OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 03-06

VANCOUVER POLICE DEPARTMENT

David Loukidelis, Information and Privacy Commissioner
February 13, 2003

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Summary: The applicant sought access to records relating to an internal VPD investigation of a harassment complaint against the applicant. All but a small number of pages of the records are excluded from the Act's operation by s. 66.1 of the *Police Act*. Section 22(1) requires the VPD to refuse disclosure of third-party personal information in the pages subject to the Act, since disclosure would unreasonably invade third-party personal privacy.

Key Words: *Police Act* conduct complaint – personal information – harassment investigation – unreasonable invasion of personal privacy.

Statutes Considered: *Police Act*, Part 9; *Code of Professional Conduct Regulation*, B.C. Reg. 205/98; *Freedom of Information and Protection of Privacy Act*, s. 22(1).

Cases Considered: *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 S.C.C. 53, [2002] S.C.J. No. 55.

1.0 INTRODUCTION

[1] On January 15, 2001, the applicant made a request under the Act to the VPD for access to records in the following terms:

> Any and all records relating to complaints lodged or expressed against myself by … [names and identifiers of two complainants] and by any other officer during the investigation of ... [the two complainants'] complaints. This includes any records in IIS and Human Resources. This includes any formal or informal complaints regarding gender bias, promotional matters or any other subject. This includes not only reports, statements and the like, but also e-mails, correspondence and notes.

[2] On June 20, 2001, the VPD released some 74 pages of records from which it had severed third-party personal information under s. 22 of the Act. The VPD withheld the entirety of the remaining responsive records, totalling some 408 pages, under s. 22 of the Act. The disputed records include records of interviews, conducted by the VPD's internal investigator, of various individuals involved in the complaints and records relating to the investigation.

[3] On July 14, 2001, the applicant requested a review under the Act of the VPD's decision. Since the matter did not settle during mediation, this Office issued a Notice of Written Inquiry to the parties and the third parties. Soon after that, counsel to the Office of the Police Complaint Commissioner ("OPCC") wrote to this Office and objected to the inquiry proceeding, citing s. 66.1 of the *Police Act*, which ousts the Act's application to certain records relating to a "conduct complaint" under the *Police Act*. I then invited submissions and evidence from the OPCC, the VPD and the applicant on whether s. 66.1 applied to the disputed records. I adjourned the inquiry pending resolution of the OPCC's jurisdictional objection. The applicant, VPD and OPCC made submissions on that point.

[4] After deliberating on the jurisdictional question, I wrote to the parties and the OPCC and said that, although I had reached certain conclusions about the meaning of s. 66.1 of the *Police Act*, it was not possible for me to decide its application at that time. At that time, I only had before me a copy of the records that had been partially disclosed to the applicant. I therefore suspended consideration of the jurisdictional issue until I had the entire set of records before me, as well as full submissions on the case as a whole. I invited the OPCC to participate in the inquiry as an intervener on the s. 66.1 issue and gave it notice under s. 54(b) of the Act. The inquiry proceeded and the OPCC provided submissions on the s. 66.1 issue.

[5] The following discussion about the meaning and scope of s. 66.1 of the *Police Act* essentially reproduces my discussion of that issue in my earlier letter, mentioned above. The finding expressed below about the application of that section in this case is based on my review of all the evidence and argument before me and on my review of all of the disputed records.

2.0 ISSUES

[6] The preliminary issue, again, is whether s. 66.1 of the *Police Act* precludes me from proceeding with the inquiry on the merits of the VPD's s. 22(1) decision under the Act. Consistent with previous decisions, I consider the VPD has the burden of establishing that s. 66.1 applies to the records.

[7] If s. 66.1 does not apply, I must consider whether s. 22(1) of the Act requires the VPD to refuse access to all or parts of the disputed records. Section 57(2) requires the applicant to establish that disclosure of the records would not unreasonably invade the personal privacy of third parties.

3.0 DISCUSSION

[8] **3.1 Nature of the Allegations** – The March 5, 2002 affidavit of Inspector Robert Rothwell, who is in charge of the VPD's Internal Investigation Section ("IIS"), speaks to the IIS's role in the allegations against the applicant. At para. 4, Inspector Rothwell deposed as follows:

> In March of 2000 and following, … [one complainant's name], of the Vancouver Police Department, submitted a number of reports to the Internal Investigation Section, containing complaints regarding the conduct of the Applicant while … [the applicant] was acting in … [the applicants] capacity as a sworn member of the Vancouver Police Department and as … [the complainant's] supervising officer.

[9] Inspector Rothwell deposed, at para. 5, that the IIS, "was assigned to investigate the complaints raised in the reports" and that this investigation was completed at the end of September 2000.

[10] Exhibit "A" to Inspector Rothwell's affidavit is a copy of a memorandum ("IIS Memorandum") that the officer then in charge of the IIS, Inspector Eldridge sent to the Chief Constable of the VPD in 2000. The first paragraph of the IIS Memorandum says that two police officers had

> … complained about the conduct of … [the applicant] while … [the applicant] was their supervisor. Some of the complaints relate to allegations of *Police Act* defaults, others relate to allegations of workplace harassment.

[11] The second paragraph of the IIS Memorandum goes on to note that the investigator had obtained a review of his findings by the Director of the City of Vancouver's Equal Employment Opportunity Program, apparently because of her knowledge of "workplace harassment issues." The same paragraph indicates that the investigator found that the applicant had done "two of the things related to workplace harassment" that the applicant was accused of, while the rest of the allegations were "explained away for some reason or another." The second paragraph also indicates that "[n]o *Police Act* defaults were identified", which I take as a conclusion that no *Police Act* defaults had been proved.

[12] The last three paragraphs of the IIS Memorandum merit reproduction in full:

> Sergeant Barnard is a very experienced investigator and finder of fact. He has interviewed many people as part of this investigation and produced a 54-page report as a result. This was a conscientious and diligent effort at investigating a new area which is usually beyond the scope of the mandate of the I.I.S. We do not normally investigate workplace harassment complaints or matters pertaining to the B.C. *Human Rights Act* [*sic*]. Members of I.I.S., including myself, have no particular training in investigating workplace harassment complaints other than taking the two-day VPD Workplace Harassment Training Program available to all members. For the record, this investigation was assigned to the I.I.S. because there were possible *Police Act* defaults involved and it was thought that attempting two investigations, one *Police Act* and one workplace harassment, by two different

> sections, would be too cumbersome. The investigation turned out to be a very large one with many people involved.
>
> As a result, and in spite of Sergeant Barnard's excellent effort, I do not feel qualified to sign off on the investigation. It is my recommendation that this file be handed over to a workplace harassment investigation expert who has no connection to the City of Vancouver or the VPD. In this way an independent review of the file can be conducted. Following that you can consider implementing recommendations. This will probably not be an inexpensive venture. However, given the magnitude of the investigation and the issues at stake I believe it is important to finalize the file in this manner. The consultant may have to re-interview some of the parties involved.
>
> In the future you may want to consider some specialized investigative training for I.I.S. members in the workplace harassment/*Human Rights Act* area.

[13] The author appears to have believed that the allegations were mixed, *i.e.*, that some of the allegations related to possible *Police Act* "defaults" while others were in the nature of workplace harassment allegations and matters pertaining to the "B.C. *Human Rights Act*."

[14] The IIS Memorandum gives no details of what *Police Act* "defaults" were alleged and gives no details of the other allegations, but others of the disputed records provide that information. The material before me makes it clear that the allegations were varied. Some amounted to allegations of workplace harassment, which at the relevant time was prohibited by section 44.14 of the VPD's Regulations & Procedures Manual. Others had to do with the applicant's alleged behaviour with or toward members of the public. It appears these are allegations that IIS members labelled *Police Act* complaints.

[15] **3.2 Does s. 66.1 of the *Police Act* apply*?*** – The VPD and OPCC contend that s. 66.1 of the *Police Act* puts the disputed records out of the Act's reach. Section 66.1 reads as follows:

> ***Freedom of Information and Protection of Privacy Act* does not apply**
>
> **66.1** Except as provided by this Act, the *Freedom of Information and Protection of Privacy Act* does not apply to any record that
>
> (a) arises out of or is otherwise related to the making, submitting, lodging or processing of a conduct complaint under this Part, and
>
> (b) is created on or after the conduct complaint is made, submitted or lodged.

[16] The OPCC says that, because the records arise out of or are related to a "conduct complaint" within the meaning of Part 9 of the *Police Act*, the Act does not apply and I have no jurisdiction to proceed any further under the Act. Although the VPD initially responded to the applicant's access request, it has joined in the OPCC's objection.

[17] Before analyzing the *Police Act* issue I will summarize the relevant arguments.

Applicant's arguments

[18] The applicant's arguments can be summarized as follows:

- Although it is not entirely clear from Part 9 of the *Police Act* what constitutes a "complaint", the way in which a complaint is submitted and processed drives the determination of whether it is a complaint and, if it is a complaint, what kind it is.

- This case was a "workplace matter." There was no public trust dimension to the allegations and no citizen was involved. A complaint form under the *Police Act* was not used and the matter was not "characterized" under s. 52.1.

- There was, therefore, no complaint or complainant under Part 9. The matter was a labour relations matter, not a matter raised by a member of the public. It was open to being resolved through the process under the *Labour Relations Code*, as s. 65 of the *Police Act* acknowledges.

- Part 9 was never intended to extend to workplace labour relations matters. The only exception to this is the OPCC's need to know how the labour process in each municipal police force functions and to have access to related files, to ensure there are no public trust or other public interest matters that are being hidden.

- The records do not relate to a "conduct complaint" within the meaning of the *Police Act*, so s. 66.1 does not apply to the disputed records.

OPCC's and VPD's Arguments

[19] The OPCC's arguments – which the VPD adopts – can be summarized as follows:

- Part 9 of the *Police Act* is a complete code for handling all complaints against municipal constables.

- Part 9 recognizes service or policy complaints and conduct complaints, the latter of which can be either public trust complaints or internal discipline complaints.

- The complaints against the applicant – which were investigated and reported upon by the IIS – consisted of allegations of *Police Act* defaults and workplace harassment.

- Since the complaints related to the "acts, omissions or deportment" of a municipal constable and were not characterized as public trust complaints under Part 9, they were – as contemplated by the *Police Act* definition of "internal discipline complaint" – conduct complaints within the meaning of s. 66.1.

- A complaint can be a conduct complaint even if it has not been submitted in accordance with the requirements of s. 52 of the *Police Act* and has not been characterized under s. 52.1. The word "complaint" in ss. 46 and 52.1 should be given its ordinary meaning. In this light, the complaints about the applicant are complaints, regardless of the fact that they may be processed differently under the *Police Act*, depending on what type of complaint they are. The fact that they may be processed in different ways does not mean they are not "complaints" for the purposes of Part 9.

- It is wrong to focus, as the applicant does, on the requirements of ss. 52 and 52.1, since those provisions do not apply to internal discipline complaints processed under Division 6 of Part 9. Such complaints need not be in a prescribed form under s. 52 and need not be characterized under s. 52.1. Accordingly, the absence of a form of complaint, or characterization of a lodged complaint, does not mean they are not internal discipline complaints and therefore conduct complaints.

- The records relate to or arose out of the making and processing of conduct complaints and were created after the complaints were made. Section 66.1 therefore applies to the disputed records.

- If s. 66.1 did not apply to the records, it would mean the OPCC has no oversight role for some kinds of complaints against municipal constables, thus depriving the public of the benefits of independent civilian oversight. This is not consistent with the legislative intention underlying Part 9 of the *Police Act*.

Does s. 66.1 apply?

[20] The OPCC says this question goes to my jurisdiction to proceed with the inquiry. It says, at para. 32 of its initial submission, that I do "not have jurisdiction to inquire into records arising out of or related to the complaints." I consider that I have the jurisdiction to inquire into and determine whether a provision such as s. 66.1 of the *Police Act* excludes records from the Act's scope.

[21] It seems to me the issue turns on the contention that the allegations fall under s. 66.1 because they relate to alleged acts or omissions – in other words, "defaults" – of a police constable that are "internal discipline complaints" within the *Police Act* definition of that term. Here, the OPCC says, someone "complained" about the applicant, and the manner in which the complaint is processed "in accordance with the *Police Act*" does not matter. Once a complaint is made, the OPCC argues, it may be processed differently depending on its type, but it can still be a complaint contemplated by s. 66.1. The Part 9 requirements for conduct complaints to be reduced to writing and characterized do not matter, the OPCC says, since an internal discipline complaint is dealt with under Division 6 of Part 9, and is not subject to the writing and characterization requirements of ss. 52 and 52.1.

[22] I will only set out s. 64 of the *Police Act,* although I have considered all of Part 9 in reaching my decision here:

Division 6 — Internal Discipline Complaints

Internal discipline complaints

64 (1) For the purposes of internal discipline complaints, the discipline authority must establish procedures, not inconsistent with this Act, for imposing all disciplinary and corrective measures for those complaints.

(2) The procedures established under subsection (1) take effect after

(a) a copy of the procedures is filed with the police complaint commissioner, and

(b) the board having authority over the municipal police department with respect to which the procedures are established approves of the procedures.

(3) For the purpose of internal discipline complaints, the discipline authority, the board and any arbitrator that may be appointed under the grievance procedure of the collective agreement may use, but are not restricted by, the Code of Professional Conduct

(a) to determine standards against which the conduct of a municipal constable, chief constable or deputy chief constable may be judged, and

(b) to impose disciplinary or corrective measures.

(4) The discipline authority must provide the police complaint commissioner with a copy of

(a) any recommendation on disciplinary or corrective measures arising from an internal discipline complaint, and

(b) the final decision reached by the discipline authority, by the board or by an arbitrator respecting an internal discipline complaint.

(5) If a municipal constable, chief constable or deputy chief constable is alleged to have committed an act or to have omitted to do an act and the act or omission would, if proved, constitute a disciplinary default, the discipline authority may deal with the allegation as a matter of internal discipline under this Division if

(a) the police complaint commissioner has not, under section 54(6)(a) or (8) or 55(3), ordered an investigation into the act or omission and has not arranged a public hearing in respect of that act or omission, and

(b) one or more of the following applies to the allegation:

(i) the act or omission does not constitute a public trust default;

(ii) a record of complaint was not lodged under section 52 in respect of the act or omission;

(iii) a record of complaint was lodged under section 52 in respect of the act or omission but the complainant has filed a notice of withdrawal under section 52.2 and the discipline authority has ceased to process the complaint under Division 4.

(6) On request of the police complaint commissioner, a discipline authority must provide any additional information about an internal discipline complaint that is in the possession or control of the municipal police department to which the complaint relates.

What is a conduct complaint?

[23] Section 12 of the *Interpretation Act* requires me to interpret the *Police Act* as being "remedial" and to give it "such fair, large and liberal construction and interpretation as best insures the attainment of its objects." In addition, the Supreme Court of Canada has said that the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense, in harmony with the scheme of the legislation, the purposes of the legislation and the intention of the Legislature. See, for example, *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 S.C.C. 53; [2002] S.C.J. No. 55.

[24] In enacting Part 9 of the *Police Act*, the Legislature created processes for the making, processing, investigating and disposing of certain kinds of complaints against police officers or police departments. A key part of this scheme is the institution of the Police Complaint Commissioner and the role he or she plays in Part 9 matters. Since the Police Complaint Commissioner is an officer of the Legislature, the Act does not, by virtue of s. 3(1)(c) of the Act, apply to a record in the custody or control of the Police Complaint Commissioner if the record "relates to the exercise" of the Police Complaint Commissioner's "functions under" the *Police Act*.

[25] Section 66.1 of the *Police Act*, by excluding certain records from the Act's application, complements s. 3(1)(c) of the Act by ousting the Act's operation respecting certain complaint-related records in the custody or under the control of another public body. Section 66.1 does not, however, completely oust the Act in relation to Part 9 matters. It explicitly applies only to records related to the "making, submitting, lodging or processing of a conduct complaint" and then only to ones that are created at a certain time. Nor does s. 66.1 apply to service or policy complaints.

[26] Conduct complaint records are shielded from the Act, but it does not necessarily follow, on the face of s. 66.1, that the Legislature intended the access to information rights granted by the Act not to apply to matters that in any way involve a police

constable's behaviour, including human rights or harassment issues. The OPCC says that comments made in debate by the Attorney General of the day indicate the Legislature's concern to give a municipal police department the room necessary to deal with discipline issues internally. These remarks support the view, the OPCC suggests, that s. 66.1 applies to the matter at hand, citing the following passage from the Legislative debate regarding Part 9 (Debates of the Legislative Assembly of British Columbia (Hansard), vol. 6, no. 24, July 16, 1997 (Afternoon Sitting), at pp. 5822-23):

> **G. Plant:** I have heard from time to time the concern about the difficulty of distinguishing between public trust complaints and internal discipline complaints. I think the question in its simplest form goes something like this: why should the presence or absence of a complainant be a terribly significant factor? Why not process all discipline defaults as if they were public trust complaints?
>
> **Hon. U. Dosanjh:** I think the essential concern is that we allow the police bodies to deal with issues around labour-management and internal discipline issues in a way that leaves them with some management on their own, although you might say that those are issues of public interest. There's no question about that. That's why I believe that the police complaint commissioner has access to information with respect to all of those proceedings. But they have to be dealt with separately so that the public realizes that a public trust complaint is a complaint that's different from an internal discipline complaint and is dealt with very differently. The complainant would have access to all of that information through the complaint commissioner, whereas the information may not be as readily available because of labour-management issues involved in internal procedures.
>
> **G. Plant:** I think I understand that explanation. We will see how it works over time. … .

[27] Of course, remarks made during legislative debate can guide the interpretation of a statute, but the statutory language is the key.

[28] Turning, therefore, to the provisions of Part 9, the first question is what qualifies as a "conduct complaint" under Part 9. Section 46 of the *Police Act* defines this term exhaustively – it means either an "internal discipline complaint" or a "public trust complaint". An internal discipline complaint is any complaint relating to the acts, omissions or deportment of a municipal police constable that is not a public trust complaint or is a public trust complaint that is not processed under Division 4 of Part 9.

[29] A complaint can be made orally or in writing, but cannot be processed under Division 4 or 5 of Part 9 unless it is reduced to writing in the prescribed form and has been "lodged" as required by s. 52(2). Under s. 64(5), however, an internal discipline complaint can be dealt with "as a matter of internal discipline under" Division 6 of Part 9 if conditions set out in s. 64(5) apply. Section 64(5) provides that a municipal police department may treat a matter as a matter of internal discipline if a constable is "alleged to have committed an act or to have omitted to do an act and the act or omission would, if proved, constitute a disciplinary default". A "disciplinary default" is defined in s. 46(1) as meaning "a breach of the Code of Professional Conduct", *i.e.*, the *Code of Professional*

Conduct Regulation, B.C. Reg. 205/98 ("Conduct Code"). Sections 4 and 5 of the Conduct Code read as follows:

Disciplinary defaults

4(1) In this Code, **"disciplinary default"** means

(a) discreditable conduct,

(b) neglect of duty,

(c) deceit,

(d) improper disclosure of information,

(e) corrupt practice,

(f) abuse of authority,

(g) improper use and care of firearms,

(h) damage to police property,

(i) misuse of intoxicating liquor or drugs in a manner prejudicial to duty,

(j) conduct constituting an offence,

(k) being a party to a disciplinary default, or

(l) improper off-duty conduct.

(2) It is a breach of this Code to commit, or to attempt to commit, a disciplinary default referred to in subsection (1).

Discreditable conduct

5 For the purposes of section 4 (1) (a), a police officer commits the disciplinary default of discreditable conduct if

(a) the police officer, while on duty, acts in a disorderly manner or in a manner that is

(i) prejudicial to the maintenance of discipline in the municipal police department with which the police officer is employed, or

(ii) likely to discredit the reputation of the municipal police department with which the police officer is employed,

(b) the police officer's conduct, while on duty, is oppressive or abusive to any person,

(c) the police officer contravenes a provision of the Act, a regulation, rule or guideline made under the Act, or does not comply with a standing order of the municipal police department with which the police officer is employed,

(d) the police officer withholds or suppresses a complaint or report against any other officer,

(e) the police officer fails to report to an officer whose duty it is to receive the report, or to Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada, or

(f) the police officer suppresses, tampers with or fails to disclose to an investigating officer, or to the discipline authority of a respondent, information that is material to a proceeding or potential proceeding under Part 9 of the Act. … .

Abuse of authority

10 For the purposes of section 4 (1) (f), a police officer commits the disciplinary default of abuse of authority if the police officer

(a) without good and sufficient cause arrests, detains or searches a person,

(b) uses unnecessary force on a person,

(c) while on duty, is discourteous or uncivil or uses profane, abusive or insulting language to a person including, without limitation, language that tends to demean or show disrespect to a person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status, or

(d) harasses, intimidates or retaliates against a person who makes a report about the conduct of an officer or submits a complaint under Part 9 of the Act.

[31] I am satisfied that the intent, and effect, of s. 64(5) is to leave it to a municipal police department to deal with allegations of disciplinary default that are contained in a conduct complaint that is made orally, but has not thereafter been reduced to writing in prescribed form or lodged and characterized as contemplated by s. 52.1. The further intent and effect of s. 64(5) is to leave it to a municipal police department to deal with a conduct complaint that has been reduced to writing, in the form prescribed under the *Police Act* and lodged or characterized under s. 52.1, but has later been withdrawn. Moreover, s. 64(5) can apply where an allegation is made in a complaint by one municipal police constable about another. Section 52(1) provides that "a person" may make complaints against a municipal constable under Part 9. Although s. 65.1 expressly provides that a "municipal constable" may confidentially report to the Police Complaint Commissioner the alleged wrongdoing of other police officers, I do not read this as excluding a municipal constable from the class of persons who can complain under s. 52(1) or s. 64(5). In other words, s. 64(5) contemplates cases where one municipal constable complains about another constable in a way that triggers Part 9 of the *Police Act*. The absence of any Form 1 or complaint characterization under s. 52.1 does not

exclude these complaints from the ambit of s. 64(5). This conclusion is reinforced by s. 64(5)(b)(ii), which provides that a discipline authority may deal with an "allegation" as a matter of "internal discipline" if "a record of complaint under section 52 in respect of the act" alleged has not been lodged.

[31] Based on the material before me, I have reached the following conclusions:

- The allegations against the applicant fall within the above definitions of "disciplinary default" and thus were internal discipline complaints falling under s. 64(5). The complaints had, as I have indicated, an internal disciplinary character. The evidence shows that the complaints included allegations of workplace harassment and gender bias. They also included allegations of unprofessional conduct involving members of the public. The allegations therefore related to the supposed "acts, omissions or deportment" of the applicant, as contemplated by the *Police Act* definition of "internal discipline complaint".

- At least one of the complaints was made in writing, while another was made orally to a responsible VPD member and was thereafter written down.

- There is no evidence that any public trust complaint or conduct complaint was made in writing and "lodged" respecting the applicant under Part 9 in the manner contemplated by s. 52. Nor is there any evidence that a report about the applicant was made to the Police Complaint Commissioner by a municipal constable, orally or in writing, as contemplated by s. 65.1.

- Nor is there any evidence that an event described in s. 64(5)(a) has occurred that would prevent these complaints from being treated as internal discipline complaints under s. 64(5). There is no evidence that the Police Complaint Commissioner knew about, or investigated, complaints about the applicant or that the OPCC otherwise participated in the matter. There is no evidence that the Police Complaint Commissioner arranged a public hearing into any acts or omissions alleged against the applicant. Nor is there any evidence that a report about the applicant was made to the Police Complaint Commissioner by a municipal constable, orally or in writing, as contemplated by s. 65.1.

[32] It does not matter that, in various places, the records refer to the complaints being a combination of workplace harassment and *Police Act* default allegations. For one thing, one individual's views on what kinds of issues or complaints were or might have been involved are by no means determinative. Moreover, it must be remembered that the individuals who referred to possible *Police Act* defaults may have been thinking of the possibility that public trust or service complaints were involved. Again, I am satisfied that, in light of s. 64(5), s. 66.1 can be triggered by an internal discipline complaint such as the complaints at issue here, whether or not any of the other kinds of *Police Act* defaults were involved and whether or not the characterization and lodging process contemplated by s. 52.1 was followed.

Does s. 66.1 apply to all the disputed records?

[33] This does not mean that s. 66.1 ousts the Act's application to all of the disputed records, although that is what the VPD and the OPCC argue. Section 66.1 applies to any record arising out of or otherwise related to a conduct complaint, as set out in s. 66.1(a), but s. 66.1(b) stipulates that the record must also have been "created on or after the conduct complaint is made, submitted or lodged". I am satisfied that the vast majority of the disputed records meet both requirements of s. 66.1. My review of the records reveals, however, that some were created before the third-party complaints about the applicant were made.

[34] Specifically, the records found at pp. 297-319, 321-323, 491 and 555-607 to which I refer to as the "pre-complaint records", pre-date the complaints. They consist of a number of Miscellaneous and Supplementary Reports filed by VPD members, clearly while discharging their duties in the ordinary course. Others are VPD Investigation Reports, Request for Information Logs and Continuation Reports, again clearly generated in the ordinary course. Pages 305-309 contain undated photographs and copies of driver's licences of several members of the public. These pages follow immediately after a four-page Miscellaneous and Supplementary Report dated May 15, 1998 that pertains to the same individuals. I infer that the photographs and driver's licence copies were created at the time the May 15, 1998 report was created. Page 323 is a copy of an undated photograph of a handgun. It is found with several Miscellaneous and Supplementary Reports dated May 1998 and appears to date from 1998. Page 491 is a field trainer's report about a third-party VPD recruit, while a Justice Institute of British Columbia Recruit Evaluation Report for a third-party recruit is found at pp. 555-607.

[35] The pre-complaint records are not covered by s. 66.1 of the *Police Act*. It is not apparent, based on the records alone, that they arise out of or otherwise relate to a conduct complaint, as required by s. 66.1(a). Further, these records do not meet the s. 66.1(b) requirement, since they were not, as required by s. 66.1(b), created on or after the making of such a complaint. It is therefore necessary for me to consider whether s. 22(1) of the Act requires the VPD to refuse to disclose those records.

[36] **3.3 Third-Party Personal Privacy** – Section 22(1) of the Act requires the VPD to withhold personal information if its disclosure would unreasonably invade personal privacy. The pre-complaint records contain third-party personal information. The VPD has not addressed these records in its s. 22 arguments, which are devoted to the VPD's contention that s. 22(1) requires it to refuse to disclose the third-party interviewees' statements to the VPD investigators. The applicant's s. 22 arguments also focus on the third-party statements to the VPD investigators.

[37] I will first note that, although the VPD treated the pre-complaint records as responsive to the applicant's request, it is not at all clear to me that they are covered by the request. Further, it is clear on the face of pp. 297-319 and 321-323 that the personal information they contain was, within the meaning of s. 22(3)(b) of the Act, compiled and is identifiable as part of an investigation into possible violations of law by various

members of the public. It is therefore beyond question that pp. 297-319 and 321-323 raise the presumed unreasonable invasion of personal privacy created by s. 22(3)(b).

[38] Pages 491 and 555-607 of the pre-complaint records consist, again, of performance evaluations of third-party VPD recruits. It is plain that the contents of these records raise the presumed unreasonable invasion of third-party privacy in s. 22(3)(d) of the Act, since the personal information in these records relates to third-party employment, occupational or educational history.

[39] Because of the VPD's approach to s. 22, both in its response to the applicant and in this inquiry, the applicant did not, in the initial stages of this inquiry, have an opportunity to make representations as to whether s. 22(1) applies to the pre-complaint records. Accordingly, I wrote to the parties and communicated my finding that the above-described presumed unreasonable invasions of personal privacy arise in relation to the pages mentioned above. I gave the applicant an opportunity to make representations on whether, in light of those presumed unreasonable invasions of personal privacy and the applicant's burden of proof, s. 22(1) of the Act requires the VPD to refuse to disclose the affected records. I told the applicant that, in the absence of any submissions from him on this point, I would find that the presumptions had not been rebutted and that s. 22(1) requires the VPD to refuse to disclose pp. 297-319, 321-323, 491 and 555-607.

[40] In response, the applicant said that if the other materials were "created clearly for other purposes, I make no claim for them". The applicant indicated that, in such a case, there would appear to be no basis for exercise of his right to see his own personal information. I have already noted that it is by no means clear that the pre-complaint records are responsive to the applicant's request. To borrow the applicant's words, they "do not seem to have been directed in any manner towards" the complaints against the applicant. They are ordinary-course VPD operational documents, for the most part involving members of the public.

[41] In the absence of any submissions from the applicant on the issue, and bearing in mind that the applicant bears the burden of proof, I find that s. 22(1) requires the VPD to refuse disclosure of the pre-complaint records. In arriving at this finding, I have also considered the fact that, judged against the material before me (including the disputed records), none of the relevant circumstances set out in s. 22(2), certainly, favours disclosure of the personal information in these pages to the applicant.

4.0 CONCLUSION

[43] For the above reasons, I find that, by virtue of s. 66.1 of the *Police Act*, the Act does not apply to the disputed records. Accordingly, under s. 58 of the Act I confirm that the VPD has performed its duties under the Act in responding as it did to the applicant.

[44] As an exception to this, I find that s. 66.1 of the *Police Act* does not apply to pp. 297-319, 321-323, 491 and 555-607 of the disputed records. The Act therefore applies to those records. Because I have found that s. 22(1) of the Act requires the VPD to refuse to disclose those pages, however, under s. 58 of the Act I require the VPD to refuse to disclose them to the applicant.

February 13, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia