



Office of the
Police Complaint Commissioner

British Columbia, Canada

OPCC File: 2021-20838
January 16, 2023

NOTICE OF REVIEW ON THE RECORD

Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Review on the Record into the Ordered Investigation against
Special Municipal Constable Foster Martin of the Victoria Police Department**

To: Special Municipal Constable Foster Martin (Member)
c/o Victoria Police Department
Professional Standards Section

And to: Inspector Colin Brown (Discipline Authority)
c/o Victoria Police Department
Professional Standards Section

And to: Chief Constable Del Manak
c/o Victoria Police Department
Professional Standards Section

WHEREAS:

Investigation

1. On November 25, 2021, the Office of the Police Complaint Commissioner (OPCC) received information from the Victoria Police Department (VicPD) in relation to an incident which occurred in September 2021.
2. According to the VicPD, the department received information that in September of 2021, Special Municipal Constable (SMC) Foster Martin (Member) showed a colleague unsolicited video footage of a person engaged in intimate relations.
3. On December 16, 2021, after reviewing the information forwarded by the VicPD, I ordered an investigation pursuant to section 93(1) of the *Police Act* into the conduct of the Member for one allegation of *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act*. The

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Police Complaint Commissioner

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assigned VicPD Professional Standards investigator, Sergeant Paul Spencelayh, conducted a *Police Act* investigation into this matter.

4. On April 21, 2022, the Investigator amended the *Notice of Complaint and Initiation of Investigation* to include an allegation of *Deceit* pursuant to section 77(3)(f)(i)(a) of the *Police Act*, regarding an allegation that the Member provided misleading statements.
5. On June 16, 2022, the Investigator submitted the Final Investigation Report (FIR) to the Discipline Authority.
6. On June 30, 2022, pursuant to section 112 of the *Police Act*, the Discipline Authority, Inspector Colin Brown of the VicPD, identified that the following allegations of misconduct appeared to be substantiated:

Allegation #1: *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* for the Member taking videos of prisoners in VicPD cells masturbating and showing them to friends.

Allegation #2: *Deceit* pursuant to section 77(3)(f)(i)(A) of the *Police Act* for the Member not being truthful during his *Police Act* interview.

7. The Discipline Authority found the allegation of *Discreditable Conduct*, as outlined in the December 16, 2021 *Order for Investigation*, with respect to the Member video recording a person having intercourse and showing this video to a colleague while on duty, was not substantiated.
8. On July 13, 2022, the Discipline Authority directed the Investigator to undertake further investigative steps, pursuant to section 114 of the *Police Act*, after receiving a request for further investigation from the Member.
9. On July 29, 2022, the Investigator submitted a Supplementary Investigation Report (SIR) to the Discipline Authority.
10. On July 29, 2022, the Discipline Authority submitted his decision, pursuant to section 116 of the *Police Act*, wherein his June 30, 2022 decision was unchanged.

Discipline Proceeding and Proposed Discipline

11. On September 7, 2022, a discipline proceeding was convened. On October 7, 2022, the discipline proceeding was concluded.
12. After considering the available evidence and submissions, the Discipline Authority substantiated the following allegation:
 - i. *Discreditable Conduct* pursuant to section 77(3)(h) of the *Police Act* for taking a video of himself on duty with a male prisoner in the background purportedly masturbating and sharing it with one or two work colleagues.

Finding: Substantiated

Proposed Disciplinary or Corrective Measure – Two-day suspension without pay.

In arriving at the proposed disciplinary or corrective measure for *Discreditable Conduct*, the Discipline Authority considered that the Member, at the Discipline Proceeding, admitted to video recording a male apparently masturbating in cells and sending the video to co-workers.

13. After considering the available evidence and submissions, the Discipline Authority unsubstantiated the following allegation:
 - ii. *Deceit* pursuant to section 77(3)(f)(i)(A) of the *Police Act* with respect to the Member knowingly being untruthful during his *Police Act* interview about showing a video of persons having intercourse to a coworker.

Finding: Unsubstantiated

With regard to the Discipline Authority's decision not to substantiate the allegation of *Deceit*, he determined the evidence was not clear that the Member was knowingly untruthful when the Member denied that he showed video to a co-worker.

14. In his decision, the Discipline Authority affirmed his section 112 finding that the *Discreditable Conduct* allegation with regard to the Member's video recording of persons having intercourse, sending the videos to his friends, and subsequently showing the video to a coworker, did not appear to be substantiated.
15. The Member was provided a copy of the Discipline Authority's findings with respect to each allegation of misconduct, and determinations on appropriate disciplinary or corrective measures at the Discipline Proceeding. The Member was informed that if he was aggrieved by either the findings or determinations, he could file a written request with the Police Complaint Commissioner (the Commissioner) to arrange a Public Hearing or Review on the Record.
16. To date, the OPCC has not received a request from the Member for a Public Hearing or Review on the Record.

Decision

17. Pursuant to section 138(1) of the *Police Act*, the Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner considers that there is a reasonable basis to believe: that the Disciplinary Authority's findings under section 125(1) are incorrect; that the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128(1); or, otherwise considers that a Public Hearing or Review on the Record is necessary in the public interest.

18. Having reviewed the investigation, the Discipline Proceeding, and associated determinations, pursuant to section 138 of the *Police Act*, I have determined that a Review on the Record is required. I consider there is a reasonable basis to believe that the Discipline Authority's findings under section 125(1) are incorrect, that the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128, and I have determined that a Review on the Record is necessary in the public interest.

In relation to the Discipline Authority's determinations pursuant to section 125(1)

19. With respect to the Discipline Authority's substantiated finding of *Discreditable Conduct* in relation to the Member's recording of a male prisoner apparently masturbating in cells and sharing that video, I agree with the Discipline Authority's determination that misconduct has been proven pursuant to 125(1) of the Act.

20. With respect to the Discipline Authority's decision not to substantiate the *Deceit* allegation, relating to the Member's *Police Act* interview, I have a reasonable basis to believe that the Discipline Authority's findings are incorrect. In my view, the evidentiary record supports that the Member knowingly provided false and misleading information during his *Police Act* interview. During his *Police Act* interview, the Member unequivocally denied showing the videos to a coworker stating that it could not have happened because he took the videos on a *Snapchat* platform which is not saved. However, the evidence reasonably supports a conclusion that the videos were saved to the Member's personal cell phone. In addition, the Member stated that whoever made this complaint against him was "lying." However, at the Discipline Proceeding the Member admitted the coworker had seen the video and that he most likely showed it to her.

21. Additionally, during his *Police Act* interview, the Member unequivocally denied the incident occurred in relation to video recording a male apparently masturbating in VicPD jail cells, but subsequently admitted to the allegation at the Discipline Proceeding. Furthermore, in an opportunity to provide any follow-up information, the Member advised that he had been "completely truthful."

22. With respect to the Discipline Authority's Discipline Proceeding affirmation of his section 112 decision regarding the original allegation of *Discreditable Conduct* as referenced in the December 16, 2021 *Order for Investigation*, I have a reasonable basis to believe this determination to be incorrect.

23. Specifically, while six of the seven videos were taken before the Member was employed by the VicPD, the seventh video was taken while he was an employee.

24. Further, while the Discipline Authority considered the Member's age-related immaturity as a factor for the decision to not substantiate this allegation, the seriousness of the matter in violating the person's privacy and dignity was given insufficient weight.

In relation to the Discipline Authority's application of section 126 in proposing disciplinary or corrective measures under section 128

25. I have concluded, pursuant to section 138 of the Act, that there is a reasonable basis to believe that the Discipline Authority has incorrectly applied section 126 of the Act in proposing disciplinary or corrective measures in this matter.
26. Specifically, I have concluded that the Discipline Authority has not sufficiently considered the seriousness of the Member's conduct in proposing the disciplinary or corrective measure in relation to the substantiated allegation of *Discreditable Conduct*. The evidence reasonably supports that this conduct involved the video recording of a male masturbating in VicPD jail cells while he was in the care and custody of the police. The Member was in a position of trust, tasked with supervising and protecting vulnerable persons in police custody and under his duty of care.
27. In addition, while the Discipline Authority was satisfied that the Member accepts responsibility for his actions and found this to be a mitigating factor, the decision does not sufficiently consider the Member's denials during the investigation process.

A Public Hearing is not required

28. In light of the thorough and complete investigation, and the available material evidence, I am of the view that a Review on the Record is appropriate in all of the circumstances.
29. In my view, examination or cross-examination of witnesses is not necessary in this matter as the adjudicator may independently weigh all the available evidence.
30. I have therefore determined that a Public Hearing is not necessary or required in this particular matter. Accordingly, pursuant to sections 138(1) and 141 of the *Police Act*, I am arranging a Review on the Record.

Review on the Record is necessary in the public interest

31. In determining that a Review on the Record is necessary in the public interest, I have considered several relevant factors, including but not limited to the following:
 - (i) The complaint is serious in nature as the allegations involve a significant breach of the public trust;
 - (ii) The disciplinary or corrective measures proposed are inappropriate or inadequate;
 - (iii) The conduct has violated or would be likely to violate, a person's dignity, privacy or other rights recognized by law;
32. A Review on the Record is required in the Public Interest to ensure that all alleged misconduct is reviewed in its totality in light of the seriousness of the allegations of *Discreditable Conduct* and *Deceit*. I have considered the serious violation of multiple persons' dignity and privacy engaged in this matter. The evidentiary record, and the subsequent admissions of the Member, supports that the Member knowingly breached the intimate privacy of individuals. Further, the recording and dissemination of these breaches, in all the circumstances underscores that a review by a retired judge is required in the public interest.

33. Pursuant to sections 141(2) of the Act, the Review on the Record will consist of a review of the disciplinary decision as defined by section 141(3) of the Act and will include all records related to the investigation and the discipline proceeding, unless pursuant to section 141(4) of the Act, the Adjudicator considers that there are special circumstances and it is necessary and appropriate to receive evidence that is not part of the record of disciplinary decision or service record of the member.
34. In arriving at this determination, I have considered that the Adjudicator has the ability to receive submissions:
- (i) Pursuant to section 141(5) of the *Police Act*, the Member, or his agent or legal counsel, may make submissions concerning the matters under review.
 - (ii) Pursuant to section 141(6) of the *Police Act*, the Police Complaint Commissioner or his commission counsel may make submissions concerning the matters under review.
 - (iii) Pursuant to section 141(7)(b) of the *Police Act*, the Adjudicator may permit the Discipline Authority to make oral or written submissions concerning the matters under review.

THEREFORE:

35. A Review on the Record is arranged pursuant to sections 138(1) and 141 of the *Police Act*.

Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Judge Brian Neal, K.C., retired Provincial Court Judge, is appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*.

TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

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DATED at the City of Victoria, in the Province of British Columbia, this 16th day of January 2023.



Clayton Pecknold
Police Complaint Commissioner