
To: All Municipal Police Chief Constables

And to: All Professional Standards Officers

From: Office of the Police Complaint Commissioner

Date: December 7, 2018

Re: Accountable and Transparent Investigations pursuant to Part 11 of the *Police Act*

BACKGROUND

In a process in which police conduct the investigation of complaints against police, the transparency and accountability of such a process has a direct impact on public confidence. As the custodians of the public interest in this process, the role of the OPCC includes the promotion of accountability and transparency through the independent oversight of investigations completed by the police.

Obtaining statements from involved members and other witnesses is an important component of a truth-seeking process where the investigator's professionalism and the quality of investigative steps undertaken by the investigator directly impacts the ability to uncover the truth. Each investigator should embody the attributes of objectivity and impartiality and should endeavor to treat all witnesses equitably when conducting investigations pursuant to the *Police Act*.

Each investigator has an obligation to protect the public interest by exercising his or her authorities pursuant to the *Police Act* to ensure timely, transparent and accountable investigations. Public confidence in the process is eroded when investigations are delayed, are inadequate, or lack transparency in a legislative scheme specifically designed to eliminate these issues.

Similarly, the Police Complaint Commissioner has a legislated duty to ensure that the objectives of the *Police Act* are achieved¹ and has been provided specific authorities to fulfill that duty. Based on the provisions of the *Police Act*, it is clear that one of the objectives of the *Police Act* is to ensure that police officers cooperate with investigating officers.² Another objective is cooperation with the Police Complaint Commissioner and staff at the OPCC.³

¹ See section 177(1) of the *Police Act*, RSBC 1996 ch. 367

² See section 101 of the *Police Act*, *ibid*.

³ See sections 97 and 178 of the *Police Act*, *supra*.

Challenges to the duty to cooperate have resulted in recent decisions from the BC Supreme Court⁴ and the Supreme Court of Canada⁵ that have confirmed police officers' duty to cooperate fully with investigating agencies, whether it be agencies mandated to conduct criminal investigations into police officers' conduct or agencies mandated to conduct professional misconduct investigations. These decisions have made it clear that a member's duties and responsibilities to cooperate are rooted in both common law and statute and that members have no discretion to determine the bounds of their cooperation.

PURPOSE

The OPCC has observed inconsistencies in the approach to conducting investigations under the *Police Act*. Pre-statement disclosure of materials to members has varied in the past as well as the manner in which statements are obtained and interviews are carried out. We have also observed delays in conducting interviews which has led to the need for extensions. As a result, clarification is needed to ensure a consistent and accountable approach to investigating matters that fall under the *Police Act*.

This Bulletin should serve as a guide for best practices as it pertains to disclosure of materials to respondent and witness members, and obtaining statements in relation to investigations conducted under the *Police Act*. Although this Information Bulletin is not designed to remove, or interfere with investigative discretion in the investigative methods used during *Police Act* investigations, this discretion is still subject to the provisions of the *Police Act* and the oversight powers of the Police Complaint Commissioner.

A. PRE-STATEMENT DISCLOSURE OF MATERIALS

The *Police Act* does not provide that members have a right to disclosure prior to providing a statement to an investigating officer. The decision of what information may be disclosed and when disclosure is to take place is within the discretion of the investigator, unless statutorily prohibited or required. This exercise of discretion will be influenced by the investigative strategy undertaken by the investigator, and may include withholding disclosure until the time of the interview. The goal in disclosing appropriate materials is to ensure witnesses are able to provide the best evidence possible and to refresh their memory if significant time has lapsed. Respondent or witness members, complainants and other civilian witnesses may use the information disclosed to them to assist in recalling details of their involvement and observations of an incident.

The manner and nature of the disclosure is an important consideration in terms of oversight by the OPCC in assessing the accountability of the process. In order to protect the integrity of the investigation from allegations of investigational bias, investigating officers ought to consider whether their pre-statement disclosure decisions would garner perceptions of affording police preferential treatment in the complaints process. For instance, in ensuring

⁴ *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department*, 2018 BCBC 1804; *Kyle v. Stewart*, 2017 BCSC 522

⁵ *Wood v. Schaeffer*, 2013 SCC 71

impartiality in the complaints process, disclosure considerations should also include the complainant and other civilian witnesses, if appropriate. It may be worthwhile to remind investigators that the duty of fairness owed to members is minimal at the investigative stage of the complaints process: *Kyle v. Stewart*, 2017 BCSC 522, at para. 89.

Recommended Process

While the *Police Act* does not provide specific guidance concerning what materials should be provided to members who are either named as a witness or a respondent in a *Police Act* investigation, the Act is clear that when a complaint has been made admissible, the respondent member is to be notified that a complaint has been made. This is to include the nature of the complaint and the name of the complainant.⁶ When an investigation has been ordered into an incident, the Act also notes that the member, whose conduct is the subject of the investigation, is to be notified that the Police Complaint Commissioner has ordered an investigation.⁷

For admissible complaints and ordered investigations, the respondent member is typically provided a copy of the *Notice of Admissibility* or *Order for Investigation* authored by the OPCC; in cases of admissible complaints, the *Notice of Complaint/Initiation of Investigation* document authored by the investigating agency is also typically provided to the respondent member.

As various departmental practices have developed, the OPCC has noted an inconsistency in terms of what additional materials may be provided to members. Agencies differ in their disclosure of materials to witness and respondent members, and to other witnesses, which includes but is not limited to: the oral or written complaint; audio and video records; police records; and statements or other evidence collected during the *Police Act* investigation.

The report by Josiah Wood, Q.C. in 2007 (“the Wood Report”) following his audit of the police complaints process, provided valuable guidance as to what materials should be provided to respondent members prior to the provision of a statement.

While we accept that a Respondent should be given proper notice of the nature of the complaint before being called upon to make a statement, this could be done by providing the Respondent with a copy of the complaint and sufficient particulars to permit the Respondent to identify the incident underlying the complaint. We are less convinced of the appropriateness of providing Respondents with complete copies of all statements and evidence emanating from the Complainant during the course of the investigation of a complaint, before Respondents are required to provide their own statements.

The disclosure of materials to persons involved in *Police Act* investigations can directly impact the evidence they will subsequently provide. There exists a need to balance the privacy rights of complainants and the ability of members to adequately address the allegations contained in a complaint. In addition, there is a need to protect against the impression of an investigative bias, either real or perceived, by departing from best practices and allowing members to view the

⁶ See section 83(3) of the *Police Act*

⁷ See section 93 of the *Police Act*

entire investigative file prior to providing a statement or providing specific questions to members, their agents or any other support person in advance of the interview.

Upon the initiation of an investigation, the police agency should privatize the PRIME file to preserve the evidence and control access to the material. The investigator will provide members only those portions of the PRIME file that they authored. This practice is currently in place in a number of departments, but was one area in which we observed an inconsistent approach.

Permitting members to refresh their memory by viewing video footage prior to providing a statement under the *Police Act* is within the discretion of the investigator. There should be some obvious investigative purpose or justification to withhold the review of video where a person is depicted prior to providing a statement. Complainants and civilian witnesses should have the same opportunity as provided to respondent or witness members to view any audio or video recordings for the purposes of refreshing their memory prior to providing a statement.

Specific questions should not be provided to either respondent members or other witnesses prior to the commencement of the interview; however, the investigating officer may identify the issues or themes that will be canvassed during the interview if is not clear from the registered complaint or the *Notice of Complaint/Initiation of Investigation*.

Respondent Members:

✓ *May be disclosed*

- Record of original Complaint
- Notification of Admissibility
- Notice of Order for Investigation
- Notice of External Investigation
- Notice of Mandatory External Investigation
- Any and all police records that the member created related to the incident
- Any and all audio or video records that the member is depicted in or participated in at the time of its creation.

X *Should not be disclosed*

- Other members' oral or written statements
- Police records created by other members
- Audio or video records, or portions thereof, that the member did not experience or participate in at the time of creation
- Any personal information related to the complainant or other members of the public
- Any other evidence collected during the *Police Act* investigation
- Specific questions that will be asked during the *Police Act* interview

Witnesses (police members and civilian witnesses):

✓ *May be disclosed*

- Notification of Admissibility
- Notice of Order for Investigation
- Notice of External Investigation
- Notice of Mandatory External Investigation
- Any and all records that the witness created in relation to the incident
- Any and all audio or video records that the person is depicted in or participated in at the time of its creation.

X *Should not be disclosed*

- Other oral or written statements from witnesses, including the subject officer
- Police records created by others
- Audio or video records that the party is not depicted or heard in, or present for
- The oral or written complaint
- Any personal information of the members, the complainant or any other members of the public
- Any other evidence collected during the *Police Act* investigation
- Specific questions that will be asked during the *Police Act* interview

Respondent or witness members should not automatically receive disclosure of the listed items but rather the investigator should consider disclosure on a case by case basis depending on the investigative strategy for that file.

Any delays that are caused in order to offer disclosure of evidence to respondent members and witnesses should be carefully weighed in consideration of the potential erosion of memory and the investigative need to obtain statements while the evidence is fresh in the mind of the respondent or witness.

B. DUTY OF CONFIDENTIALITY

Confidentiality of investigations and information arising from *Police Act* investigation must not be revealed to anyone unless specifically authorized by the Act.

Specifically, section 51.01(5) of the Act states,

The Police Complaint Commissioner, any person employed, retained or designated by the Police Complaint Commissioner, and every investigating officer must, except as specifically authorized under this Act, maintain confidentiality in respect of all matters that come to her or his knowledge in the exercise of powers or performance of duties under this Act. (emphasis added).

Professional Standards Investigators must maintain confidentiality with respect to all information that comes to their knowledge pursuant to the *Police Act*. One of the reasons for this need for confidentiality is to prevent the contamination of evidence and to ensure the integrity of the investigation is maintained.

Members also have a duty to maintain confidentiality upon request by the investigator, as specified in section 101 of the Act:

- 2) ...at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may require a member to do one or more of the following, and the member must fully comply with the request:
 - a) Answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;
 - b) Provide the investigating officer with a written statement in respect of matters relevant to the investigation;
 - c) **Maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).**
(emphasis added).

In addition, any third party who is privy to aspects of the *Police Act* investigation ought to maintain confidentiality. This extends to any support persons who attend an interview with a Complainant or union agents representing respondent or witness members.

Recommended Process

In order to prevent the contamination of evidence and to ensure confidentiality of *Police Act* investigations, any third party who is present during an interview, other than retained legal counsel, should be asked to sign a confidentiality agreement. The third party will be permitted to discuss the information disclosed during the interview with the interviewed party but will be restricted from conveying any of that information to anyone, including, but not limited to other witness or respondent members involved in that incident. See appendix A for a recommended template of this agreement that should be used for this purpose. This signed agreement should form part of the evidentiary record.

In addition, there should be a documented reason why a third party is required to be present at the interview and that confidentiality will be maintained by the parties present.

Similarly, any third party who provides support or advice with respect to a written statement, other than retained legal counsel, should be asked to sign a confidentiality agreement.

Members should also be asked by the investigator to maintain confidentiality with respect to any aspect of an investigation, pursuant to section 101(2)(c) of the *Police Act*.

C. DUTY TO COOPERATE

Amendments to the *Police Act* in 2010 imposed a statutory duty on members to cooperate with an investigating officer. These amendments were introduced as a result of the conclusions set out in the Wood Report following his review of the complaints process. It was determined that the previous legislation failed to provide investigators with the necessary powers to ensure that complaints could be thoroughly investigated.

Section 101 of the *Police Act* specifically deals with a member's duty to cooperate with an investigating officer, answer questions and provide written statements.

Section 101

- (1) A member must cooperate fully with an investigating officer conducting an investigation under this Part.
- (2) Without limiting subsection (1), at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may request a member to do one or more of the following, and the member must fully comply with that request:
 - a) answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;
 - b) provide the investigating officer with a written statement in respect of matters relevant to the investigation;
 - c) maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).
- (3) A member requested to attend before an investigating officer must, if so requested by the investigating officer, confirm in writing that all answers and written statements provided by the member under subsection (2) are true and complete.
- (4) Unless the Discipline Authority grants an extension under subsection (5), the member must comply with any request under subsection (2) within 5 business days after it is made.
- (5) If satisfied that special circumstances exist, the Discipline Authority may extend the period within which the member must comply with a request under subsection (2).

The current legislation lays out the expectation placed on members to cooperate fully with investigating officers. Section 101 imposes a statutory duty on members to cooperate fully and comply fully with a request made by an investigating officer. Investigators have express authority to request a member to do the things as set out under section 101.⁸ The legislation does not provide that members must receive pre-interview disclosure or be accompanied by a lawyer and/or union representative to an interview. Nor does the legislation provide that the investigator must accommodate the member's work schedule or the schedule of their

⁸ *Kyle v. Stewart*, 2017 BCSC 522

legal counsel and/or union representative. This is particularly clear considering that the member has five business days to comply with a request made by the investigating officer.

A duty to cooperate under the *Police Act* is absolute and it is the investigating officer who determines the statement/interview conditions and parameters.⁹ Pursuant to the provisions of Part 11 of the *Police Act*, however, that discretion is subject to the oversight of the Police Complaint Commissioner and the duty to ensure that the objectives of the *Police Act* are achieved.

The Supreme Court of Canada has also affirmed that legislation intended to investigate and adjudicate police disciplinary matters are a complete code for handling police complaints, investigations and the administration of discipline and proceedings.¹⁰ The Honourable Justice MacNaughton in *Kyle v. Stewart*, 2017 BCSC 522 determined that “the clear statutory language of s. 101 does not leave room for employment or labour relations policies to modify the mandatory obligation” of members to cooperate with investigating officers. Justice MacNaughton held that the role of an investigating officer during the investigative stage of the complaints process is “investigative” and not “adjudicative” in nature; therefore, any duty of fairness owed to the member, if it exists, will be minimal.

A member’s duty to cooperate also extends to the Police Complaint Commissioner and the staff at the OPCC.

Section 178

A member has a duty to cooperate with the Police Complaint Commissioner in the Police Complaint Commissioner's exercise of powers or performance of duties under this Act and with any Deputy Police Complaint Commissioner or other employee of the Police Complaint Commissioner who is acting on behalf of the Police Complaint Commissioner.

The legislators sought fit to consider the contravention of a provision under the *Police Act* or a regulation, rule or guideline made under the Act as misconduct. Members should be aware that failure to follow the legislative requirements of the Act may result in an investigation under the Act, despite acting on advice of legal counsel or union representative.

D. OBTAINING A STATEMENT FROM POLICE MEMBERS AND OTHER WITNESSES, INCLUDING THE COMPLAINANT

Statements from involved members and witnesses are the cornerstone to every *Police Act* investigation. The dominant purpose of obtaining statements is to ensure that a full understanding of all the relevant events giving rise to the complaint and subsequent allegations of misconduct are obtained. We have seen a variety of approaches to obtaining statements and have observed a spectrum in terms of the quality of these statements in not only the thoroughness but the manner in which the statement was obtained or the interviews conducted.

⁹ *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department*, 2018 BCSC 1804

¹⁰ *Regina Police Assn. v. Regina Police Commrs.*, [2000] 1 S.C.R.

In our view, in-person interviews are the best avenue to address allegations under investigation compared to duty statements that are obtained from respondent and witness members. Most duty statements do not thoroughly address material aspects of the allegation(s). Interviews allow for additional probing by the investigator to fully understand the rationale and grounds for the members' actions and their observations.

This practice is supported in the review conducted by Josiah Wood, Q.C. (2007) where it was revealed that there was a reliance on prepared statements from involved members and instances where investigators did not take the necessary steps to pursue significant points or inconsistencies in the evidence. In addition, statements often did not include issues regarding lawfulness of the officer's actions that may have given rise to the complaint. As a result, the reliance on duty reports, which lack sufficient detail, can have a negative impact on the quality of the investigation and subsequent decisions from Discipline Authorities.

Furthermore, the review of duty statements by union agents has become a concern with this office due to the delay created by such a process and because this practice undermines the accountability of the complaint process. There have been examples where duty statements have taken in excess of two months to obtain, with follow up interviews often being conducted towards the end of an investigation. Moreover, our review of these investigations indicates that both respondent and witness members consult union agents during the preparation of their duty statements. This consultation includes providing draft statements to agents for review and feedback, including matters in which the same agent represents multiple members. This has resulted in cases where duty statements from two different members are almost identical or very similar in terms of content.

The statements of the Supreme Court of Canada in *Wood v. Schaeffer* regarding consultation with legal counsel prior to complying with a duty to take notes are worthy of note. The Court found that consultation with counsel at the note-taking stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence that the SIU process was meant to foster.¹¹ Similarly, the current duty statement regime, which includes consultation with, and input from, union agents is antithetical to public confidence in the *Police Act* process because the scope and content of that consultation, including its influence on the evidence that is created, is hidden from the oversight body.

Delays in obtaining statements from respondent members and other witnesses can directly affect the quality of the investigation. According to Josiah Wood, Q.C. (2007),

A duty to provide a statement or submit to an interview must be complied with promptly if the quality of the investigation is to be maintained. The investigative audit revealed a number of instances where a requested duty report or statement was provided only after a lengthy delay. In some cases, usually those involving allegations of excess force, the delay exceeded six months, leading to the inference that the delay was deliberately related to the six month limitation period associated with a charge of common assault under the Criminal Code.

¹¹ 2013 SCC 71 at para. 47

Josiah Wood, Q.C. (2007) received information from police regarding the delay issue which prompted the imposition of a five day deadline. This deadline was included in the amendments to the *Police Act* and was meant to be used as a tool to prevent any undue delays with the investigation.

The concern surrounding delay has also been echoed in the results of the statutory audit undertaken by a Special Committee of the Legislature in 2012 where it was determined that less than half of the investigations were completed within the six month time frame. While the number of investigations requiring an extension has decreased since then, approximately one quarter of investigations still require at least one extension of the six month time limitation period.

Another area that could potentially impact the quality of information arising from statements is the presence of audio or video recordings. These recordings may serve as an aide memoire for the witness or respondent members if they are depicted in such recordings.

For these reasons, it is our view that duty statements should not be obtained from police witnesses or respondent members.

Recommended Process

Obtaining statements and conducting other investigative steps for the purposes of *Police Act* investigations should be conducted in an equitable manner which does not afford any party preferential treatment unless there is an articulable rationale for doing so. For instance, if there is relevant video or audio recording which may serve as an aide memoire, the decision to show such information to a member should also extend to that of a civilian witness or complainant, if they are depicted in such recordings.

We have noted a practice amongst some municipal police agencies whereby interviews of complainants and civilian witnesses are audio and video recorded but interviews of members are only audio recorded. In our view, subject to a legitimate investigative purpose, the manner in which statements are obtained from members and civilians ought to be consistent.

As memories fade over time, statements from police members and other witnesses should be obtained in a timely manner in order to obtain the best evidence possible of what occurred. Section 101 of the *Police Act* lays out the member's duty to cooperate with the investigating officer, which includes answering questions. Section 101(4) of the *Police Act* stipulates that unless an extension is granted by the Discipline Authority, the member must comply with an investigating officer's request for a statement within five business days. While it may not be practical for a member to comply with an investigator's request for a statement within the five business day time limit, this is a tool that can be used by investigating officers to ensure the timely receipt of statements and attendance of interviews under the *Police Act*.

If a police officer is unable to provide a statement in the time frame provided, pursuant to section 101(5) of the *Police Act*, it is the responsibility of the Discipline Authority to review the matter to determine whether special circumstances exist to grant an extension.

Investigative best practices recommend that all witnesses provide in-person recorded interviews as part of the investigation. By obtaining a pure version statement from the member or other witnesses, the investigator will be in the best position to immediately ask follow-up questions and to probe material areas requiring additional information. There is little value in obtaining duty statements first prior to conducting an interview; this practice has unnecessarily introduced an additional layer of delay in obtaining a fulsome statement from the member.

Moreover, the current practice of preparing duty statements, where members are creating evidence of what they observed or heard, and/or actions they took, includes a review and consultation process by union agents that is not the subject of oversight by this office. This is a process which undermines the transparency and accountability of the police complaints system.

As a result, it is our position that interviews of all relevant parties should be obtained early in the investigation to mitigate the effect of fading memories. While we understand that there may be a preference to obtain evidence from all witnesses prior to interviewing a respondent, such an approach should not be the default as it may create a significant delay in obtaining evidence from respondents. Written statements should only be obtained in circumstances in which the investigating officer and OPCC analyst agree that a written statement, created solely by the witness/respondent member without input from third parties, would adequately address the material issues in the investigation.

We understand the role of union agents to be one of support and advocacy for members. While it is acceptable for a respondent or witness to receive advice prior to an interview or during the course of the investigation, union agents and other representatives should not play a role in the giving of evidence. Such a role undermines the accountability of *Police Act* investigations.

Therefore, the role of an agent, counsel or other representative does not extend to participating in the interview alongside the member, by either introducing evidence on the record, asking questions or participating in the creation of evidence through a member's written statement. The interview room is managed by the investigator. If there is a need for the union agent or legal counsel to ask a question, the conversation should be held outside the room between the union agent and the investigator to discuss the need for such a question. It is the investigator's discretion whether to ask or probe the additional areas as suggested by union agent/counsel. The investigator should explain, on the record, the area (or areas) that the union agent or counsel has suggested, what the investigator has decided regarding the relevance of that suggestion and why. Then the investigator should proceed as appropriate.

The most prudent approach is to establish with the assigned OPCC Investigative Analyst a mutual understanding of the material issues requiring investigation, the witnesses requiring a statement and the manner in which that statement should be obtained. The default should be an audio recorded interview that is obtained from all material witnesses, including the respondents, as early in the investigation as practicable. This will assist in preventing delays

in the investigation and will ensure that all relevant material issues have been canvassed in a timely manner.

Section 97(1)(c) and (d) of the *Police Act* provide the authority of the OPCC to provide advice and direction to the investigating officer or Discipline Authority. Any issues that cannot be resolved between the analyst and investigator will result in a direction from the Police Complaint Commissioner as the circumstances require.

I hope this Bulletin will assist in ensuring an accountable and consistent approach when PSS investigators disclose materials to subject and witness officers in the preparation of *Police Act* statements.



Stan T. Lowe
Police Complaint Commissioner

Appendix: Recommended Confidential Agreement Template