

2017

Recommended Procedures for Public Hearings

To: All Retired Judges appointed under Section 117(4) of the BC *Police Act*

From: Office of the Police Complaint Commissioner

Date: April 5, 2017

Re: Recommended Procedures for Public Hearings

INTRODUCTION

The purpose of this guide is to establish a procedural framework that will promote an open, fair and timely hearing process. The framework promotes the early identification and potential resolution of contentious and non-contentious issues, which in turn will facilitate a focused and efficient Public Hearing process. The guide is not intended in any way to fetter the discretion of Adjudicators, but to serve as recommendations as to procedure which have been employed in past Public Hearings.

Part 1 sets out the relevant statutory provisions with respect to conducting Public Hearings. The Adjudicator may give any directions or make orders on matters of procedure, consistent with the provisions of the *Police Act*. Part 2 contains additional recommended procedures to assist the Adjudicator in conducting an open, fair and timely hearing process. The Adjudicator has the discretion to dispense with or vary any of the recommendations under Part 2 if he or she is satisfied special circumstances exist.

[ss.137(1), 141(2) & 137(2)]

Either a member/former member or a complainant may request a Public Hearing or Review on the Record after a disciplinary decision is made (i.e., following a Discipline Proceeding). Under the Act, the Commissioner has the authority to determine whether or not to grant that request and appoint an Adjudicator to conduct a Public Hearing or a Review on the Record of a disciplinary decision - where the Commissioner determines that there are sufficient grounds to conduct such a hearing or review.

The Commissioner may arrange a Review on the Record instead of a Public Hearing, where he believes that it is unnecessary

- to examine or cross-examine witnesses; or
- to receive evidence beyond what is contained in the record of disciplinary decision or the member's service record;

and, further, that a Public Hearing is not required to preserve or restore the public's confidence in investigations of police misconduct or the administration of police discipline.

Office of the
Police Complaint Commissioner

PART ONE: Relevant Aspects of the Police Act

DEFINITIONS

<i>Adjudicator</i>	A retired judge of the Provincial Court, Supreme Court or the Court of Appeal, selected by the Associate Chief Justice of the Supreme Court and appointed by the Police Complaint Commissioner under section 142 to preside over a Public Hearing.
<i>Commission Counsel</i>	Legal counsel representing the Police Complaint Commissioner at a Public Hearing.
<i>Former Member</i>	In relation to a complaint or investigation under Division 3 concerning the conduct of a person who, at the time of the conduct of concern, was a member of a municipal police department but who after that time has retired or resigned and is no longer a member of any municipal police department.
<i>Member</i>	A municipal constable, Deputy Chief Constable or Chief Constable, whose conduct is the subject of the Public Hearing.
<i>Misconduct</i>	Conduct as defined by Division 2 of Part 11 of the <i>Police Act</i> , which constitutes a disciplinary breach of public trust when committed by a member.
<i>Public Hearing Counsel</i>	Legal counsel appointed by the Police Complaint Commissioner to present to the Adjudicator the case relative to each allegation of misconduct against the member or former member concerned.

INITIATING A PUBLIC HEARING

Determining whether to arrange a Public Hearing or Review on the Record [s.138(4)]

Within ten (10) business days after the Police Complaint Commissioner has determined that a Public Hearing is required, the Commissioner will issue a Notice of Public Hearing and provide copies to:

- The complainant (if any);
- The member or former member;
- The Chief Constable of the department for which the member or former member was employed at the time of the alleged conduct;
- The chair of the police board of the department if the alleged conduct is that of the Chief Constable or former Chief Constable; and
- The Discipline Authority, if different than the Chief Constable or chair of the police board of the department.

NOTICES OF PUBLIC HEARING

In addition to the parties, the Police Complaint Commissioner must provide Notice of the Public Hearing to those listed under section 138(4), the Commissioner will also provide a copy of the Notice of Public Hearing to:

- the Registrar
- the investigating officer
- the Public Hearing Counsel

All Notices of Public Hearings will be posted on the Office of the Police Complaint Commissioner's website at the discretion and direction of the Commissioner.

Unless special circumstances exist for which the Adjudicator has ordered the hearing be held in camera, all dates, times and locations for Public Hearings will be posted on the Office of the Police Complaint Commissioner's website and are open to the public.

APPOINTMENT OF AN ADJUDICATOR

Appointment of Adjudicator for Public Hearing or Review on the Record [s.142]

The Associate Chief Justice of the Supreme Court provides the Office of the Police Complaint Commissioner with a list of retired judges of the Provincial, Supreme and Court of Appeal who are recommended to act as Adjudicators pursuant to the *Police Act*. The Commissioner then appoints one of the recommended retired judges from a set rota, based on availability and a conflicts check. The appointment of the Adjudicator is normally included within the *Notice of Public Hearing*, but may if required, be a separate document issued by the Commissioner.

The appointed Adjudicator must, with the assistance of the Registrar, arrange and set the earliest practicable date or dates for, the Public Hearing and the Commissioner must serve¹ written notice of the proceeding on the following persons at least 15 business days before the proceeding may commence:

- (a) the complainant, if any;
- (b) the member or former member whose conduct is the subject of the proceeding; and
- (c) the Discipline Authority concerned.

¹ If, after reasonable effort, service cannot be effected on a party, the Commissioner may serve the notice by registered mail to that person's last known address on record with the OPCC.

PARTICIPANTS IN A PUBLIC HEARING

Other participants in a Public Hearing

- Public Hearing Counsel
- Commission Counsel
- The member, or former member (or his/her legal counsel or agent)
- Any other person who, upon application to the Adjudicator, is granted rights to participate

Powers respecting participants at Public Hearings [s.145]

The Adjudicator may make orders respecting:

- the manner and extent of a participant's participation;
- the rights and responsibilities, if any, of a participant; and
- any limits or conditions on a participant's participation.

PUBLIC HEARING

Public Hearing [s.143(2)]

A Public Hearing is a new hearing concerning the conduct of a member or former member that was the subject of an investigation under Division 3.

Exclusive jurisdiction [s.154(1)]

An Adjudicator has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in respect of a Public Hearing, and to make any order permitted under Division 3 of the *Police Act*.

Public Hearing [ss.143(8) & 150]

A Public Hearing is open to the public and media, unless the Adjudicator, by order, prohibits or restricts a person or a class of persons, or the public, from attending all or part of a the hearing, or from accessing all or part of any information provided to or held by the Adjudicator. An Adjudicator may make such an order:

- if there is an assertion of privilege or immunity over the information;
- for any reason for which information must or may be excepted from disclosure by the head of a public body under Division 2 of Part 2 of the Freedom of Information and Protection of Privacy Act; or
- if the Adjudicator has reason to believe that the order is necessary for the effective and efficient fulfillment of the Adjudicator's duties to conduct a Public Hearing.

Evidence at Public Hearing

Public Hearing [ss.143(3)&(5)]

A Public Hearing is not limited to the evidence and issues that were before a Discipline Authority at a discipline proceeding. Public Hearing Counsel, the member or former member, or her or his legal counsel or agent, and Commission Counsel may:

- call any witness who has relevant evidence to give, whether or not the witness was interviewed during the original investigation or called at the discipline proceeding;
- examine or cross-examine witnesses;
- introduce into evidence any record or report concerning the matter; however, limited to those issues, witnesses, and documents set out in the case management record unless the Adjudicator determines otherwise; and
- make oral or written submissions, or both, after all the evidence is called

Public Hearing [s.143(7)]

The complainant (if any) or her or his agent or legal counsel, may make oral or written submissions, or both, after all the evidence is called.

Public Hearing [s.143(6)]

The Adjudicator may,

- receive and accept information that the Adjudicator considers relevant, necessary and appropriate, whether or not the information would be admissible in any court; and
- without limiting the participant's rights as granted by the *Police Act*, exclude anything unduly repetitious.

Witnesses:

All oral evidence must be given under affirmation or oath.

Public Hearing [s.146(2)]

A participant or witness in a Public Hearing has the same immunities as a witness who appears before the court. A witness is considered to have objected to answering any question that may incriminate the participant or witness in a criminal proceeding, or establish the participant's or witness's liability in a civil proceeding.

Public Hearing [s.146(3)]

Any answer provided by a participant or witness before an Adjudicator must not be used or admitted in evidence against the participant or witness in any trial or other proceedings, other than a prosecution for perjury in respect of the answer provided.

Subject to the law of privilege, all witnesses are compellable at the Public Hearing.

Orders to Attend and Produce Records or Things

Orders to attend and produce records or things [s.147]

The Adjudicator may order a person to do either or both of the following:

- (a) attend, in person or by electronic means, before the Adjudicator to give evidence on oath or in any other manner;
- (b) produce for the Adjudicator a record or thing in the person's possession or control.

An Adjudicator's order to attend must be in the form of a summons, served on the person by personal delivery or registered mail to the person's last known address on record with the Police Complaint Commissioner.

Power to enforce summons and punish for contempt [s.149]

If a person who has been served a summons to appear fails to:

- attend as directed;
- take an oath or make an affirmation;
- answer questions; or
- produce records or things in the person's possession or control,

the Adjudicator may make an order finding that person to be in contempt and may impose a fine on or commit the person for contempt.

Compellability of a Member or Former Member:

Compellability [s.151]

A member or former member whose conduct is the subject of a Public Hearing is not compellable to testify as a witness at the Public Hearing, but an adverse inference may be drawn from the member's or former member's failure to do so.

Recording Public Hearings:

Recording Public Hearings [s.152]

All proceedings of a Public Hearing are to be recorded. The Police Complaint Commissioner is responsible for ensuring the proceedings of a Public Hearing are transcribed or that a record of all meetings and hearings is made.

The transcript or recording must be considered to be correct and to constitute part of any record of the hearing or any meeting in respect of it.

The validity of the Public Hearing on the record is not affected if, by a mechanical or human failure or other accident, the transcript or recording is destroyed, interrupted or incomplete.

Cancellation of Public Hearings:

Cancellation of Public Hearings [s.153]

The Police Complaint Commissioner may cancel a Public Hearing *at any time* if:

- the hearing was initiated on the Commissioner own initiative;
- new evidence has come to light that is substantial and material to the case; and
- holding the hearing is no longer required in the public interest.

Or:

- the hearing was initiated by the request of a member or former member;
- the member or former member now requests the Commissioner cancel the hearing; and
- the Commissioner is satisfied that a Public Hearing is no longer required in the public interest.

DECISIONS BY THE ADJUDICATOR

Public Hearing [s.143(9)]

After all the evidence is called and submissions by the participants are concluded, the Adjudicator must determine:

- whether any misconduct as defined by section 77 of the Police Act has been proven against the member or former member;
- if applicable, the appropriate disciplinary or corrective measures to be taken; and
- recommendations, if any, to the Chief Constable or police board regarding changes in policy or practices as the Adjudicator considers advisable in respect of the matter.

Imposition of disciplinary or corrective measures [s.126]

If the allegations of misconduct have been proven, the Adjudicator must determine the appropriate corrective or disciplinary measures to be imposed pursuant to section 126(1), and taking into consideration the mitigating and aggravating circumstances as set out in section 126(2). At the discretion of the Adjudicator, the participants may be invited to make written submissions regarding corrective and disciplinary measures.

If the Adjudicator considers that one or more disciplinary or corrective measures are necessary, an approach that seeks to correct and educate the member concerned takes precedence, unless it is unworkable or would bring the administration of police discipline into disrepute.

Public Hearing [s.143(10)]

Within 10 business days after reaching a decision, the Adjudicator must provide notice of that decision, together with written reasons, with the assistance of the Registrar, to the following:

- the complainant, if any;
- the member or former member whose conduct is the subject of the Public Hearing;
- the Chief Constable or chair of the board of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern;
- the Discipline Authority involved in the matter, if different than a Chief Constable or chair of the board; and
- the Police Complaint Commissioner.

Appeals from Public Hearing decisions [s.154]

An appeal on a question of law lies to the BC Court of Appeal, with leave of a Justice of the Court of Appeal, from an Adjudicator's decision.

Technical errors as to form, failure to file or provide notice on time and other procedural errors of a minor nature do not go to jurisdiction and may not be appealed to the Court of Appeal unless the error prejudiced a fair determination of the issues at the Public Hearing.

Immunity protection for Adjudicators [s.153]

No legal proceedings for damages lies or may be commenced or maintained against an Adjudicator, or a person acting on behalf of or under the direction of the Adjudicator, because of anything done or omitted in the exercise or intended exercise of any power under the *Police Act*, or in the performance or intended performance of any duty under the *Police Act*, so long as that action or omission was committed in good faith.

PUBLICATION OF REASONS FOR DECISION BY ADJUDICATORS

Unless special circumstances exist for which the Adjudicator has ordered a ban on publication, all *Notices of Public Hearings*, submissions from Counsel, and Reasons for Decision by Adjudicators will be accessible to the public and published on the Office of the Police Complaint Commissioner's website.

PART TWO: Recommended Public Hearing Procedures

NOTICES OF PUBLIC HEARING

In addition to the parties, the Police Complaint Commissioner must provide Notice of the Public Hearing to those listed under section 138(4), the Commissioner will also provide a copy of the Notice of Public Hearing to:

- the Registrar
- the investigating officer
- the Public Hearing Counsel

All Notices of Public Hearings will be posted on the Office of the Police Complaint Commissioner's website at the discretion and direction of the Commissioner.

Unless special circumstances exist for which the Adjudicator has ordered the hearing be held in camera, all dates, times and locations for Public Hearings will be posted on the Office of the Police Complaint Commissioner's website and are open to the public.

CASE MANAGEMENT CONFERENCE:

Purpose:

Prior to the Public Hearing, the Adjudicator may conduct a Case Management Conference. The purpose of the Case Management Conference is to expedite proceedings and to:

- define and simplify the issues;
- permit a full and satisfactory understanding of the matters to be considered;
- confirm admissions of fact; and
- identify witnesses and other evidence required at the Public Hearing.

Attendance at a Case Management Conference:

The following individuals must attend at a Case Management Conference:

- Public Hearing Counsel;
- the member, or former member, or her or his agent or legal counsel; and
- the Adjudicator may invite or allow any affected person to attend the Case Management Conference to make representations to assist the Adjudicator.

The Case Management Conference is recorded and is open to the public.

Documents to be Entered as Exhibits:

- The Notice of Public Hearing
- Oath of the Adjudicator
- Oath of the Registrar
- Agreed Statement of Facts & Issues
- Case Management Record

Case Management Record:

At the conclusion of the Case Management Conference, Public Hearing Counsel will prepare a Case Management Record to be signed by the Adjudicator. This record may include:

- any agreed facts
- any issues that have been resolved
- the issues that will be the subject of the hearing
- a list of witnesses to be called and documents to be introduced at the hearing, including expert witnesses and expert reports.
- any special procedures to be followed at the hearing
- any orders made by the Adjudicator; and
- the date(s) set for the Public Hearing.

Except by leave of the Adjudicator, a party may not call a witness whose name is not on the list of witnesses in the Case Management Record.

Following the Case Management Conference, Public Hearing Counsel will provide the required summons to the Registrar to obtain the signature of the Adjudicator.

The Registrar will ensure that all parties receive a copy of the signed Case Management Record.

EXPERT WITNESSES

No expert may give evidence of the expert's opinion unless a summary of the expert's opinion, including a description of the expert's qualifications, is provided

- (a) to the persons specified by the Adjudicator; and
- (b) on or before the date specified by the Adjudicator.

Instead of calling an expert to give evidence, a report may be introduced at the hearing if the person intending to introduce the report provides a copy of the report to all persons by the date specified by the Adjudicator.

DEPOSITION EVIDENCE

The Adjudicator may order that a person be examined on oath or affirmation before or during a hearing, before an official reporter or any other person the Adjudicator may direct in order that the deposition be available to be submitted as evidence at the hearing.

Unless the Adjudicator orders otherwise, the deposition shall be recorded either by the official reporter in the form of the questions and answers or on videotape or film.

ADJOURNMENTS OF PUBLIC HEARINGS

The Adjudicator may, on application, adjourn the hearing if the Adjudicator is satisfied that the adjournment is unavoidable or an injustice will result.

APPLICATIONS

At any point in the proceedings, any party may apply to take action that varies from standard Public Hearing procedures or seek direction from the Adjudicator.

The applicant must file the Notice of Application to the Adjudicator and serve a copy of the Notice on all parties affected by the order requested at least five (5) business days before the Public Hearing date.

The Adjudicator who will be conducting the Public Hearing will hear applications unless there is a reason that another Adjudicator should hear preliminary applications.

PUBLICATION OF REASONS FOR DECISION BY ADJUDICATORS

Unless special circumstances exist for which the Adjudicator has ordered a ban on publication, all Notices of Public Hearings, submissions from Counsel, and Reasons for Decision by Adjudicators will be accessible to the public and published on the Office of the Police Complaint Commissioner's website.