

# Recommended Procedures for Reviews on the Record

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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 Reviews on the Record**

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## INTRODUCTION

The purpose of this guide is to establish a procedural framework that will promote an open, fair and timely 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 Review on the Record 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 Reviews on the Record.

[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.

## DEFINITIONS

<i>Discipline Authority</i>	<p>The Discipline Authority (“DA”) is the Chief Constable of the municipal department with whom the member is employed.</p> <p>The Chief Constable may delegate the position to the Deputy Chief Constable or senior officer with a rank of Inspector or higher.</p> <p>The Chief Constable or the Police Complaint Commissioner may delegate the role of Discipline Authority to the Chief Constable or senior officer of an external police agency, if required in the public interest.</p>
<i>Disciplinary Decision</i>	<p>Refers to the report [s.133] by the DA following a discipline proceeding that sets out:</p> <ul style="list-style-type: none"><li>• The findings and reasons;</li><li>• The disciplinary or corrective measures proposed and any policy changes being considered, if any;</li><li>• The reasons for the proposed disciplinary or corrective measures, and policy changes, if any; and</li><li>• Any noted aggravating and mitigating factors in the case,</li></ul> <p>Including any further reasons provided by the DA in the Disciplinary Disposition Record [s.128].</p>
<i>Discipline Representative</i>	<p>If a member’s request to call witnesses at the discipline proceeding is granted, a Discipline Representative is appointed by the DA to present the case at the discipline proceedings.</p>
<i>Final Investigation Report</i>	<p>The report submitted by the investigating officer at the conclusion of the investigation.</p>
<i>Investigating Officer</i>	<p>The officer appointed to conduct an investigation into allegations of misconduct, pursuant to Division 3 of the <i>Police Act</i>.</p>
<i>Member / Former Member</i>	<p>A municipal constable, Deputy Chief Constable or Chief Constable, whose conduct is the subject of concern.</p> <p>If the conduct that is the subject of concern occurred while the member was still employed by the municipal police department but the member has since retired or resigned and is no longer a member of any municipal police department in British Columbia, that individual is referred to as a former member.</p>
<i>Misconduct</i>	<p>Conduct as defined by Division 2 of Part 11 of the <i>Police Act</i> that constitutes a disciplinary breach of public trust when committed by a member.</p>

## 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 Review on the Record*, but may if required, be a separate document issued by the Commissioner.

## EVIDENCE

*[ss.141(3), 141(4), 147(1) & 147(2)]*

Generally, the evidence in a Review on the Record will be limited to:

- the Final Investigation Report made by the investigating officer and any supplementary reports that may have been prepared;
- any investigation reports made during an adjourned discipline proceeding under section 132;
- all records related to the investigation and discipline proceeding;
- the disciplinary disposition record created under s.128(1);
- the report created under section 133(1)(a); and
- where a review is initiated based on the availability or discovery of new evidence under s.139, any record relating to the new evidence;
- collectively, the “Record of Disciplinary Decision.”

However, where the adjudicator believes that special circumstances make it necessary and appropriate to do so, he or she may receive additional evidence that is not part of the Record of Disciplinary Decision or of the service record of the member involved.

While the member who is the subject of the Review on the Record is not a compellable witness, the Adjudicator may, by summons, order a person to give evidence on oath or in any other manner, or to produce a record or item in the person’s possession or control.

The OPCC will provide the Adjudicator with an encrypted USB containing disclosure of the evidence to be reviewed. Disclosure of materials will also be sent to all other counsel involved using an encrypted USB. The USB will either be hand delivered or delivered using a courier service.

## SUBMISSIONS

*[ss. 141(5)-(8)]*

Under the scheme of the Act, both the member involved and the Commissioner (or their respective counsel or agents) may - by right - make submissions to the Adjudicator. The Adjudicator may permit the complainant, the discipline authority, or the discipline representative to make submissions. It will be up to the adjudicator to decide whether to grant a request to make submissions.

The Adjudicator may permit oral or written submissions. The Registrar will assist the Adjudicator in arranging for submissions. The Registrar is currently Ms. Sylvia Sangha.

## FORUM

*[ss.148, 150 & 152]*

It appears clear that the legislature's intention was that a Review on the Record would be a public process, unless attendance is limited by the Adjudicator. This results from the enactment of provisions circumscribing an Adjudicator's power to prohibit or restrict the attendance of the public or certain persons, provisions on the maintenance of order and provisions in regard to transcribing a Review on the Record proceeding and making a record of meetings and hearings.

## SUGGESTED PRE-REVIEW ON THE RECORD CONFERENCE

The Commissioner offers the following procedural advice to Adjudicators conducting Reviews on the Record. Prior to commencing a Review on the Record proceeding, the Adjudicator should generally give notice of and convene a pre-review on the record conference, the purpose of which would be to set dates and deadlines and to hear from the parties on the following matters:

- whether the parties who have a right to make submissions intend to make those submissions;
- whether the parties who may make submissions upon approval of the Adjudicator, intend to do so and whether the Adjudicator will approve of the submission of such submissions. where the party has to seek leave to make submissions: its application to do so - it is suggested that leave would be based, in large part but not exclusively, on an assessment of the applying party's submission as to whether or not the Discipline Authority erred at law or did or did not misapprehend the evidence in the Record of Disciplinary Decision;
- whether submissions should be in writing or oral or both;
- whether the testimony or records of certain persons should be ordered;
- whether special circumstances exist for the submissions of new or additional evidence - it is suggested that special circumstances would require that potential evidence be identified that a) is credible, b) could not have been obtained earlier with reasonable diligence and c) if given, would probably have an important influence on the decision; and

- whether there are any grounds to exclude the public, persons or classes of persons from the proceeding, taking into account ss.143(8)& 150.

## DECISION BY THE ADJUDICATOR

[s. 141(9)]

The standard of review to be applied by the Adjudicator to a decision is correctness.

[s. 141(10)]

The Adjudicator must decide whether any misconduct has been proven; if so, determine the appropriate disciplinary or corrective measures to be taken in accordance with s. 126 of the Act; and if applicable, provide recommendations to a chief constable or board of the department concerned regarding any changes to policy or practices that 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.

[s. 141(11)]

The Adjudicator must provide notice of the decision together with written reasons within 10 business days after reaching a decision to the following parties:

- the complainant, if any;
- the respondent member (or former member)
- the chief constable or chair of the board of the municipal department
- the DA involved in the matter
- the Police Complaint Commissioner

The Adjudicator will need to send their decision to the Registrar who will assist in the dissemination of the Adjudicator's decision to the appropriate parties.

## PUBLICATION OF REASONS FOR DECISION BY ADJUDICATORS

Unless special circumstances exist for which the Adjudicator has ordered a ban on publication, all Notices of *Reviews on the Record*, 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.