OPCC File: 2017-14249

REVIEW ON THE RECORD
DECISION

PURSUANT TO SECTION 141 POLICE ACT, R.S.B.C. 1996, c. 267

In the matter of a Review on the Record into the Ordered Investigation concerning
[redacted]
of the Vancouver Police Department ("VPD")

To: [redacted],([redacted]) Vancouver Police Department ("the Member")
And to: Chief Constable Adam Palmer, Vancouver Police Department (the "Chief Constable")
And to: Mr. Clayton Pecknold, Police Complaint Commissioner (the "Commissioner")
And to: Mr. K Woodall, Counsel for [redacted] ("Member's Counsel ")
And to: Mr. M. Underhill, Commission Counsel ("Commission Counsel")
And to: Supt. M. Davey, Vancouver Police Department (the "Discipline Authority"),

Review hearing date: June 26, 2019, Vancouver B.C.

Decision date: July 18, 2019
Place: Victoria, B.C.

REASONS FOR DECISION:

I Decision Summary

(1) This review concerns the disciplinary and corrective measures that should be imposed when a police officer:
   (a) Acting without lawful authority, uses confidential police databases to conduct searches for personal reasons, including searches concerning a youth covered by the Youth Criminal Justice Act (the "YCJA")and
   (b) Improperly discloses information about a young person found on the databases to a member of the public.

(2) The specific allegations of misconduct concerning the Member are as follows:

Allegation 1 Unauthorized Use of Police Facilities/Resources, pursuant to section 77(3)(c)(iv) of the Police Act which is using or attempting to use any equipment or facilities of a municipal police department, or any police force or law enforcement agency, for purposes unrelated to the performance of duties as a member. Specifically, that the Member conducted a CPIC and/or PRIME search for a purpose unrelated to his duties as a police officer;

Allegation 2 Unauthorized Use of Police Facilities/Resources, pursuant to section 77(3)(c)(iv) of the Police Act which is using or attempting to use any equipment or facilities of a municipal police department, or any police force or law enforcement agency, for purposes unrelated to the performance of duties as a member. Specifically, that the Member conducted a CPIC and/or PRIME search for a purpose unrelated to his duties as a police officer; and

Allegation 3 Improper Disclosure of Information pursuant to section 77(3)(i)(i) of the Police Act which is intentionally or recklessly disclosing, or attempting to disclose, information that is acquired by the Member in the performance of duties as a member. Specifically, that the Member improperly disclosed confidential information he acquired from police databases to a member of the public;

(the "Misconduct")

(3) The Misconduct has been admitted by the Member and there are few discrepancies on the relevant facts. The Member has taken early, and complete, acceptance of responsibility for his actions.

(4) Having reviewed the record of proceedings relating to the Misconduct, the provisions of the *Police Act* and considered the submissions of the parties, I have determined that the prior disciplinary decision made January 4th, 2019 (the "Discipline Decision") setting out the disciplinary or corrective measures to be applied to the Member is in error. I find that it in error with respect to conclusions reached concerning the seriousness of the Misconduct in light of the provisions of the YCJA, the mitigation accorded to the Member [redacted] and the disciplinary sanctions to be imposed. I have therefore found that such decision is incorrect.

(5) Considering all of the factors in subsections 126(2) & (3) of the *Police Act*, the evidence in the record and submissions of the Parties, I have determined that the correct disciplinary measures to be applied to the Member are five day suspensions from service, without pay, concurrent on Allegations 1, 2 and 3.

(6) I am satisfied that such disciplinary measures are just and appropriate being necessary to ensure:

(a) Confidence in the administration of police discipline proceedings, and
(b) Deterrence with respect to any future similar misconduct of members.

II Mandate

(7) I have been appointed as Adjudicator to conduct a Review on the Record of certain discipline outcomes relating to the Member set out in the Discipline Decision. My appointment was made by the Commissioner March 14, 2019 pursuant to subsection 138(1) of the *Police Act*.

(8) My mandate is limited to a review of the correctness of the disciplinary or corrective measures ordered by the Discipline Authority in the Discipline Decision.

(9) Section 141 of the *Police Act* sets out the overall process and procedure to be followed in conducting this review.

(10) Subsection 141 (9) of the *Police Act* confirms that the standard to be applied in my review of the Disciplinary Decision is correctness. Specifically, my obligation is to determine the appropriate disciplinary or corrective measures to be taken in relation to the Member in accordance with section 126 which provides as follows:

Imposition of disciplinary or corrective measures in relation to members

> *126 (1) After finding that the conduct of a member is misconduct and hearing submissions, if any, from the member or her or his agent or legal counsel, or from the complainant under section 113 [complainant's right to make submissions], the discipline authority must, subject to this section and sections 141 (10) [review on the record] and 143 (9) [public hearing], propose to take one or more of the following disciplinary or corrective measures in relation to the member:*
> *(a) dismiss the member;*
> *(b) reduce the member's rank;*
> *(c) suspend the member without pay for not more than 30 scheduled working days;*
> *(d) transfer or reassign the member within the municipal police department;*
> *(e) require the member to work under close supervision;*
> *(f) require the member to undertake specified training or retraining;*
> *(g) require the member to undertake specified counselling or treatment;*
> *(h) require the member to participate in a specified program or activity;*

(i) reprimand the member in writing;
(j) reprimand the member verbally;
(k) give the member advice as to her or his conduct.

(2) Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation,

(a) the seriousness of the misconduct;

(b) the member's record of employment as a member, including, without limitation, her or his service record of discipline, if any, and any other current record concerning past misconduct;

(c) the impact of proposed disciplinary or corrective measures on the member and on her or his family and career;

(d) the likelihood of future misconduct by the member;

(e) whether the member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence;

(f) the degree to which the municipal police department's policies, standing orders or internal procedures, or the actions of the member's supervisor, contributed to the misconduct;

(g) the range of disciplinary or corrective measures taken in similar circumstances; and (h) other aggravating or mitigating factors.

(3) If the discipline authority 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.

(11) In completing my Review, I am required to consider all aggravating and mitigating circumstances in order to determine the just and appropriate disciplinary or corrective measures in relation to the Misconduct of the Member.

(12) If I determine that one or more disciplinary or corrective measures are necessary, subsection 126(3) of the *Police Act* provides that 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.

III Overview and History of Proceedings :

(13) The evidence to be considered on this Review is limited to that set out by subsection 141 (3) of the *Police Act:*

(3)For the purposes of a review on the record under this section, the record of a disciplinary decision consists of

(a)the final investigation report of the investigating officer, any supplementary reports or investigation reports under section 132 and all records related to the investigation and the discipline proceeding,

(b)the records referred to in section 128 (1)
(c)the report referred to in section 133 (1) (a) and
(d)in the case of a review on the record initiated under section 139 , any record relating to the new evidence referred to in that section.

(the "Record")

(14) The facts concerning the Member in these proceedings set of in the Final Investigation Report of July 17, 2017 (the "FIR") are not in dispute and can be summarized as follows:

a. On November 24, 2017 beginning at 8:30 am the Member used police computer VA3A13 to query police databases CPIC and PRIME to search the records of an [redacted], then [redacted], (the "Young Person");

b. The Member initially conducted searches in relation to this Young Person where he reviewed specific records relating to [redacted];

c. On that same date the Member used the same computer at 9:15 am to query records relating to [redacted] in both CPIC and PRIME;

d. On November 29, 2017 at 12:14 pm the Member again conducted searches of CPIC and PRIME in relation to the Young Person. At that time, he received [redacted]

e. A further search of the same databases took place at 12:15 pm with a queried location of the Young Person's expected home address. Immediately thereafter another search queried [redacted].

f. None of the searches touched on any of the Member's professional duties and responsibilities nor were they authorized by law in any manner;

g. The Member subsequently shared some of the information he found through these searches with [redacted]. Precisely what was said is unclear, partly because the Member said that he could not recall the exact details, but also because the [redacted] was not interviewed to confirm his recollection of events;

h. The material shared appears to have been limited to advising [redacted] The Member's interview with the author of the FIR did note at page 15, however, that the Member had advised:

[redacted]

i. This part of the Member's statement to the investigator appears to be in conflict with the more detailed questions posed at page 16 of the FIR as follows:

> *"Q. In regards to the discussion you had with ([redacted]) about the Young Person and [redacted]. Can you provide details on what you told ([redacted]) specifically?*
>
> *A. Specifically, no. I did we were in that room for a while. I just talked to [redacted] about [redacted]*

j. The Member had concluded that the Young Person could [redacted]

k. The Member has denied sharing any specific information concerning the [redacted]. The Final Investigation Report does not conclude that there is evidence to support a different position on this point, notwithstanding the apparent conflicts in the evidence of the Member on this issue. As an example, it appears as though the Member recalls in some detail many of the subjects discussed with [redacted] but is not certain of what specifically he told [redacted] about the Young Person. This conflict remains unresolved from the evidence in the FIR, however the investigator and author of the FIR concluded at page 24 of the report:

> *"In an interview (the Member) acknowledged that he had advised [redacted] that [redacted]*
> *"I just said [redacted]"*

l. The assessment of the author of the FIR on this point was set out at page 24 as follows:

"As set out above, the Member used the information he obtained from a CPIC/PRIME query of the Young Person to form part of his opinion that the Young Person would be a [redacted]. The Member then provided [redacted] with a generic statement about the [redacted]."

m. In December, the [redacted] and the Young Person were communicating [redacted];

n. [redacted]

o. [redacted]

p. [redacted]

q. [redacted]

r. The Young person reported the conversations to [redacted] December 7, 2017. [redacted]

s. The Office of the Police Complaint Commissioner ("OPCC") was informed of the incident on January 15, 2018;

t. On January 17, 2018, former Police Complaint Commissioner Lowe ordered an investigation into the conduct of the Member;

u. An investigation was undertaken as ordered and in the course of that review, it was discovered that the Member had also searched for information [redacted] on five police databases on November 24, 2017. The searches were for reasons unrelated to the performance of the Member's duties;

v. The Final Investigative Report was completed July 17, 2018 recommending substantiation of the following allegations against the Member:

(i) Unauthorized Use of Police Facilities/Resources, pursuant to section 77(3)(c)(iv) of the Police Act which is using or attempting to use any

equipment or facilities of a municipal police department, or any police force or law enforcement agency, for purposes unrelated to the performance of duties as a member. Specifically, that the Member conducted a CPIC and/or PRIME search for a purpose unrelated to his duties as a police officer;

(ii) Unauthorized Use of Police Facilities/Resources, pursuant to section 77(3)(c)(iv) of the Police Act which is using or attempting to use any equipment or facilities of a municipal police department, or any police force or law enforcement agency, for purposes unrelated to the performance of duties as a member. Specifically, that the Member conducted a CPIC and/or PRIME search for a purpose unrelated to his duties as a police officer; and

(iii) Improper Disclosure of Information pursuant to section 77(3)(i)(i) of the Police Act which is intentionally or recklessly disclosing, or attempting to disclose, information that is acquired by the Member in the performance of duties as a member. Specifically, that the Member improperly disclosed confidential information he acquired from police databases to a member of the public;

w. A prehearing conference was held on August 29, 2018 before an Inspector of the VPD Professional Standards Branch. An agreement was reached at that conference wherein:

(i) The Member would admit the various misconduct allegations;
(ii) A disciplinary sanction of a verbal reprimand would be imposed for all counts; and
(iii) The Member would be required to participate in a review of policy and relevant manuals in relation to accessing police database information under the direction of a supervisor.

x. In reviewing the agreement reached in the prehearing conference, however, the former Police Complaint Commissioner determined that the discipline agreed to did not adequately address the seriousness of the misconduct. Therefore, the matter was set for a discipline proceeding;

y. On September 6, 2018, the Chief Constable delegated his authority to conduct this proceeding to the Discipline Authority;

z. On September 13, 2018, after due notice to the Member, the Discipline Authority convened a discipline proceeding;

aa. At the discipline proceeding, the Member admitted the allegations of misconduct. As such, the Discipline Authority found that all of the allegations were substantiated and invited further submissions on the appropriate penalty;

bb. After considering the submissions received, the Discipline Authority determined that a written reprimand for each of the allegations would be the appropriate penalty for the substantiated misconduct;

cc. In reviewing the discipline decision of the Discipline Authority, the Commissioner determined that there was a reasonable basis to believe that the Discipline Authority misapplied s. 126 of the *Police Act* in imposing disciplinary or corrective measures. In particular, the Commissioner was of the view that the Discipline Authority erred:

(i) In taking an approach that sought to correct and educate the Member; and
(ii) In placing inappropriate weight to possible mitigation arising from the fact that that the Member ;

dd. The Commissioner determined, therefore, that a Review on the Record was necessary in the public interest. The Commissioner expressed the view that there was a public interest in receiving guidance regarding the appropriate range of disciplinary measures for misconduct involving the use of police databases for personal reasons and the improper disclosure of personal information;

ee. As a result, the Commissioner ordered this Review on the Record of the allegations concerning the Member, but limited the scope of that review to a determination of the appropriate disciplinary or corrective measures with respect to the proven allegations;

ff. The Discipline Authority was invited to make submissions in the context of this Review, but declined to make any such submissions.

IV **Submissions of Counsel to the Commissioner**

(15) The general thrust of submissions from Counsel to the Commissioner is on the need for a "reset" of disciplinary outcomes for misconduct arising from improper access to, and use of, CPIC, PRIME and other police databases, particularly in relation to data protected by the YCJA.

(16) Counsel for the Commissioner acknowledges that several earlier disciplinary decisions have imposed written reprimands as an appropriate sanction for similar patterns of misconduct. However, Counsel submits that a higher range of sanction is warranted to acknowledge the seriousness of the misconduct in the context of the YCJA, disciplinary decisions arising in other jurisdictions and indeed, similar decisions in other professions.

(17) The Commissioner submits that public confidence in the administration of policing discipline is in peril if more stringent sanctions are not imposed for the improper access to and use of highly confidential and sensitive data maintained in police computer systems.

(18) With respect to the Member's misconduct, the specific submissions of Counsel for the Commissioner can be summarized as follows:

(a) The seriousness of the misconduct in this case demands a more severe sanction than that ordered by the Discipline Authority. It is submitted that the *YCJA* provisions severely limiting access to records of the investigation of youth criminal activity, and outcomes of those investigations, must be given significant weight in considering discipline sanctions;

(b) The Discipline Authority erred in lessening the sanction imposed in this case simply because the Member [redacted]. Counsel for the Commissioner takes the position that the existence of such relationships has no bearing on mitigating factors and no relevance to the imposition of appropriate sanctions;

(c) Disciplinary authorities in policing agencies outside of BC and certain professional authorities have imposed significant penalties for improper access to and use of confidential information;

(d) It is improper to focus on a need to educate and correct the Member in this case as to do so would put the administration of police discipline into disrepute. Counsel for the Commissioner submits that the Member clearly had been trained to know, and did know, that it was improper to access and ultimately make use of police data for personal reasons.

(e) As such, it is submitted that re-education of the Member was not needed or useful. Rather, it is submitted that such misconduct requires a disciplinary sanction of a significant suspension without pay to appropriately support deterrence and maintain public confidence in the administration of police discipline processes.

(19) In submissions on the specific factors to be considered under section 126 of the *Police Act,* Counsel for the Commissioner makes the following arguments:

(i) <u>Aggravating factors</u>

(a) The Misconduct admitted by the Member was extremely serious. The powers and privileges of police officers also require the assumption of significant responsibilities in the use of confidential information;

(b) Police databases contain extensive amounts of extremely sensitive information. The scale and scope of such information raises the seriousness of any actions taken to improperly access and use the same: *British Columbia*

(Re) 2012 BCIPC 16. Improperly accessing and disclosing information on those databases is therefore extremely serious*;*

(c) The privacy of information on police databases is protected not only by the *Police Act*, but also the *Freedom of Information and Privacy Act of BC*. ("FIPPA") The quasi constitutional protection afforded to FIPPA is, it is submitted, a clear indication of the seriousness society attaches to the legislative safeguards created to govern access to and use of private information: *Freedom of Information and Protection of Privacy Act RSBC 1996, c.165 : British Columbia v Philip Morris International Inc. 2016 BCCA 203 para 17*;

(d) The Member's actions in improperly accessing and using protected police data for personal purposes was not inadvertent, nor a single impulsive act. Rather, it is submitted, the Member's actions were deliberate, repeated and focused on personal needs of the Member to the exclusion of his professional responsibilities. Again, it is submitted that such actions render the Member's misconduct more serious than a single, impulsive search;

(e) In addition to the foregoing, it is submitted that the provisions of the YCJA has particular relevance to the seriousness of the Member's misconduct. Due to their inherent vulnerability, young people are granted special privacy rights under the YCJA. Counsel for the Commissioner submits that when dealing with a young person, such as the person researched by the Member, police cannot act in a manner that undermines the clear policy objectives of the YCJA in severely limiting access to and use of information held concerning a youth. To do so, it is submitted, is a very serious matter at law and highly relevant to the seriousness of the misconduct in question; and

(f) Disclosure of the sensitive information located by the Member to [redacted] was, it is submitted, highly reckless in all of the circumstances. It is further submitted that the information in question was in fact used by the [redacted] in his subsequent dealings with the Young Person, again raising a serious concern as to the Member's judgment and actions.

(ii) ***<u>Mitigating Factors</u>***

(g) Counsel to the Commissioner takes issue with the finding by the Discipline Authority that it is "extremely mitigating" that the Member [redacted] Counsel notes that such [redacted] do not specifically appear in the list of mitigating circumstances to be considered under section 126 of the *Police Act.* It is submitted that such is the case for good reason: officers should not be held to a lower standard of conduct simply because they have [redacted];

(h) Counsel also submits that there should be no significant distinction between this case and cases where police officers searched databases and disclosed the information found for financial gain. It is submitted that in both cases, the search is deliberate and the disclosure intentional for a personal benefit.

Counsel submits that the Discipline Authority erred in distinguishing this case from cases where officers misused confidential for financial or proprietary gain. In the result, it is submitted that rather than personal circumstances being a mitigating factor, such are elevated to an aggravating factor. As a consequence, Counsel for the Commissioner takes the position that the Discipline Authority erred in emphasizing the importance of the Member's role as [redacted].

(iii) <u>The Proper Range of Discipline or Corrective Measures in similar circumstances</u>

(i) Counsel for the Commissioner submits that the Discipline Authority improperly discounted consideration of discipline cases which included suspensions, reductions in rank and dismissal;

(j) Counsel further submits that jurisprudence from police authorities in other Provinces shows that misconduct related to improper access to and disclosure of information on police databases have resulted in findings of major misconduct. As a result of such findings, Counsel submits the range of sanction has extended to suspensions, forfeitures of pay and even dismissal in jurisdictions outside British Columbia;

(k) The submission of Counsel to the Commissioner also extends to consideration of disciplinary sanctions imposed in professions outside policing. Specifically, Counsel references disciplinary decisions relating to nurses and physicians. Overall, the submission is that misconduct by improper access to, and use of, confidential information warrants sanctions well beyond a reprimand, generally extending to lengthy suspensions without pay.

(iv) <u>An Approach that Educates and Corrects is Inappropriate</u>

(l) Counsel to the Commissioner submits that sanctions directed to educate and correct the Member are not appropriate for the following reasons:

I Counsel submits that the Member was well aware that his behaviour was in violation of law and policy;

II The Member received specific training in the use of police databases;

III In September of 2007, the Member signed a form acknowledging that he was not entitled to use police databases or disclose personal information found on those databases for personal reasons;

IV The VPD Regulations and Procedures Manual section 1.6.9(i) specifically addresses strict limits on the use of police databases; and

V The Member, as a senior officer, had experience supervising other officers which would have included supervising their use of databases consistent with VPD policy and the law.

(m) Counsel submits that in the current case, the Member has already received adequate training regarding the misconduct at issue and as such, education would serve no useful purpose;
(n) It is submitted that in the absence of a useful purpose for re-education and correction, an appropriate sanction must strongly denounce the Member's conduct to deter similar behaviour in others;
(o) Counsel therefore submits that an educative and corrective approach is therefore inappropriate on the facts of this case as it would ultimately serve no purpose and would bring the administration of police discipline into disrepute.

(v) The Appropriate Sanction

(p) Counsel for the Commissioner submits that the appropriate sanction for Member misconduct in this case is a suspension without pay in the range of 15 to 30 days.

V Submissions of Counsel for the Member

(i) Preliminary Issue – Deference – Standard of Review

(20) Counsel for the Member advanced a preliminary submission challenging the decision of the Commissioner to order this Review on the Record. The essence of the submission is that a comprehensive disciplinary process took place before the Commissioner's decision to order this Review. It is submitted that the process included a pre-hearing conference, admissions by the Member, an agreement on misconduct sanctions and subsequently at the Discipline Proceeding, due consideration of the full range of prior relevant disciplinary decisions in BC and the issuance of a considered and detailed Disciplinary Decision.

(21) Counsel submits that the pre-hearing conference process and the disciplinary outcomes ordered by the Discipline Authority must be afforded some degree of respect in any review unless the Commissioner can point to an error of principle or a material misapprehension of fact in the earlier process. The submission is that no such case has been made.

(22) It is the submission of Counsel for the Member that there is no foundation for a conclusion that the decision of the Discipline Authority was incorrect. Therefore, Counsel submits that:

"..it is not proper for the (Commissioner) to reject an agreement reached in a pre-hearing conference unless the agreed disciplinary or corrective measures clearly fall outside the range of what is reasonable."

(Member's submissions, para 52.)

(23) Counsel for the Member acknowledges that the test for a review on the record is "correctness". However, it is submitted that the imposition of disciplinary or corrective measures is profoundly contextual. As such, Counsel for the Member submits that it is important for the current review process to consider the nature of the questions under review in the context of the experience of the decision makers whose decisions are under review in these proceedings.

(ii) The Reasonable Person Test – Subsection 126(3) Police Act

(24) As a general submission, Counsel for the Member notes that a disciplinary outcome that entails punishment may only arise if educative and corrective measures "*would bring the administration of police discipline into disrepute*" (Subsection126(3), *Police Act*).

(25) Counsel submits, however, that determining whether or not such action "would" bring the administration of police discipline into disrepute can only be determined by considering the "Reasonable Person" test first set out in *R. v Collins*, [1987] 1 S.C.R 265. Counsel notes the decision of Lamer, C.J. with respect to the considerations for judges in applying a similar test under subsection 24(2) of the *Charter of Rights and Freedoms*. In that case at paragraph 33 the Court adopted the following test:

"Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?"

(26) Counsel for the Member submits that applying a similar standard to this case, a reasonable and well informed member of the public would conclude that although accessing and ultimately disclosing information on confidential police databases was wrong, it was not, in all of the circumstances, misconduct requiring more than educative or corrective measures.

(iii) Seriousness of the Misconduct Subsection 126(2)a

(27) Counsel for the Member takes issue with the Commissioner's position that the current proceedings evidence serious misconduct which was not fully acknowledged in the Discipline Decision.

(28) Specifically, Counsel for the Member submits that the Discipline Authority did not fail to recognize the gravity of a police database queries made concerning the Young Person or the misconduct evidenced by searches concerning the [redacted]. Counsel notes that the Member has acknowledged that his actions were improper on both these issues and the disclosure of information to [redacted].

(29) However, Counsel also notes that the full familial circumstances behind the Member's motivation for the searches and disclosure were known to, and considered by, the Discipline Authority.

(30) Put into this context, Counsel for the Member submits that the seriousness of the misconduct is diminished, as recognized by the Discipline Authority in her decision.

(31) It is submitted that the seriousness of the misconduct is not mitigated merely because of familial relationships, but rather because of the compelling and understandable justification for seeking the information in question articulated by the Member in the earlier proceedings.

(32) In addition, Counsel for the Member submits that prior to the unauthorized searches, the Member had received information from another officer on the dealings the Young Person had had with police. It is submitted that the Member, [redacted], was entitled to disclose such information to [redacted] and further, that there is no evidence that the Member told [redacted] anything more than had been told to him by his fellow officer.

(33) As such, Counsel for the Member submits that the seriousness of the Member's misconduct in accessing and later disclosing information was significantly reduced.

(iv) <u>The Member's Service Record of Discipline Subsection 126(2)b</u>

(34) Counsel for the Member notes that the Member has a previously unblemished record of service as an officer with the VPD.

(35) Counsel also notes that the Commissioner had not taken this fact into account in his decision which, it is submitted, is an error of principle on the part of the Commissioner.

(v) <u>Likelihood of Future Misconduct Subsection 126(2)d</u>

(36) Counsel for the Member submits that there is little likelihood of future misconduct.

(37) Counsel further submits that no further education or correction is warranted and any other measures would be purely punitive.

(38) Again, Counsel for the Member submits that the Commissioner has not taken this into account in his decision, and maintains that this is also an error of principle.

(vi) <u>Whether the Member accepts responsibility for the misconduct and is willing to take steps to prevent its recurrence Subsection 126(2)e</u>

(39) Counsel for the Member notes that from the outset the Member has acknowledged his misconduct, assisted with the investigation of that misconduct and attended a pre-hearing conference and prior discipline proceeding acknowledging the same.

(40) The submission on this point is that the Member unquestionably accepts responsibility for his misconduct and will act to prevent its recurrence.

(41) Again, Counsel for the Member submits that the Commissioner has not taken this into account in his decision, and maintains that this is also an error of principle.

(vii) <u>The range of disciplinary or corrective measures taken in similar circumstances – Subsection 126(2)g</u>

(42) Counsel for the Member takes strong exception to the suggestion made by Counsel to the Commissioner that a "reset" of sanctions is required or indeed appropriate on the facts of the current case.

(43) The specific submission is that the prior disciplinary decisions involving members in similar circumstances to the facts of this Review have all had the tacit, or explicit sanction of the Commissioner.

(44) It is noted by Counsel for the Member that the range of disciplinary sanctions for improper access to and disclosure of police database material is well established in this Province and that the result set out in the Discipline Decision rests well within that range. As such, Counsel submits that no "reset" is required, or appropriate, on the facts of this case.

(45) Counsel for the Member submits that one of the most important factors to be considered in this Review is the established range of cases decided in this Province concerning police officers in similar circumstances.

(46) Counsel submits that the collateral decisions from other jurisdictions and involving other professions are simply not relevant to issue of considering appropriate sanctions for police misconduct in British Columbia.

(47) Counsel has provided a comprehensive list of all of the cases publicly known where members were found to have conducted themselves improperly by accessing police

databases and subsequently disclosing some or all of that information without authority.

(48) Counsel for the Member submits that the vast majority of such cases resulted in disciplinary or corrective measures less than a suspension generally ranging from advice as to future conduct or a reprimand.

(49) Counsel acknowledges that in a very small number of cases a brief suspension was ordered where the member concerned was found to have disclosed specific confidential information to members of the public.

(50) Counsel for the Member submits that not such information was disclosed by the Member.

(viii) Summary

(51) In summary, it is the submission of Counsel for the Member that the Commissioner has not shown that the decision of the Discipline Authority was "incorrect" and hence, no review of that decision should endorse a different outcome.

VI Counsel for the Commissioner's Reply – Preliminary Issue

(52) Counsel for the Commissioner submitted a brief reply to the Member's submissions concerning the implicit rejection by the Commissioner of the pre-hearing agreement reached concerning the Member's misconduct.

(53) Counsel's submission is that as Adjudicator, I have no authority to examine or consider the decisions taken by the Commissioner in ordering this review. Counsel submits that the submissions of Counsel for the Member on this point touch on issues outside the statutory authority of this Review on the Record.

VII Analysis - Preliminary Issue raised by Counsel for the Member:

(54) On the preliminary issues raised by Counsel for the Member I cannot agree that I have jurisdiction to consider the matter.

(55) My authority as Adjudicator in conducting this Review on the Record is governed by the relevant provisions of Part 11 of the *Police Act.* Nowhere in that Act is authority granted for me to consider or evaluate the grounds on which the Commissioner came to the decision to order a Review on the Record in this case, nor do I have authority to consider whether or not such decision was proper.

(56) My evaluation of the correctness of the Discipline Decision is governed by the statutory framework of the *Police Act*, and in particular, the factors set out in subsection 126(2).

(57) Allegations concerning the Commissioner's perceived lack of respect for prior decisions and agreements are not specifically identified as enumerated factors for consideration under subsection 126(2). As such, they are not within my statutory mandate.

VIII Analysis- Aggravating and Mitigating Circumstances

(58) I now turn to consideration of the relevant aggravating and mitigating circumstances, as identified in subsection 126(2) of the *Police Act*.

(59) My general mandate under subsection 126(2) is as follows :

> "*Aggravating and mitigating circumstances must be considered in determining just and appropriate disciplinary or corrective measures in relation to the misconduct of a member of a municipal police department, including, without limitation* (subsections a-h)

(60) It is evident from the structure of section 126 that what is required is a comprehensive consideration of the relevant general aggravating and mitigating circumstances relating to the Member's misconduct, as well as specific review of the factors enumerated in subsections 126 (2) a-h. It is not my role to focus only on specific factors, such as the range of prior disciplinary outcomes or the likelihood of further misconduct. Rather, my role is to weigh all of the statutory factors and any other relevant aggravating and mitigating matters in order to determine just and appropriate disciplinary or corrective measures.

(61) I will begin my analysis by considering the seriousness of the Member's misconduct.

(i) Seriousness of the Misconduct subsection 126(2)a

(62) The Member's misconduct was, I find, very serious.

(63) In coming to that conclusion, I have found that I cannot agree with the submissions of Counsel for the Member. In particular, I cannot agree that the fact that the Member had received information from another officer concerning the Young Person's dealings with police before conducting the unauthorized searches in any manner reduces the seriousness of his subsequent computer searches.

(64) Contrary to the submissions of Counsel for the Member, I find that the Member was not entitled to disclose to [redacted] information obtained from the other officer. Any information received by the Member was received as a result of his status as an officer and the professional relationship with his colleague, not simply as a member of the public. Under no circumstances was the Member entitled to disclose such information to [redacted] or any other member of the public.

(65) In concluding that the misconduct involving the Member was serious, I have specifically considered several issues.

(66) First, it is admitted that the misconduct included not just access to confidential police databases unavailable to the public, but also disclosure of part of the information in those records to the [redacted].

(67) It is important to recognize that policing agencies are given extensive authority to report and record extremely confidential information for the purposes of enhanced law enforcement. Some of the most personal data relating to individuals is found on those databases. The content is therefore important to secure for lawful purposes only.

(68) Public acceptance of the need for such data collection rests on a common understanding that the interests of justice require the same to be undertaken for the greater good, infringing on the general privacy rights of all citizens. Improper access to and use of such information is a clear breach of public expectations concerning the creation and use of police data bases. It also creates a real risk of reduced public confidence in the professionalism of policing agencies. It is self-evident that there is already in existence an increasing degree of community cynicism associated with many public and private sector data systems. Improper use of police databases by officers charged with their lawful use can only increase that cynicism and diminish respect for the administration of justice.

(69) Second, the access to and use of information on the police databases was not a singular impulsive act. Rather the Member, a senior officer with extensive experience, has admitted to three searches relevant to the Young Person and five searches relevant to [redacted]. The searches took place on two dates, November 24th and November 29th, 2017.

(70) By engaging in multiple searches over two separate days followed by an unauthorized disclosure to [redacted], the Member has foregone any argument that the misconduct was an aberration in behaviour. The Member did not stop to reflect on his actions after the first set of searches, but instead launched into a second set of searches five days later. The misconduct in conducting the searches was clearly focused, purposeful and intentional in apparent disregard to the well-known sanctions against such actions.

(71) Third, the information obtained by the Member was used for personal purposes. In one case, information was used to help the Member deal with [redacted]. In the second, the information was used to search out reports of the [redacted] in the hope of determining [redacted]. In both cases the Member's interest in such information is understandable.

(72) However, in neither case could any other officer, [redacted] lawfully access and use the data concerned to assist with their [redacted]. The reason is clear: the information on the police databases is assembled and recorded only for the purposes of law enforcement priorities. In no sense is it a tool for any form of personal use, no matter how laudable the personal goal. Using this sophisticated and detailed tool for personal purposes was a serious error in judgment.

(73) Fourth, the Member knew that his access to and use of the databases was unauthorized. He knew this because he had been trained on freedom of information and privacy laws, VPD policy directives (Manual section 1.6.9(1) and had signed a specific undertaking concerning these issues in September of 2007 in the following terms:

> *It is my responsibility to familiarize myself with and adhere to the terms and conditions of all VPD policies that I have been advised apply to me regarding my use of Designated and Classified Information.*
> *I may only access Designated and Classified Information in a manner authorized and for a purpose required for the performance of the duties of my employment.*
> *I will only release Designated and Classified Information, including by way of verbal, written, or any other form of disclosure, to an individual who has a legitimate need-to-know and possesses a security or reliability status commensurate with the sensitivity of the information being released or read.*
> *I understand that need-to-know is the need for an individual to access and know information in order to perform his or her duties.*
> *Any breach of the above specified requirements may result in: the immediate revocation of my access to any Designated and Classified Information; to discipline, up to and including termination of my employment; and to criminal charges.*
> *I will not disclose any Designated and Classified Information, to which I may be privy as part of my employment, to other members within the VPD or to third parties, unless the disclosure is dictated by the duties of my employment or other legitimate operational purpose*.

(74) The terns of the Member's undertaking were clear, specific and concise. There would be no reasonable misunderstanding of the seriousness of misconduct related to improper access to and use of confidential police information based on the VPD undertaking terms endorsed by the Member.

(75) Fifth, in accessing the police databases and subsequently disclosing information to [redacted], the Member did so as a senior officer. He was not a newly commissioned member unsure of his duties and responsibilities. The Member knew and had known for many years the full scope and content of the legal and policy framework in place for the use of confidential police data. Accessing such data would have been a daily part of the Member's duties and as such it is not possible for the Member to have been unaware of his duties concerning the same.

(76) Sixth, the Member's misconduct appears to have violated the provisions of the *Freedom of Information and Protection of Privacy Act* , subsections. 26 -33 and in particular, subsections 30.4, 32 and 33 as follows:

> ***30.4*** *An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this Act.*
>
> ***31.1*** *The requirements and restrictions established by this Part also apply to*
> *(a)the employees, officers and directors of a public body, and*
> *(b)in the case of an employee that is a service provider, all employees and associates of the service provider.*
>
> ***32*** *A public body may use personal information in its custody or under its control only*
> *(a)for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose (see section 34),*
> *(b)if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or*
> *(c)for a purpose for which that information may be disclosed to that public body under sections 33 to 36.*
>
> ***33*** *A public body may disclose personal information in its custody or under its control only as permitted under section 33.1, 33.2 or 33.3.*

(77) Seventh, the Member accessed information, for personal purposes, relating to the [redacted] Young Person which detailed the status of various investigations concerning that individual. The Member later disclosed general information based on those searches [redacted].

(78) The records available to the Member as part of the police databases were all governed by the *Youth Criminal Justice Act*, ("YCJA") Part 11 and in particular section 110, 116 and 118 as follows:

> ***110 (1)*** *Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.*

> ***116 (1)*** *A department or an agency of any government in Canada may keep records containing information obtained by the department or agency*
>
> ***(a)*** *for the purposes of an investigation of an offence alleged to have been committed by a young person;*
>
> ***(b)*** *for use in proceedings against a young person under this Act;*
>
> ***(c)*** *for the purpose of administering a youth sentence or an order of the youth justice court;*
>
> ***(d)*** *for the purpose of considering whether to use extrajudicial measures to deal with a young person; or*
>
> ***(e)*** *as a result of the use of extrajudicial measures to deal with a young person.*
>
> ***(2)*** *A person or organization may keep records containing information obtained by the person or organization*
>
> ***(a)*** *as a result of the use of extrajudicial measures to deal with a young person; or*
>
> ***(b)*** *for the purpose of administering or participating in the administration of a youth sentence.*

> ***118 (1)*** *Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.*

(79) Any of the police records maintained by CPIC, PRIME or the VPD concerning the Young Person would also have been governed by those sections of the YCJA:

(80) Any investigation of the Young Person would also be governed by the YCJA, and of course, any records associated with those investigations. Nothing in the YCJA authorizes access to information related to the Young Person or investigations concerning the Young Person on the CPIC, PRIME or VPD systems for personal purposes.

(81) Here the specific nature of the searches undertaken by the Member clearly touched on records relating to investigations of the Young Person and therefore unquestionably subject to the provisions of the YCJA.

(82) By passing onto [redacted] information about the Young Person, even though general information, the Member clearly published data subject to protection under the YCJA. I am aware that the Counsel for the Member takes a much more restrictive view of the term “publish” maintaining that the term applies only to broad publication in the press or wider community.

(83) However, whether to one person or the world, I find that publication of any information relating to a youth protected by the provisions of the YCJA in any form is prohibited unless specifically authorized by an exception in that Act. The logic of ensuring the confidentiality of youth records under the YCJA only survives if the prohibitions on publication applies to all forms of publication.

(84) I conclude, therefore, that the Member's improper access to and use of data relating to a youth protected by the YCJA is a serious aggravating factor.

(85) Eighth, the misuse of access to police databases had effects beyond the Member as at least [redacted], the Young Person and the Young Person's [redacted] became aware of the Member's actions. This disclosure unquestionably had the effect of raising legitimate concerns as to the security of police data and the use of that data by police officers for lawful purposes in the minds of the Young Person and [redacted], a serious concern.

(86) The powers and authorities vested in police officers also assume acceptance of other significant responsibilities associated with those powers, such as the duty to safeguard confidential conformation for law enforcement purposes alone.

(87) I find that the Member's misconduct in this case seriously eroded those responsibilities. Indeed, the misconduct defined under subsection 77(3) of the *Police Act* recognizes the importance of issues which can seriously affect the public's trust in police by constituting the misconduct in question as a disciplinary breach of public trust.

(88) Taking all of the foregoing into account, I find that the Discipline Authority was incorrect not to attach very significant weight to the seriousness of the misconduct of the Member in accessing and disclosing the confidential data in issue.

(ii) <u>Record of Employment and Service Record of Discipline subsection 126(2)b</u>

(89) Neither Counsel allege any issue with the Member's record of employment or service record of discipline.

(90) The lack of a prior disciplinary record for an officer with the Member's extensive service is a clear mitigating factor.

(iii) Impact of Proposed Measures on the Member, his Family and Career subsection 126(2)c

(91) There can be no doubt that the Member has from the outset admitted the misconduct in issue. I have, however, not received any specific submissions on the possible impact of possible misconduct sanctions on the Member, his career or family.

(92) Clearly it is reasonable to assume that any sanction beyond a reprimand will have an adverse impact on the Member. I have taken that fact into consideration.

(iv)The Likelihood of Future Misconduct by the Member subsection 126(2) d

(93) I find that the Member's genuine acceptance of his responsibility for the misconduct, and lack of prior disciplinary record combine to reduce the likelihood of future misconduct by the Member. Neither counsel takes issue with that conclusion.

(94) The limited likelihood of future misconduct is a clear mitigating factor.

(v) Whether the Member Accepts Responsibility for the Misconduct and is Willing to Take Steps to Prevent its Recurrence subsection 126 (2) e

(95) I am satisfied that the Member has indeed fully accepted responsibility for his misconduct and has cooperated fully in the investigation, pre-hearing process, and initial discipline proceeding.

(96) In my view it is correct to acknowledge the cooperation by the Member in this case as a mitigating factor in considering a just and appropriate disciplinary sanction.

(97) As to whether or not the Member is willing to take steps to prevent reoccurrence of the misconduct considered in these proceedings, the conclusion is unclear. The Member's submissions are not supportive of further education or training. There have been no specific proposals advanced detailing how the Member will avoid the temptation to misuse police databases in the future.

(98) As such, what I am left with is the hope that the Member's participation in this process, or sanctions imposed as a result of this process, adequately deter the Member from future misconduct. I do not find that uncertain conclusion adequate to warrant consideration as a mitigating factor.

(vi) The Degree to Which the Municipal Police Department's Policies, Standing Orders or Internal Procedures, or the Actions of the Member's Supervisor, Contributed to the Misconduct subsection 126(2) f

(99) There is no evidence before me of any municipal police department policies, standing orders, internal procedures or actions of the Member's supervisor that may have contributed to the misconduct.

(vii) The Range of Disciplinary or Corrective Measures Taken in Similar Circumstances subsection 126 (2) g

(100) A critically important factor in this Review is the consideration of the range of disciplinary or corrective measures taken in similar circumstances under subsection 126 (2) (g). Although none of those other decisions are binding in these proceedings, nonetheless they offer useful guidance in achieving a just and appropriate outcome.

(101) All of the facts and circumstances of a case must be considered, without the automatic imposition of a set sanction or minimum penalty. As well, it is clear that no two cases are the same. There must always be discretion to determine the appropriate sanction based on the particular facts of each case and the circumstances of the member concerned, while having due regard for what was done in similar circumstances.

(102) Before considering a detailed analysis of the BC cases, it is important to address the two main sub issues arising under this heading:

(a) The issue of a "reset" on the range of disciplinary sanctions that can be applied in circumstances similar to the misconduct allegations involving the Member; and
(b) The issue of making use of disciplinary decisions from other jurisdictions and indeed other professions.

(i) Reset

(103) On the first sub issue, both Counsel acknowledge that it is not my role is to develop or enshrine policy for future misconduct sanctions. My role is statutorily proscribed and limited to consideration of the facts of this case in the context of Part 11 of the *Police Act.* My decision, therefore, is the product of consideration of Part 11, the Record, submissions of both Counsel and specifically, the factors set out in subsection 126(2) of the Police Act.

(104) I take the Commissioner's submission for a "reset" to mean that what I am being asked to do is broaden the scope of my analysis to find support for a much more stringent sanction that deters further misconduct.

(105) I do not take the Commissioner's submission to mean that I should ignore the earlier discipline decisions made under the *Police Act* in similar circumstances, but rather to expand on those decisions to give due recognition to the importance of denouncing the specific misconduct in this case.

(106) In that regard, I note that Counsel for the Commissioner submits that the facts of this case are somewhat unique, given the nature of the privacy breaches involved and the various statutory regimes that seem applicable.

(107) I therefore find that the issue of a "reset" is most appropriately characterized as an acknowledgement of the Commissioner's submissions with respect to the Member, seeking a higher than normal sanction.

(108) The Commissioner has every right to advance the submission concerning the Member that he considers most appropriate in the public interest recognizing, of course, that in doing so, I am bound to consider that submission only in the context of Part 11 of the *Police Act.*

(ii) <u>Other Authorities</u>

(109) The second sub issue relates to consideration of authorities and precedents from other policing jurisdictions and professions (the "Supplemental Authorities"). As noted earlier, Counsel for the Commissioner is of the view that considerable support for much more stringent disciplinary sanctions can be found by considering a broader range of decisions from other Provinces and other professions.

(110) My authority to consider other disciplinary decisions is, of course, found in subsection 126(2)g of the *Police Act*. There is, however, no specific authority permitting consideration of decisions and precedents from jurisdictions outside British Columbia, such as the Supplemental Authorities. Subsection 126 (2) g limits my review to consideration of *"..the range of disciplinary or corrective measures taken in similar circumstances.".*

(111) I have reviewed the extensive materials submitted by Counsel for the Commissioner setting out the Supplemental Authorities from other Provinces and professions. Having reviewed these materials I find that I must agree with submissions from Counsel for the Member. I cannot find on the material before me that the disciplinary or corrective measures set out in the Supplemental Authorities did in fact arise in "similar circumstances". Each Province and professional

organization appear to have their own legislative and policy regimes. Some of the decisions provides partial insights into those regimes. However, without further evidence as to the "similar circumstances" under which the Supplemental Authorities arose, including the relevant legislative framework and police discipline standards, I am unable to conclude that they are indeed directly relevant to the current proceedings arising in "similar circumstances".

(112) I am unable to conclude that any other provision of Part 11 or, in particular, section 126 of the *Police Act* provides me with the authority to consider authorities arising outside that Act,

(113) As such, I must conclude that consideration of the Supplemental Authorities arising outside of the BC *Police Act* disciplinary process would exceed my jurisdiction. I have therefore excluded the Supplemental Authorities from consideration in my review of this matter.

(iii) Circumstances relevant to the review of disciplinary or corrective measures

(114) In considering the range of disciplinary or corrective measures taken in similar circumstances, it is important to first define those circumstances. In this case, I find that the following unique circumstances apply to the analysis of other disciplinary or corrective measures taken in relation to misconduct analogous to that of the Member in these proceedings:

(a) The Member concerned is a senior officer with supervisory experience;
(b) The misconduct in issue is serious and relates to:
    i. unauthorized access to police databases, and
    ii. unauthorized disclosure of information on those databases to a member of the public
(c) The misconduct involved multiple searches covering several databases over two dates;
(d) The searches undertaken were not a single impulsive act, but rather deliberate, focused and covering several subjects involving a youth, the youth's [redacted];
(e) The subject of some of the searches was a youth within the meaning of the YCJA with entries in the databases relating to his dealings with police, including the [redacted];
(f) The justification for the searches was to assist the Member in personal matters [redacted];
(g) The misconduct of the Member became known to the subject of his search [redacted];
(h) On being advised of a complaint, the Member acknowledged his misconduct and cooperated with the subsequent investigation of the complaint;
(i) The Member has no prior record of disciplinary defaults; and

(j) The likelihood of the Member committing further misconduct is low,

(115) Both Counsel for the Member and Counsel for the Commissioner have advanced disciplinary decisions arising under the BC *Police Act* for my review. The decisions touch on both the general subject of improper computer searches and disclosure of confidential police database information to unauthorized individuals.

(116) Almost all of the decisions tendered for review are case summaries. Very few have any details of the relevant aggravating and mitigating circumstances, nor any specific consideration of the factors to be addressed under subsections 126(2) or (3). Fewer still have any details as to the personal circumstances of the member concerned.

(117) As such, the review of these cases can only provide a limited overview of the relevant facts in order to determine whether or not they indeed disclose "*disciplinary or corrective measures taken in similar circumstances".*

(118) Having noted the limitations of the case summaries submitted for review, it does not appear that any of these authorities specifically touch on all of the unique factors noted above relevant to the Member's misconduct, Specifically, none appear to touch on the search and disclosure of information subject to the provisions of the YCJA.

(119) What is apparent from a general examination of each of these discipline summaries is that the range of sanctions imposed for misconduct extends from advice as the future conduct, to verbal reprimands, to written reprimands to a limited number of suspensions without pay. The maximum suspension detailed in these case summaries so far has extended to five days. One case resulted in the dismissal of the officer concerned but with few details.

(120) The Discipline Authority appears to have specifically considered some of these decisions noting, however, that many of them were not directly relevant to the Member's misconduct.

(iv) <u>Cases submitted by Counsel for the Member</u>

(121) Under the category of "Unauthorized Computer Searches (no disclosure of information), the following case summaries identified by Counsel for the Member were considered:

OPCC File No.	General Summary	Penalty
2000-804	Member runs license plate of woman recently met. Uses information to approach woman.	Verbal Reprimand
2000-630	Woman complains of unwanted attention	"

	of a member. Member searches woman's name several times on CPIC.	
2003-1863	Member runs CPIC and PIRS queries on several family members.	"
2006-3426	Member conducts queries of ex-wife and new boyfriend in context of divorce	"
2006-3424	Member does several searches over a seven month period concerning ex-wife's new boyfriend.	"
2581	Member induces another member in Another jurisdiction to query cars outside of residence of estranged wife.	Advice as to Conduct
2009-4885	Member uses CPIC for unauthorized purpose.	Written Reprimand
2010-5096	Member uses CPIC for unauthorized purpose.	Advice as to Conduct

(122) The general circumstances of each of these decisions relate to unauthorized use of police computer systems to access confidential databases. In most of these decisions the searches relate to a third party, although three relate to ex-spouses and one to family members in general.

(123) The only similar circumstances of relevance to consideration of this collection of decisions relates to unauthorized use of computer facilities for a personal purpose. None of the other special factors associated with the Member's misconduct in this case appear to be part of this first group of decisions.

(124) The second group of decisions noted by Counsel for the Member are under the category of cases involving "Unauthorized computer search with improper disclosure". These decision summaries were as follows:

OPCC file No.	General Summary	Penalty
2007-3896	Member does multiple searches for a friend's private purposes (not explained) 5 on CPIC 15 on Prime Copies of reports printed Member leaves work to go To another jurisdiction where Friend resides.	2 day suspension (computer searches) 1 day suspension (disclosure of information)
1624[2003]	Member does CPIC searches and discusses information with other Persons. (Number of searches and nature of disclosure not stated)	1 day suspension

2006-3550	Member enters police officer where he does not work, off duty, opens email of another member. Accesses information re investigation of common law partner and ex wife Member discloses information, to whom not clear.	5 day suspension (office entry/access) written reprimand (disclosure)
2007-3279	Member writes internet article mentioning Information he received as officer. Member writes second article with further	written reprimand (first disclosure) suspension (second disclosure)
2007-3814	Member gives information to the media about alleged sex offender Member brings home bulletin about sex offender, shows to family, distributes throughout neighbourhood	2 day suspension
PH06-01	Member discloses confidential information to suspect in criminal investigation. Member discloses PIRS information in relation to drug investigation.	Written reprimand, reduction in rank for 12 months
2008-4125	Over 13 years, member conducts multiple CPIC searches (purpose not stated). Disclosure of data. (details not Stated)	2 day suspension (searches) 1 day suspension (disclosure)
New West (no file no.)	Member releases text page from PRIME search to private citizen. (no details)	Advice as to future conduct
2010-5445	Member discloses complainant's criminal record to third party (no details)	Written reprimand
2010-5736	Member attends domestic violence call, develops sexual relationship with the complainant. Uses CPIC to obtain information about the complainant's husband. Sexual relations with complainant in (Police building and her home.	Written reprimand (CPIC search complainant) Written reprimand (CPIC search husband Dismissal Having sex in police bldg.)
2011-6059	Member conducts police database searches of associates of estranged wife. Discloses confidential information	2 day suspension (searches) 1 day suspension (disclosure)

	to estranged wife.	
2011-6510	Member discloses confidential information from operational plan for a public event to media.	4 day suspension and administrative Transfer
2011-5880	Member circulates email to neighbours with unvetted confidential information.	Advice as to future conduct
2010-5294	Member does unauthorized Database search and discloses information to third party. (no details provided) Member makes false statements about actions during investigation.	Written reprimand (searches/disclosure) 20 day suspension (deceit)
2012-7140	Member queries police databases for purposes unrelated to duties, and discloses information (no details provided)	written reprimand (searches) 2 day suspension (disclosure)
2011-6759	In pre- employment polygraph interview member admits he improperly accessed PRIME and CPIC and disclosed information.	Verbal reprimand (searches) Written reprimand (disclosure)
2013-8328	Member conducted unauthorized searches utilizing police databases and made disclosure of same. (no details given)	Dismissal (searches/disclosure)
Cst P	Member does CPIC search on contractor doing work for girlfriend. Discloses information to Girlfriend (also a member)	Written reprimand
2014-9796	Member searches police databases Because of a family member's concern (no details)	no discipline cited
2015-10697	Member does unauthorized CPIC search on vehicle of contractor and discloses to property manager information regarding contractor's lack of insurance and criminal record.	1 day suspension (search) written reprimand (disclosure)
2015-11356	Three members conduct improper database inquiries and disclosed results. (no details given)	ethics training written reprimands
2011-6210	Improper CPIC query by member, disclosure to member of the public. (no details given)	written reprimand

2015-11237	Member queries tenant using police database.	written reprimand
2016-12313	Member does unauthorized CPIC search (no details)	written reprimand

(125) It is clear that this group of cases involving improper access and disclosure have resulted in more significant sanctions than those reported concerning improper access alone. The majority of this second group of cases resulted in some form of suspension ranging from one to five days. At the extremes there was one case reporting no disciplinary action and another, a dismissal. Reasons were not given for either of those two outcomes.

(126) In general terms, therefore, the misconduct relating to the Member is most similar to the basic circumstances found with this second group of cases. As noted above, however, none of the cases involved searches of, or disclosures concerning, data protected by the YCJA.

(127) Incidents of multiple unauthorized access to police data bases are limited in number and very dated. Such cases include 2007-3896 where a very senior officer had conducted multiple improper data searches over many years on police databases. In that case the discipline authority concluded that a deterrent factor was needed and imposed a two day suspension for the improper searches and a one day suspension for the improper disclosure of information. Those circumstances are similar to the misconduct of the Member; however, the facts do not relate to YCJA data and the decision itself is now over twelve years old.

(128) In 2006-3550 the Member's misconduct was more egregious than the misconduct of the Member resulting in a 5 day suspension. The similar circumstances, however, include multiple searches and improper disclosure of confidential data. In that case the member resigned prior to the discipline hearing. Again, this decision is very dated, over thirteen years old.

(129) In 2008-4125 the member had conducted multiple searches over thirteen years for non work related purposes. Unauthorized disclosure of some of that information also took place. Unspecified aggravating and mitigating circumstances were considered resulting in a two day suspension for improper searches and one day for improper disclosure. Although the number of unauthorized searches and disclosures were much more extensive than the facts relating to the Member's misconduct, again, it is important to recognize that this is a dated decision, over eleven years old with unspecified criteria used to warrant the sanction imposed.

(130) In terms of more recent decisions, none appear to be markedly similar in circumstances to the misconduct of the Member, although they do all touch on

improper computer database access and unauthorized disclosure of confidential information.

(v) Cases submitted by Counsel for the Commissioner

(131) Counsel to the Commissioner also submitted a further group of case summaries for consideration. The cases each set out more complex fact patterns and generally more significant consequences for the misconduct which was substantiated. The case summaries are as follows:

OPCC file no.	General Summary	Penalty
2014-9552	A very complex and serious case involving 13 allegations of serious misconduct, fraud, breach of court orders including inappropriate computer access and disclosure. (This case is distinguishable as It involves very serious conduct including criminal convictions on computer misuse allegations.)	10 day suspension (access and disclosure 2 day suspension (access and disclosure)
2015-10959	Member was alleged to have he used his position as a police officer inappropriately to inappropriately convey messages to the complainant. The second allegation relates to inappropriate disclosure of information by disclosing a DVD relating to an interview involving another alleged offence that had nothing at all to do with any of the issues that were involved in the interview with the complainant.	18 day suspension (inappropriate messages) 5 day suspension (disclosure)
2016-11864	Nine allegations of inappropriate use of police id, use of police vehicle, disclosure of holdback information from homicide investigations and other matters. (unspecified aggravating and mitigating factors)	15 day suspension (main disclosure issue) 1 day suspensions and reprimands

2015-10543	multiple unauthorized searches on police databases for individuals, multiple false or misleading statements to investigators. (unspecified aggravating and mitigating factors)	Dismissal
2014-1099	Multiple allegations of sexual communications and acts while on duty. Unauthorized use of police resources for database search.	3 day suspension (search)
2015-10697-	Unauthorized search of contractor license plate. Disclosure of information to member of public.	1 day suspension (Search) written reprimand (disclosure)

(132) I am not satisfied that the cases referenced by Counsel for the Commissioner reflect circumstances similar to the Member's Misconduct, other than in the most general terms. Most of those cases outline much more serious fact patterns, often involving misconduct well beyond unauthorized databases searches and disclosure. None appear to be markedly similar in circumstances to the misconduct of the Member although they do all touch on improper computer database access and unauthorized disclosure of confidential information. As such, the relevance of these cases is limited.

(vi) <u>Conclusions regarding consideration of cases submitted for review</u>

(133) Having reviewed all of the decision summaries referenced by both Counsel, I find that in cases with circumstances generally similar to the Member's misconduct, the discipline sanction outcomes result in a range of sanctions from a written reprimand to a suspension without pay. The duration of such suspension varies between one and five days.

(134) At the extremes of the range, some cases have ordered "advice as to future conduct" and in three cases, dismissal was ordered. However, each of those dismissal decisions involved other serious misconduct.

(135) As noted above, there is very limited information available on the relevant aggravating and mitigating circumstances of the discipline cases submitted for my consideration to assist in knowing how decisions were made.

(vii) Other Aggravating or Mitigating Factors

(136) One final aggravating factor must be taken into consideration. I find that when the Member conducted his searches and disclosed general details arising from the same to [redacted], he did so in circumstances where he knew that his actions were improper. He also knew, or ought to have known, that public expectations of member conduct, particularly with respect to YCJA data, would be very high.

(137) I will address the issue of public expectations in more detail as I consider the test under subsection 126(3), however, I am satisfied that a relevant aggravating factor in this case is the high likelihood of negative public perception and, implicitly, lowered confidence in policing discipline standards resulting from the Member's misconduct.

(138) Although it is not possible to know how far knowledge of the Member's misconduct concerning YCJA data has spread, the FIR makes it clear that it was known at least to the Young Person and [redacted]. Knowledge beyond [redacted] is a matter of speculation. However, I find that any erosion of public confidence in policing discipline standards is a corrosive factor worthy of consideration as an aggravating circumstance.

IX Analysis - Subsection 126(3)

(139) My role in this Review is to determine what disciplinary or corrective measures are correct considering the Record, section 126, the submissions of the parties and, of course, the analysis of the Discipline Authority.

(140) Subsection 126(3) specifically requires that I consider the following:

> *(3) If the discipline authority 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.*

(141) I am of the view that one or more disciplinary or corrective measures are necessary to address the Member's misconduct.

(142) Submissions from both Counsel confirm that in their view, further education of the Member on the matters in issue is unnecessary. The Discipline Authority also found

in her decision that the original order made at the Pre-Hearing Conference for education on the relevant policies and procedures was unnecessary.

(143) The issue here is the appropriate disciplinary or corrective sanction under subsection 126 (1) for a senior officer who knew, or ought to have known, that his actions were unauthorized and unlawful.

(144) Having considered all of the foregoing submissions, I am not satisfied that any sanction that might attempt to correct or educate the Member is appropriate. I agree that further education is not warranted given the training and experience of the Member.

(145) As to correction, any such sanction must be considered in order to determine if it is unworkable or would bring the administration of police discipline into disrepute.

(146) I find that there would be little corrective benefit from issuing a written reprimand to the Member. The Member has shown that he has ignored written policy, his undertaking and the law to conduct searches and disclose information of personal interest to him. I am unable to see how a reprimand in any form would adequately "correct" the Member. I find that although it is simple to invoke, a reprimand would otherwise be unworkable as a means of ensuring correction of the Member.

(147) An order to work under close supervision might assist in correcting the Member, but for how long? I am satisfied that it is unworkable to have the Member work under close supervision to address his misconduct.

(148) I also find that other possible corrective sanctions would have similar challenges as "workable" solutions to correct the Member in his future career.

(149) However, of much greater concern are the implications for public confidence in the administration of police discipline if corrective sanctions alone are ordered.

(150) I agree with Counsel for the Member that an appropriate way to analyze possible impacts of "confidence in the administration of police discipline" is to adopt the test established for judges in the *Collins* decision, supra. As noted above, the test in Collins, established in relation to the consideration of section 24(2) Charter issues is as follows:

> *"Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?"*

(151) Applying that logic to the interpretation of subsection 126(3) of the *Police Act,* I find that a reasonable person considering all of the circumstances of this case would

acknowledge that the Member's motivation in acting as he did was likely as result of concerns arising from [redacted].

(152) However, that same reasonable person would also note the seriousness of the Member's misconduct as set out in paragraphs 62-87 above. I cannot find that any reasonable person, dispassionately and fully considering the seriousness of the Member's misconduct, would accept that his role [redacted] would mitigate in any manner his sworn duties and responsibilities as a police officer. The clear public expectation would be that the Member honour the restrictions imposed by law, and in particular the YCJA, with respect to access to and disclosure of confidential police information notwithstanding personal interests to the contrary.

(153) I further find that a reasonable person, dispassionate and fully informed of all relevant facts, would acknowledge that there exists a heightened public awareness concerning data access issues and concern for the protection of privacy which has evolved over the past several years. This evolution of public awareness and concern with respect to data base issues is evidenced in newspaper and media reports every day and would be known to any reasonably well informed member of the public.

(154) I find that a reasonable person would conclude that it would be improper not to acknowledge the reality that public expectations of policing agencies in relation to the security of confidential police data have evolved so that they are now much more stringent than those facing the discipline authorities in the earlier discipline decisions.

(155) I find that a reasonable person considering the early discipline decisions noted above concerning improper database access and disclosure would conclude that they inadequately address the current increased public expectations concerning discipline associated with such misconduct.

(156) A reasonable person would note the relevance of similar circumstances in the above noted cases, but acknowledge that such cases must be tempered by recognizing the context and time in which they arose. That is not to say that a reasonable person would conclude that the similar circumstances of earlier discipline decisions are irrelevant, because they are not. Rather, a reasonable person would consider all of the circumstances relating to misconduct, including public expectations concerning police discipline, and the evolution of those expectations over time.

(157) Taking all of the foregoing into consideration, I find that a reasonable person would conclude that educative or corrective action in relation to the Member's misconduct would unquestionably bring the administration of police discipline into disrepute. It would do so because a reasonable person would conclude that such

action would not meet public expectations concerning the strict enforcement of laws and policy concerning improper database access, particularly with respect to YCJA data. Nor, do I find, that a reasonable person would conclude that educative or corrective action alone would adequately deter others from similar misconduct.

(158) I conclude, therefore, that educative or corrective measures in relation to the Member's misconduct would bring the administration of police discipline into disrepute. I further find that to correctly address the Misconduct, disciplinary measures must be ordered.

X – **Decision on Correctness of the Discipline Decision**

(159) In coming to a decision on this matter, I have carefully considered the submissions of Counsel for the Member on the need to be respectful of earlier disciplinary decisions concerning the Member's misconduct at the Pre-Hearing Conference and Discipline Proceeding. I acknowledge that Counsel has not suggested "deference" but rather careful consideration of the rationale for the earlier decisions and acknowledgement of the special expertise and experience of those involved in making such decisions.

(160) My role as Adjudicator is to fairly examine the facts set out in the FIR, consider the submissions of Counsel and apply the law set out in the *Police Act*. I acknowledge that prior decision makers unquestionably have greater practical experience with policing and that they have carefully, and professionally, considered the facts and law as they made their decisions.

(161) Having said that, however, it is not my role to be respectful of earlier judgments made on discipline matters. Rather, it is my responsibility to review those decisions based on the statutory obligations set out in section 126 of the *Police Act* in an examination of the correctness of the Discipline Decision before me. Nowhere in the Police Act is "respect" for earlier decisions made out and I must conclude that I have no jurisdiction to comply with the suggestions made by Counsel for the Member.

(162) On the facts of this case, I find that the Discipline Authority was incorrect with respect to her analysis of the appropriate sanctions to be imposed with respect to the Member's misconduct. The decision was incorrect because the Discipline Authority:

(a) Minimized the seriousness actions of the Member by mitigating those actions in recognition of the Member's role [redacted];
(b) Minimized the seriousness of the Member's actions by mitigating those actions in recognition of the fact that the Member was acting in an emotive state, not intending to harm or malign the Young Person when in fact the Young person was maligned in statements made to the [redacted];

(c) Failed to adequately recognize the significance of unauthorized searches relating to information protected by the YCJA;
(d) Incorrectly concluded that the Member did not "publish" information concerning the Young Person in making statements [redacted]; and
(e) Incorrectly concluded that an approach that served to educate and correct the Member by way of reprimands would not bring into disrepute the administration of police discipline.

XI Disciplinary Sanctions to be applied to the Member

(163) Considering the range of sanctions applied in generally similar circumstances, all of the factors under subsection 126(2), the submissions of Counsel and the analysis above, I am satisfied that the correct disciplinary sanction to be applied in relation to the above noted Misconduct of the Member is a suspension without pay for five working days concurrent on all three allegations. I find that a five-day suspension:

(a) Is a strong confirmation of the seriousness of the Member's misconduct and condemnation of those acts;
(b) Is within the broad range of sanctions for similar conduct taking into consideration the increased public significance of, and concerns with respect to, police data security issues;
(c) Acknowledges:
    (i) the cooperation of the Member in the discipline proceeding which extended to a full, early admission of culpability and,
    (ii) the Member's lack of a prior record of misconduct; and
(d) Reinforces the importance of strict compliance with laws governing access to police databases, adherence to privacy obligations of all police officers and sanctions the improper disclosure of confidential information.

(164) I acknowledge that the sanctions imposed are at the upper end of the range of discipline decisions in roughly similar circumstances. However, I believe that the seriousness of this misconduct by a senior officer, particularly where much of the subject matter is data protected by the YCJA, merits discipline that will serve as a deterrence to other members.

(165) I confirm that I am satisfied that the disciplinary measures ordered will result in just and appropriate sanctions for the Member's misconduct.

(166) Finally, with respect to subsection 141(10) (c) of the *Police Act*, my respectful recommendation to the Chief Constable is that a renewed focus be applied to training of all VPD members. The renewed focus should reinforce the importance of

complying with policy and statutory obligations of all members arising in connection with access to police databases, disclosure of information on those databases and privacy obligations of members with respect to such data, particularly data governed by the YCJA.

(167) Implicit in my recommendation to the Chief Constable is an acknowledgement of the extensive work that has already taken place by the VPD in this area, but arises out of recognition of the fact that:

(a) Continued public confidence in police discipline is crucial, and
(b) There is an increasing, and evolving, public awareness of the importance of privacy responsibilities generally, and the obligations of members in particular with respect to police databases and information on those databases.

Brian M Neal

Brian M. Neal Q.C. (rt)

July 18, 2019