order to "avoid unjust stigmatization of police officers", in the initial stages of *Police Act* complaint processes. He accepted that a *Police Act* disciplinary investigation qualifies as an "investigation into a possible violation of law" for the purpose of s. 22(3)(b) of the Act. That case involved a request by a journalist for records that would disclose the names of police officers against whom complaints had been made by others. In Order No. 13-1994, the commissioner – in my view, properly – concluded that until the police complaint process had been completed and a finding of guilt had been made, the identity of the officers involved should not be disclosed to a member of the media.

This is a different case. Here, the applicant knows the identity of the police officer in question, since the applicant is the person who complained about that officer (and others). It must be emphasized that we are dealing here only with the name of the officer in

question. No other personal information of that individual is contained in the letter notifying that officer that the applicant had complained about the officer. This is relevant in considering whether the presumed unreasonable invasion of personal privacy raised by s. 22(3)(b) has been rebutted. It is also a relevant circumstance for the purposes of s. 22(2) (as is the fact that the applicant knows the identity of the VPD officers about whom he complained).

After a careful consideration of the evidence, including the nature of the personal information, the fact the applicant is the person who complained about the police officers in question, and the fact that the applicant has participated in the complaints-related *Police Act* proceedings, I have concluded this is a case where the presumed unreasonable invasion of personal privacy raised by s. 22(3)(b) has been overcome. I find the Board was not required by s. 22(1) to withhold the name of the police officer on p. 64 or the names of other police officers, found elsewhere in the responsive records, against whom the applicant made *Police Act* complaints. I note, in passing, that the Affidavit of Florence Wong – which the Board did not submit to me *in camera* and a copy of which was, therefore, given to the applicant – names three of those VPD officers (as does the Board's response letter to the applicant dated November 17, 1998).

4.0 CONCLUSION

For the reasons given above, I make the following orders:

1. having found that s. 3(1)(h) does not apply to pp. 68 through 71 of the initial responsive records, under s. 58(3)(a) of the Act, I require the Board to comply with the Act by processing the applicant's access request with respect to those records;
2. having found that s. 12(3)(b) does not authorize the Board to refuse to disclose p. 49 of the initial responsive records, under s. 58(2)(a) of the Act, I require the Board to give the applicant access to that record;
3. having found that s. 14 authorizes the Board to refuse to disclose pp. 61 through 63 of the initial responsive records, and pp. 4 through 11 of the later discovered records, under s. 58(2)(b) of the Act, I confirm the decision of the Board to refuse to disclose those records to the applicant;
4. having found that litigation privilege recognized under s. 14 does not authorize the Board to refuse to disclose the records requested by the applicant (being communications between the Board, or its counsel, Robert Walker, and other lawyers involved in the applicant's *Police Act* cases), under s. 58(2)(a) of the Act, I require the Board to give the applicant access to those requested records, if any, which are in the files of the Board's counsel, Robert Walker;
5. having found that s. 14 does not authorize the Board to refuse to disclose pp. 50 through 60 of the initial responsive records, under s. 58(2)(a) of the Act, I require the Board to give the applicant access to those records;
6. having found that s. 16(1)(b) does not authorize the Board to refuse to disclose pp. 65 through 67 of the initial responsive records, under s. 58(2)(a) of the Act, I require the Board to give the applicant access to those records; and

7. having found that s. 22(1) does not require the Board to refuse to disclose to the applicant the personal information found on p. 64 of the initial responsive records, or the names of the VPD police officers about whom the applicant complained under the *Police Act* as found elsewhere in the responsive records, under s. 58(2)(a) of the Act, I require the Board to give the applicant access to that personal information.

In view of the Board's acknowledgment in its submissions that, although records in Robert Walker's files, as described above, may be responsive to the applicant's access request, the Board has not searched those files to determine the point, my inquiry in relation to those records is incomplete until the Board has conducted that search and responded to the access request in accordance with my findings in this order. To oversee this process, under ss. 58(3)(a) and 58(4) of the Act, I require the Board to comply with s. 6(1) of the Act, within 20 days after the date of this decision, by searching Robert Walker's files, as described above, for the records requested by the applicant and providing me with an affidavit of its counsel, or some other appropriately knowledgeable person, confirming that the files have been searched, attaching copies of responsive records in the files (if any), and confirming that those responsive records have been disclosed to the applicant. If necessary, I may also act under s. 44 of the Act.

December 21,1999

David Loukidelis
Information and Privacy Commissioner
for British Columbia