Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 13-1994
June 22, 1994

INQUIRY RE: A Request for Access to Records of the B.C. Police Commission

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1. Description of the Review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria, B.C. on May 13, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act) concerning a request for records received by the B.C. Police Commission (the Police Commission). The request was made by Ms. Kim Pemberton, a staff reporter for the Vancouver Sun (the applicant).

The applicant is seeking access to complaint files involving municipal police officers, which are held by the Office of the Complaint Commissioner, a component of the B.C. Police Commission, under the provisions of Part Nine of the *Police Act*. According to the Police Commission, the applicant has sought information identifying complainants and constables complained about. The alternative request was for complaint forms and letters of disposition with names severed.

The applicant's original request to the Ministry of the Attorney General on November 24, 1993 asked for any information held by the Ministry regarding the termination of employment of a West Vancouver police officer in 1993. She also asked for any information filed with the Ministry on disciplinary action taken under the *Police Act* for any officer serving on a B.C. municipal police force from January, 1992 to the present date. She wanted to know the officer involved, what police force was involved, the circumstance for the charge to arise under the *Police Act*, and how it was dealt with by law enforcement officials.

On December 23, 1993 the Police Commission offered to provide a computer printout with limited summary information on it. The applicant refused this and made a request for review. When the Police Commission sought to charge her $241.80 to process this limited information, she also requested a review of the fee. The parties agreed to delays in the scheduled hearing and to combining the two requests for review.

2. Documentation of the Review Process

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a three-page statement of facts (the fact report), which, after some amendments, was accepted by all parties as accurate for purposes of conducting the inquiry, subject to one item contested by the applicant.

Under sections 56(3) and 56(4) of the Act, each party was given an opportunity to make written representations to me. Initial submissions were made on May 11, 1994, and final submissions were exchanged thereafter. In reaching my decision, I have carefully considered these submissions, which total more than thirty pages.

The applicant was represented by Mr. Barry Gibson of Farris & Company of Vancouver. The Police Commission's case was submitted by J. David Edgar, Chair of the Police Commission, and Stephen Stackhouse, Complaint Commissioner and Deputy Chair of the Police Commission.

After reviewing the initial written submissions, I decided an oral hearing was necessary in order to further review the issue within the context of the current complaints process. Under section 56(3) of the Act, the Office gave notice of that inquiry, and thus intervenor status, to the B.C. Civil Liberties Association (BCCLA), the B.C. Federation of Police Officers represented by their president Mr. Daryl Tottenham and their counsel Mr. Kenneth Ball, and the B.C. Association of Chiefs of Police represented by Sergeant Bob Rich of the Vancouver Police Department and Constable Steven H. Ing of the Victoria Police Department. A written submission was received from BCCLA, prepared by John Westwood, and was provided to all parties at the oral hearing. All had the opportunity to make representations and to ask questions at the inquiry. I requested that the parties address the following:

- was there explicit or implied confidentiality granted to the complainant in the process?
- provide detailed information about the actual records kept by the Police Commission and supply sample copies of those records;
- provide further clarification as to what the applicant wished to receive from the Police Commission.

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or parts thereof. Thus the Police Commission bears the initial burden of proof under this section. However, section 57(2) stipulates that:

> if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove

> that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

Thus to the extent that the records in question contain such personal information, it falls to the applicant to prove that access should be granted in the circumstances.

In addition, at my request the Police Commission provided me with a representative, or at least consecutive, sample of complaint records. I reviewed these for the purpose of understanding complaint records kept by the Complaint Commissioner.

3. The Complaint Process

The functions of the Complaint Commissioner require clarification. According to its own submission to this inquiry, it is the responsibility of a municipal police department to investigate a complaint and decide what action, if any, to take. The "disciplinary authority" for the police department is the chief constable. The Commissioner acts as a facilitator to complainants and police departments, as necessary.

In addition, the Complaint Commissioner has "access to any files or other material relating to a complaint and may interview and take statements from the disciplinary authority, the complainant and the constable complained about." The Complaint Commissioner does not have a copy of the police investigative file, but can examine it. Put simply, the Complaint Commissioner monitors and assesses the adequacy of the police investigation of the complaint and attempts to ensure that police investigators understand the complainant's concerns and that the complainant understands the process. (Submission, May 10, 1994, pp. 1-2)

After completion of the municipal investigation, either the complainant or the constable complained about may ask for a mandatory public inquiry before the appropriate municipal police board. Its decision may then be appealed to the board of the B.C. Police Commission, of which the Complaint Commissioner is a member. To date, this has rarely happened. Thus the Police Commission is the final decision maker in only a very tiny proportion of formal complaints.

4. The Records in Dispute

A substantive focus at the oral hearing for this inquiry was understanding the system of complaint records held by the Police Commission. The *Police Act* creates the regime for handling complaints from the public about the conduct of municipal police officers.

The Complaint Commissioner keeps his complaint records in a segregated set of files at the office of the Police Commission in Vancouver. These files are kept under lock and key for manual records and password control for digital records.

Such complaint records normally include the following components as prescribed by the *Police Act* and the *Police (Discipline) Regulation*: 1) a Form 9 "Citizen Complaint Form" mandated in the *Police (Discipline) Regulation* (Appendix B); 2) the original letter of complaint; 3) periodic status reports from the disciplinary authority to the Commissioner and the complainant on the processing of a specific complaint by individual police forces (*Police Act*, section 55); (these are in fact routine notices that only reveal how long it is taking to process a request); 4) a section 59 letter from the disciplinary authority under the *Police Act* giving notice of the results of an investigation to the complainant, the Complaint Commissioner, and the constable against whom the complaint is made; 5) any further correspondence which may be required by sections 58, 60, and 64 of the *Police Act*. This would include letters requesting a review of a decision not to investigate a complaint further, a public inquiry, and leave to appeal to the Police Commission, along with letters containing the response to such requests.

If a complaint is resolved informally by the disciplinary authority, the *Police Act* further requires that "a record shall be made of the manner in which the complaint was resolved." Any such "results" also have to be sent to the Complaint Commissioner (section 56).

Form 9 is a single page listing such basic information as the name of the police department, identifying particulars for the complainant, the name of the police officer involved, and a brief notation of what happened, which is customarily supplemented by such attachments as a "letter of complaint." Form 9 also contains a box in which the results of informal resolution can simply be noted.

Section 59 of the *Police Act* requires that the disposition letter contain:

(a) a summary of the investigation and the results of the investigation,

(b) any disciplinary action intended to be taken by the disciplinary authority, and

(c) the right of the complainant or constable against whom the written complaint is made to request an inquiry.

In summary, the Complaint Commissioner normally has, for each complaint, a Form 9, the letter of complaint, and the status reports. The section 59 summary is not always collected. The Complaint Commissioner does not have the investigative reports on each complaint, although I noticed a few in the sample records submitted to me by the office.

The Complaint Commissioner has the power to request from a municipal police department any information regarding a complaint, which could include the contents of an investigation file, the report of the investigating officer with his or her recommendations concerning discipline, and the Chief Constable's disciplinary decision (where this is

contained in a completed Form 3). However, in practice, the Complaint Commissioner reviews this information in the police department, and the information is not sent to the Commission. (Submission of the B.C. Civil Liberties Association, p. 2)

5. The Applicant's Case

The applicant argued essentially that she should have access to all of the information on police complaints that she requested from the Police Commission. In addition to reliance on the general principle of openness incorporated in the legislation, the applicant cited section 25 of the Act, which states:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> ...

The applicant stated that with respect to her access request on behalf of the Vancouver Sun:

> Here, the public interest is clearly paramount. The public cannot have confidence in the administration of justice unless it is open to public scrutiny. Where, as here, we are dealing with complaints against the police, a small fraction of which progress to a formal hearing, that need for public scrutiny of the progress [process?] becomes obvious.

With respect to the Police Commission's argument in favour of complete non-disclosure of information on any citizen complaint against the police that has not been resolved on the ground that it would be harmful to law enforcement, the applicant responded that the statutory exemption is restricted to information that may be “harmful to a [specific] law enforcement matter” rather than generally harmful.

With respect to the Police Commission's argument that certain information in “closed files” was given to it in confidence, the applicant responded that section 15(1)(d) of the Act protects only confidential sources: “In order to invoke this provision, the Police Commission would have to establish that a complainant specifically asked that their identity not be disclosed and the Police Commission agreed to that request.”

The applicant further argued that the Police Commission can only refuse to disclose personal information where such disclosure would be an "unreasonable invasion of a third party's personal privacy." In evaluating such a disclosure, section 22(2) of the Act requires consideration of whether "the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny...." The applicant's position is that "the sole purpose of requesting the information is to subject the activities of the Police Commission to public scrutiny." Therefore, the information should be fully disclosed.

Finally, the applicant argued that the Police Commission should waive any applicable fees under section 75(5)(b) of the Act, since the information requested relates "to a matter of public interest...."

6. The Police Commission's Case

The Police Commission presented its case in a set of general summary statements, which I have set forth almost in their entirety (omitting the intervening discussion):

> I. It is submitted that the disclosure of the identities of the complainants and the constables complained about would be contrary to the *Freedom of Information and Protection of Privacy Act*.
>
> A1. Information provided by complainants and police officers pursuant to Part Nine of the *Police Act* is received by the office of the Complaint Commissioner with the implicit understanding by complainants and constables that the Complaint Commissioner will not publicly identify the complainants or constables. Information must continue to be received in confidence in order for the complaints process to continue to work. Under sections 21(1)(b) and (c)(ii), this information must not be disclosed.

[I must note that these sections in fact pertain to the release of information "harmful to business interests of a third party" and are thus not relevant to this inquiry.]

> A2. Disclosure of complaint information would harm a law enforcement matter under section 15(1)(a) of the Act.
>
> A3. A complaint, whether it results in discipline or not, is compiled and is identifiable as part of an investigation into a possible violation of law, and disclosure is presumed to be an unreasonable invasion of personal privacy under section 22(3)(b) of the Act.
>
> A4. A complaint, whether it results in discipline or not, relates to employment history of a police constable and is thus presumed to be an

unreasonable invasion of personal privacy under section 22(3)(d) of the Act.

II. It is submitted that it is not in the public interest for complaint files to be disclosed, even when personal information is severed from them, because they do not contain sufficient information about the complaint and its outcome.

B1. The public interest in ensuring that complaints against municipal constables are dealt with fairly is addressed adequately by the provisions of the *Police Act*.

B2. In small municipalities, it would be impossible to preserve the privacy of the complainant and the constable if the contents of the complaint file were released, even if their names were severed.

B3. This request represents a misuse of the Act.

B4. Public release of information contained in the complaint files of the office of the Complaint Commissioner may result in a diminishing of respect for the police because the files do not contain full information about the complaint. Incorrect assumptions may be drawn from incomplete and/or inaccurate information.

The Police Commission asked me to confirm its decision to deny access to the applicant of information identifying either complainants or constables complained about and to the contents of citizen complaint files.

7. The Applicant's Reply Submission

Briefly, the applicant replied that the Police Commission offered no evidence that: 1) any complaints to, and responses by, the Police Commission are supplied in express confidence; 2) that a single complainant or informant has ever sought agreement that their information was supplied in confidence; or 3) that disclosure of complaint information would harm a law enforcement matter.

The applicant also argued that section 22(3)(b) of the Act only relates to “personal information” in an investigation. Complaints about a public official and how these are disposed are not personal information, especially if the information is disclosed for the purpose of subjecting the activities of a public body to public scrutiny.

The applicant also opposed the Police Commission's argument that “public disclosure is unnecessary because the Police Commission is already subject to public scrutiny.... Every branch of the government could claim exemption on the basis that they are responsible to a higher authority in government.”

8. The Police Commission's Reply Submission

The Police Commission disagreed with the applicant's argument that it is necessary to submit "evidence" (in the strict legal meaning of the word) in a review of this sort: "It is submitted that the nature of your review does not lend itself to adducing 'evidence'. A common sense approach is required to assess and balance the public interest and individual privacy interests."

The Police Commission further argued that its complaint files do contain personal information within the meaning of section 22(3)(b) and 22(3)(d) of the Act, and "the release of this personal information is presumed to be an unreasonable invasion of the personal privacy of the complainant and the constable complained about." The applicant, in its view, did not rebut these presumptions.

Finally, the Police Commission advanced the view that the specific provisions of the complaints process established under the *Police Act* was "to ensure accountability in complaints against police...and to address the public interest." Thus, "[t]*he Freedom of Information and Protection of Privacy Act* should not be used to nullify and make ineffective a process that was designed to protect the public interest."

9. The B.C. Federation of Police Officers' Case

The Federation basically supported the case made by the Police Commission and took issue with specific arguments made by the applicant. The Act, it noted, was meant to protect privacy as well as promote openness. It argued that section 25 of the Act "is designed not to override any right to the protection of privacy but instead to permit public authorities to deal with health and safety emergencies. The phrases such as 'without delay' and 'about a risk of significant harm to the environment or to the health or safety of the public or a group of people', it is [*sic*] suggested more properly a reference to emergent situations, where an immediate need of the public to know of danger, pestilence or disease would take precedence over an individual right to privacy."

The Federation emphasized that it is in the public interest for police complaints to be informally resolved whenever possible and that this should not require the release of personal information about police officers or complainants. Complaint files also involve third parties who would require notice before personal information about them could be disclosed. The applicant bears the burden of proof that such disclosures would not be an unreasonable invasion of the privacy of a third party (and none has been offered during this inquiry).

Finally, the Federation commented on repeated errors made by the Vancouver Sun in falsely reporting that an RCMP corporal had killed someone.

10. The B.C. Association of Chiefs of Police Case

The Association emphasized that the responsibility for ensuring that the police discipline process works effectively rests with the chief constable of the municipality. Confidentiality is necessary within the complaints process to maintain its effectiveness. The complainant expects and requires confidentiality.

The Association noted that police officers expect confidentiality for initial complaints as part of a process that should be fair to them: "Even within a police department a complaint is treated in confidence." Some frivolous or vexatious complaints are made each year. For example, 8 of 29 complaints against Victoria City Police in 1993 "were specifically found by the disciplinary authority to have been frivolous, vexatious, not made in good faith or concerning a trivial matter (as referred to in section 58 of the *Police Act).*"

The Association argued that the complaints process "currently works extremely well," because police members cooperate with it, but they "generally believe that media does not provide balanced reporting of an incident where police conduct is being questioned." According to the submission of the chief constables, removing current levels of confidentiality from the process "would make a working system unworkable."

Finally, the Association provided me with its views on the applicability of various sections of the Act to the records requested by the applicant.

11. The B.C. Civil Liberties Association Case

The B.C. Civil Liberties Association (BCCLA) provided the inquiry with a very detailed analysis of the treatment of the several components of complaint records held by the Complaint Commissioner. Its basic position is that this information should be released "for the purpose of holding the police accountable to the public, consistent with the protection of the privacy of the persons concerned." It did not consider in detail the issue of severing information that may harm a law enforcement matter under section 15 of the Act, because, "[a]side from the letter of complaint, all the requested information has been released by the police to the complainant, and we presume that the police have already severed such 'harmful' information."

BCCLA argued that the various components of complaint files, described above in section 4, should be released to the applicant, after the names of the complainant, the officer(s) complained against, and the names of any other persons were severed. Removal of such unique identifiers might also include the badge number of an officer and any addresses and telephone numbers.

BCCLA made an especially compelling case for the release of letters of complaint, which present an individual's view of what happened:

> It is important for the public to be able to find out about the pattern of complaints that the police department has received, the number of these, and whether within a particular kind (say, excessive force) they are of a minor or more serious nature.... Complaints from the public are an important lightening rod for the assessment of the conduct of police officers, and the training and supervision which lie behind this conduct. The level of conduct of police is every citizen's business.

The second major reason for disclosure of general complaints' information, according to the BCCLA, is the public's interest in knowing how the police have responded to complaints: "The general quality of the police response to complaints against themselves is just as much the public's business as is the general quality of the conduct of police officers. The police response to complaints could not be adequately assessed, or assessed at all, without comparing the details of the complaint against the police response."

Such disclosures should occur without "personal information" about complainants, officers, and other persons involved, because "[t]he identity of these persons is irrelevant to the general level of conduct of the police, it is irrelevant to the general quality of the police response to the complaint, and it is irrelevant to an assessment of the Commission as an oversight body."

BCCLA accepted the reality that certain usually non-identifying information in, for example, a letter of complaint might in unusual circumstances identify persons involved because an incident received publicity or occurred in a smaller community:

> The reason [for disclosure] is that such information may well be relevant to an assessment of the general quality of police conduct or police response to complaints. The fact that it could identify one or more of these persons is regrettable, but the price we must pay for our ability to hold the police accountable. The police are not just any public body. We have given them the authority to use as much force as is necessary against us in carrying out their duties, to restrict our liberty and to conduct searches on our persons and possessions. We therefore have a powerful and abiding interest in how they exercise their extraordinary powers. This interest is strong enough to outweigh the invasion of privacy which occurs when individuals are inadvertently identified during the course of the satisfaction of that interest.

BCCLA also responded to various specific arguments advanced by the Police Commission in its submission to this inquiry. Among other matters, it pointed out the importance of disclosure of general complaint information in order to assess the performance of the office of the Complaint Commissioner.

12. Interpretation of the Act

Clarifying the specific issues in dispute in this inquiry necessitates initial discussion of the meaning of at least sections 15, 22, 25, and 75 of the Act. In order to accomplish this, I will address the plain meaning of words and the guidance provided by the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (1993) (the Manual), which was prepared for the government by its own Information and Privacy Branch in the Ministry of Government Services. I will treat the various sections in consecutive order.

Section 15(1)

Sections 15(1)(a) and (d) of the Act provide:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,
>
> ...
>
> (d) reveal the identity of a confidential source of law enforcement information,....

The Police Commission has claimed that both of these exceptions apply in the present case.

This exception is first of all permissive and not mandatory. In second reading on Bill 50 on June 22, 1992, Attorney General C. Gabelmann explained that the language “interfere with a law enforcement matter” had been changed to “harm.” As he further stated to a member of the Opposition: “It's to go back to the basic principle that runs through the legislation, which is that this is harm-based rather than letting people say, 'You're interfering with my activities,' which is too general and too open to abuse.” (B.C. Debates, June 22, 1992, p. 2876)

The definition of “law enforcement” in Schedule 1 of the Act includes “proceedings that lead or could lead to a penalty or sanction being imposed.” The Manual claims that this could include “disciplinary proceedings by a self-governing profession.” (Section C.4.6, p. 4) As noted above, the Police Commission plays a mixed role, and it is rare for it to be directly involved in actually adjudicating most police complaints. In fact, for the year 1992/93, the last year for which data are currently available, only 3 of 115 complaints that resulted in a formal investigation went on appeal to the Police Commission. (British Columbia Police Commission, Annual Report 1992/93 (1994), p. 13). For the previous year none of 108 formal investigations were appealed to the Police Commission (Annual Report, 1991/92 (1993), p. 12).

The exception in section 15 includes a harm test. To quote from the Manual:

> To "harm" a law enforcement matter means that disclosure would damage or be detrimental to law enforcement.... A fear that disclosure would hinder, impede, or minimally interfere with a law enforcement matter does not satisfy this harm test. (Section C.4.6, p. 10)

Thus there is a burden on the public body to establish the above level of harm. I also accept the applicant's argument that the statutory exception is restricted to information that may be harmful to a specific law enforcement matter rather than generally harmful. The Manual explains that to demonstrate possible harm to a law enforcement "matter," "the head must demonstrate that disclosure of a record could reasonably be expected to harm a matter relating to: ...investigations or proceedings that could result in a penalty or sanction being imposed." (Section C.4.6, p. 10) It might be especially hard to claim this exception once a complaint proceeding has been completed, whether informally or formally.

Finally, the Police Commission has raised section 15(1)(d) of the Act as a bar to disclosure. The prohibition is against revealing the identity of a confidential source of law enforcement information. The latter two terms are problematic in the current inquiry. The Manual defines a "confidential source" as "someone who has provided information to a public body with the assurance that his or her identity will remain secret. There must be evidence of the circumstances in which the information was provided to establish whether the source is confidential." (Section C.4.6, p.17) As the applicant noted above, the Police Commission has not documented this point with respect to explicit expectations of confidentiality.

Section 22: Disclosures Harmful to Personal Privacy of Third Parties

The applicant has raised section 22(2)(a) of the Act, which reads as follows:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,....

I note that this section concerns disclosure of personal information about third parties, which is what the applicant is seeking in addition to more general information about complaints. "Personal information" means "recorded information about an identifiable individual", including an individual's name and information about his or her employment history (Schedule 1, Definitions). The Manual instructs the public body to consider the

“sensitivity” of the personal information requested, which may be relevant to certain complaints. (Section C.4.13, p. 14)

The Manual is quite sparse in its discussion of whether a disclosure of personal information might be desirable in order to subject “a public body to public scrutiny.”

> 'Public scrutiny' is not necessarily limited to instances where wrongdoing is alleged, or where it is alleged that the public body's normal practices or procedures are not being followed. The public body considers the broader interest of public accountability that may be demonstrated by disclosure of the requested information. (Section C.4.13, p. 15)

The fundamental freedoms of expression and of the press in section 2(c) of the Canadian *Charter of Rights and Freedoms* suggest that the media are in a position to at least make some greater claims on 'public scrutiny' grounds than a member of the public.

The Police Commission raised sections 22(3)(b) and (d) of the Act as reasons for non-disclosure; they read as follows:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> ...
>
> (b) 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,
>
> ...
>
> (d) the personal information relates to employment, occupational or educational history,....

The Manual identifies these as strong, clear cut exceptions from disclosure: “These categories of personal information are intimate and sensitive in nature, and give rise to a strong expectation that privacy will be protected.” (Section C.4.13, p. 22)

Section 25: The Public Interest Override

The applicant has relied on section 25 of the Act which makes the “public interest” paramount as a reason for disclosure.

I have decided that an order can be made in the present case without specific reliance on section 25(1)(b) of the Act.

13. Discussion

I note, parenthetically, that municipal police records will not be accessible until the so-called “tier two” of the Act is proclaimed; this is expected to be in October 1994. So the applicant finds herself asking for complaint records that are significantly under the control of municipal police departments and only secondarily in the hands of the Police Commission and the Complaints Commissioner. It is also worth remarking that this application is for complaint records and not police disciplinary records.

On balance, I intend to order disclosure of the complaint records to the Vancouver Sun, subject to whatever detailed severances the Police Commission might decide it has to apply in light of the various exceptions in the Act, including the avoidance of harm to law enforcement (section 15(1)) and the privacy exceptions in section 22. Thus I do not believe that the name of a complainant or the name of an officer complained about should normally be disclosed. The desire to avoid unjust stigmatization of police officers is an important consideration. However, if a complaint is found to be substantiated after a legal process has taken place (such as would occur in any event during a public inquiry), I think the presumption should be in favor of disclosure of police officers' names. The intelligent application of severance, as the Act requires, should ensure that the “glare of publicity” is normally directed at the substance of the complaint rather than the specifics of who is complaining and about whom.

In my view, the public has a right, under the *Freedom of Information and Protection of Privacy Act*, to know more and in greater detail about the functioning of the current system of making complaints against the police. If the media receive access to the basics of complaint records, they can decide what is newsworthy. But the media will have the benefit of making their own judgment rather than depending solely on the views of the Police Commission, the Complaints Commissioner, the Federation of Police Officers, or the Chiefs of Police. Greater disclosure of records about the process should, under the theory of this Act, promote enhanced perceptions of accountability to the public and hence confidence in the municipal policing system and the conduct of individual officers. The public will also learn, for example, whether or not a significant number of complaints are dismissed because there is no evidence to substantiate allegations of police misconduct beyond the testimony of a complainant.

The public will learn more about complaints that do not reach a hearing for whatever reason. The public may also learn that the current system is resulting in the early resolution of problems between police and citizens. Those are matters worth knowing because of the situation of considerable power imbalance between the police and individual residents of a community. The public similarly has a need to know basic information about cases that do not reach the stage of a hearing or a public inquiry, because, for example, they are dropped or disposed of informally.

The applicant also made the interesting point that its request for information was about the public work of police officers, especially including misconduct, not information

about their private lives. One can only assume that complaint records do not normally include information about the private lives of police officers. I understand that a complaint that is found to be legitimate will result in a notation on a police officer's service record, but those records are not at issue in this inquiry.

Mr. Justice Wallace T. Oppal, of the British Columbia Supreme Court, who is chairing a commission of inquiry into policing in this province and is due to report shortly, stated in his interim report on February 28, 1993, with respect to the police complaints procedure, that "[n]either the public nor the police is content with the way complaints are investigated and adjudicated. Among the public there is an almost complete lack of confidence in the current system." (Policing in British Columbia, Commission of Inquiry, Interim Report, February 28, 1993, p. 8) In accordance with the broad goals of the Act, this informed statement suggests that it timely for more information and records to be disclosed to the public about the substance of police complaints and how they are being handled.

As noted above, the Police Commission provided me with a representative (or at least consecutive) sample of complaint records in its possession about which I make the following observations. Certain concluded complaints in its possession only contain the complainant's description of the incident(s), although there appear to be written indications that a file has been closed after formal or informal consultation with the complainant. For some other records, the ending of the case included a summary of investigative findings. In all of these instances, the records could be released with minimal efforts to anonymize them, such as the removal of names and addresses. It is also my view that it is not the fault of the applicant in this case that the records held by the Complaint Commissioner may not always provide a balanced assessment of what may or may not have happened. This condition may require a change in record keeping practices rather than a denial of access to the applicant.

Under the *Freedom of Information and Protection of Privacy Act* the Police Commission has the duty to seek to promote greater openness, like any other public body, with respect to the police complaint records in its custody. There is no blanket exception under the Act to prevent the disclosure of police complaint records. The Police Commission told me that it had an opportunity for input into the legislative process that produced the Act through the Ministry of the Attorney General.

Oral evidence established that the Complaint Commissioner does not and indeed cannot accept complaints with express or implicit promises of confidentiality, since the *Police Act* is silent on this point, although he does promise "confidentiality" for cases that do not reach the stage of a public inquiry. Confidentiality, in this instance, means that written complaints are shared with the police and the staff of the Commissioner and can be disclosed, for example, in response to a court order. (Anonymous complaints are not accepted.) The Police Commission and municipal police forces may want to revise their brochures or notices on police complaints to explain the conditions of confidentiality that are expected to prevail in the processing of a complaint.

The Police Commission advanced the view that the current complaints system is designed to ensure the accountability of municipal police officers to the public. The *Police Act* instructs the Complaint Commissioner to "monitor the handling of complaints and act in the public interest to ensure complaints are handled in the manner specified by this [Police] Act and the regulations." (*Police Act*, section 50(1)(e)) But, absent statutory authority to the contrary, such as a notwithstanding clause, the *Police Act* is now supplemented by the existence of *the Freedom of Information and Protection of Privacy Act*, which has as its primary purpose "to make public bodies more accountable to the public...." (Act, section 2(1)). Even though the *Police Act* provides for a monitoring and oversight role for the Complaint Commissioner, the Information and Privacy Commissioner now has a complementary and comparable role with respect to "all records in the custody or under the control of a public body...." The premise of the case, for this inquiry, is the need for greater accountability for both the Police Commission and the Complaint Commissioner with respect to the handling of complaints against the police.

The *Police Act* (section 48) requires the Police Commission to report annually to the Attorney General and then to the Legislative Assembly on its operations. The Complaint Commissioner's component of these annual reports is not a substitute for disclosure under the *Freedom of Information and Protection of Privacy Act*.

In addition, Form 11 under the *Police (Discipline) Regulation* requires each municipal police force annually to submit a set of tabulated information about police complaints to the Police Commission. This serves as the basis for a single table in the annual report of the Police Commission, but I note that the Commissioner does not appear to tabulate information collected on "decision following investigation" and "disposition at public inquiry." The public is therefore given no concrete knowledge of what actually happened in the form of disciplinary action or a lack thereof (or other recorded outcomes, such as "pending.").

I note that various initiatives are underway to reconsider the current system of police complaints against municipal forces. Perhaps it would be appropriate to fashion detailed rules for access to information and privacy protection for police complaint records and incorporate them in a revised *Police Act*, since the rules in the *Freedom of Information and Protection of Privacy Act* may be too general to handle police complaint records.

In oral and written submissions to this inquiry, the Police Commission, the Association of Chiefs of Police, and the Federation of Police Officers complained about how the media had treated certain allegations about complaints against police. The press were accused of sensationalizing specific episodes and ignoring, or at least failing to publicize, corrective information supplied by the Police Commission or the police. (See Exhibit 3) The reality is that many segments of society seem to have complaints against the media for one reason or another. But the reasons for which applicants seek access to information, or what they may do with it thereafter, is not a legitimate criterion for refusal

to disclose records. The media, for example, are subject to the law on defamation in using records that come into their possession under the Act.

If the B.C. Federation of Police Officers or the Police Commission is concerned about "unbalanced" disclosures, then the Police Commission can either create better file documentation or create a file summary record that is released to applicants along with other records in the complaint files. The file summary will "fill in the missing parts" of the file by showing the outcome of a complaint rather than leaving the file incomplete. In response to an FOI request, the applicant receives whatever is on the file, regardless of the completeness of the records, subject of course to applicable exceptions.

The submission received from the B.C. Association of Chiefs of Police raised the prospect that police officers might be less likely to cooperate in the investigation of complaints, by being "more careful" or "less candid," if they knew that selected information would become public. It seems to me that such criteria to refuse to authorize access are not appropriate or explicit ones under the Act.

The Police Commission is concerned about releasing even the severed records of complaints "in small municipalities," because the privacy of the complainant and the constable could not be preserved. Using 1992 population figures, I note that only one municipality, Nelson with a population of 9,051, may be classed as a truly small community. Three of the other municipalities with total populations under 20,000, Central Saanich, Esquimalt, and Oak Bay, are also part of Greater Victoria. Port Moody is also part of Great Vancouver. The 7 remaining municipalities range in size from 41,145 to 479,242 with the average being 122,334. Eleven of the 12 municipal forces are in greater Vancouver or Victoria.

I do not agree with the BCCLA's position, noted above, about the release of identifiable police information in small communities. Information which would clearly identify individuals should be severed to avoid unreasonable invasions of personal privacy.

14. Guidelines on Severance of Complaint Files

Under the current police complaints process, there are roughly four stages, or levels of complaints:

(1) those which are currently under investigation and are not yet resolved, whether informally or formally,

(2) those which are resolved informally, often after a successful mediation,

(3) those which are determined after an internal disciplinary proceeding, and

(4) those which are determined after a public inquiry.

Many of the complaints at the first level, particularly those which are criminal in nature, or which proceed through the disciplinary process, may be excepted from disclosure under section 15(1)(a) of the Act. In this regard, I note that the definition of "law enforcement" in Schedule 1 to the Act includes investigations or proceedings that lead or could lead to a penalty or sanction being imposed. Both criminal or disciplinary investigations or proceedings could fall within this exception. However, a harm test should be applied in each instance, because there may be some cases where disclosure may not meet that test, particularly for those cases which do not proceed into the criminal or disciplinary spheres.

Section 22 of the Act must be carefully considered at each level of complaint. With respect to the identity of a complainant, it is my view that disclosure of a full complaints file, without the complainant's name severed, would constitute an unreasonable invasion of personal privacy, at least until a matter reached level (4). The presumption in section 22(3)(b) (personal information compiled and is identifiable as part of an investigation into a possible violation of the law) may apply, as well as the considerations in section 22(2)(f) (information supplied in confidence). The applicant did not meet the burden of proof on this point.

With respect to the identity of the police officers involved in the complaints process, it is my view that their privacy interests diminish as each level increases. Where a complaint is under investigation, the presumption is section 22(3)(b) applies, as well as the factors listed in section 22(2)(f) (information supplied in confidence) and 22(2)(h) (disclosure may unfairly damage the reputation of any person referred to in the record).

Until an allegation has been proven, the factor described in section 22(2)(a) (disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny) does not outweigh the privacy interests described above. Accordingly, all information which would identify the police officer should be severed if any unresolved complaints records are disclosed.

Where complaints have been resolved informally, similar factors apply, since the police officer has not been through a formal legal process. This respects the concerns expressed by the B.C. Federation of Police Officers, that informed resolutions must be encouraged. Release of information which protects confidentiality by severing identifiable information should not, in my view, hinder the mediation process. However, by level (3), the matter has been dealt with and the factor in section 22(2)(h) would have significantly less weight. Severing of information which would identify the officer may not be required at this or later stages.

15. The Issues of Fees

Section 4(3) of the Act stipulates that "[T]he right of access to a record is subject to the payment of any fee required under section 75." However, section 75(5)(b) of the Act says:

> 75(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>
> ...
>
> (b) the record relates to a matter of public interest, including the environment or public health or safety.

The Manual defines public interest to mean "the interest of the general public or of a group of individuals. It does not include the interest of only one individual." (Chapter C.5, p. 6) This requirement for disclosure is mandatory and overrides any other provision of the Act. Again I am of the view that a media request can at least be taken as evidence of significant public interest.

The substantial amount of newspaper coverage of police complaints in recent years is evidence of "public interest" at a higher level than the mere satisfaction of curiosity. The Legislative Library's index of provincial newspapers contains 220 articles between January 7, 1993 and May 25, 1994 under the rubric of "police-complaints against."

The applicant asked me to waive the payment of fees in this particular case, because the application was in the "public interest." I decided not to rule on this issue, because the Police Commission has not yet engaged in the appropriate severing of complaint records that I order below. I do note that a public body cannot charge for search time or severing under section 75(2) of the Act.

16. Orders

Under section 58(2)(a) of the Act, I order the B.C. Police Commission to release police complaint records to the Vancouver Sun, subject to the application of the exceptions in the Act under standard procedures for severance mandated by section 4(2) of the Act.

Within 30 days of receipt of this order, the B.C. Police Commission must comply with this order and furnish me with evidence that the appropriate records have been released to the applicant. Such evidence should be sent to my direct attention at the Office of the Information and Privacy Commissioner, Fourth Floor, 1675 Douglas Street, Victoria, B.C.

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David H. Flaherty
Commissioner

June 22, 1994