

PHC: 2024-02

OPCC File: 2015-11014

**IN THE MATTER OF**  
**THE POLICE ACT R.S.B.C. 1996 c. 367 AS AMENDED**  
**AND**  
**IN THE MATTER OF THE PUBLIC HEARING**  
**INTO THE CONDUCT OF**  
**CONSTABLES KORY FOLKESTAD, ERIC BIRZNECK, DEREK CAIN, JOSH WONG,**  
**BEAU SPENCER, HARDEEP SAHOTA, AND NICK THOMPSON**  
**OF THE VANCOUVER POLICE DEPARTMENT**

Before: The Honourable Elizabeth Arnold-Bailey, Adjudicator

**RULING ON ADMISSIBILITY OF STATEMENTS BY CST. FOLKESTAD, CST.**  
**SAHOTA, AND CST. THOMPSON IN THE INDEPENDENT INVESTIGATION OFFICE**  
**INVESTIGATION**

Public Hearing Counsel:	Bradley Hickford
Commission Counsel:	Christopher Considine KC
Counsel for Cst. Folkestad:	Christine Joseph
Counsel for Cst. Sahota	Brad Keilmann
Counsel for Cst. Thompson:	Scott R. Wright
Adjudicator's Counsel:	Greg DelBigio KC
Written submissions:	Dated January 9 - 13, 2026
Date of Reasons:	February 19, 2026

## Introduction

1. This application is brought by Ms. Joseph on behalf of Cst. Folkestad, and adopted by counsel on behalf of Cst. Sahota and by Cst. Thompson. Ms. Joseph seeks to have excluded from evidence at this Public Hearing the statements made by these three Members to representatives of the Independent Investigations Office [IIO] during the IIO's investigation of the conduct of Vancouver Police Department members regarding the death of Myles Gray. The application is opposed by Public Hearing Counsel and Counsel for the Police Complaint Commissioner [PCC].

## Applicants' Position

2. The main objection to admissibility focuses on these Members being characterized by the IIO as "witness members" at the time the statements were made, which meant they were compelled to provide statements, as opposed to being "subject members", who were not required to provide statements.
3. In addition, Ms. Joseph submits that the admission of Cst. Folkestad's IIO statement at the Public Hearing is not "necessary" as that term is used in s. 143(6) of the *Police Act*, RSBC 1996, c. 67 [the Act].
4. Furthermore, she submits even if I was to find that its admission at this Public Hearing is "necessary", I should exclude it based on potential prejudice and unfairness to her client given that other Members consistently characterized by the IIO investigators as "subject members", were not compelled to provide such statements, and as such do not face any statements they made to the IIO being admitted in this proceeding.
5. While Ms. Joseph admits that Cst. Folkestad's other statements, an initial written statement and his statement to the investigator for the Office of the Police Complaint Commissioner [OPCC] are admissible, it is her position that his statement to the IIO ought to be excluded. Mr. Wright, counsel for Constable Thompson, adopts these

arguments on behalf of his client. According to their counsel, neither Cst. Folkestad nor Cst. Thompson were facing any jeopardy from the IIO's investigation into the Myles Gray incident at the time they made the statements to IIO investigators that are at issue here. It does not appear from the very limited information provided that Cst. Thompson or Cst. Sahota experienced a change in their status during the IIO investigation insofar as they were designated as "witness officers."

### **Public Hearing Counsel's Response**

6. Mr. Hickford provided a detailed response in relation to this application. He began by pointing out different statutory powers and requirements contained in the *Act* as between the IIO and the OPCC.
7. Whereas the IIO operates within and under the authority of Part 7.1 of the *Act* to conduct criminal investigations regarding police conduct and determine which matters should be sent to Crown Counsel for consideration for the laying of criminal charges, the OPCC, operating under a different part of the *Act*, Part 11, deals with complaints of a broader range of police misconduct, including those which do not rise to the level of seriousness of criminal charges.
8. Mr. Hickford indicated that the IIO's practise of designating members as "subject officers" and "witness officers" exists pursuant to a Memorandum of Understanding between the IIO and the VPD, and as such has nothing to do with the OPCC. "Subject officers" face the jeopardy of being charged criminally and are not required to provide statements, whereas "witness officers" are not at risk of criminal charges, and are required to provide statements. Therefore, he submits it is in the sole discretion of the IIO investigator how this designation is applied.
9. Mr. Hickford further advised that on November 15, 2017, the IIO decided to re-designate Cst. Folkestad from a "subject officer" to a "witness officer", and therefore as he was no longer in jeopardy of facing criminal charges, he was required to provide a

statement. None of this, Mr. Hickford pointed out, had anything to do with the misconduct investigation of the incident involving the death of Myles Gray carried out by the OPCC under Part 11 of the *Act*.

10. An OPCC investigation of an incident of alleged police misconduct is suspended once the IIO becomes involved and it only resumes once the IIO investigation is concluded, either by no criminal charges being recommended, or if charges are proceeded with, once legal proceedings are concluded. When the investigation of a complaint resumes, as it has in the present case, the OPCC appoints an investigator to conduct a thorough investigation to assist in the determination of whether allegations of misconduct against members should be brought forward and adjudicated.
11. Mr. Hickford stated that all the evidence obtained by the IIO during their investigation is routinely provided to the investigator tasked with the OPCC complaint investigation and becomes part of the OPCC investigation. Often the investigator of the complaint may not re-interview witnesses interviewed by the IIO. Members' prior statements are included in the report investigating the complaint for the OPCC because they are relevant and necessary to the police complaint investigation.
12. This practice, Mr. Hickford submitted is demonstrated by the present circumstances in relation to Cst. Folkestad. When he was being interviewed by Sgt. Nash, Cst. Folkestad was asked if there was anything he wanted to refer to that was not "covered off with the IIO originally, or that you think maybe, uh you know Kris and I should know going into this?" Cst. Folkestad answered, "Not that I can think of." When Sgt. Nash questioned Cst. Folkestad about what efforts were made to de-escalate the situation with Mr. Gray, before answering, Cst. Folkestad asked to refer to his IIO statement to "double check" something, and Sgt. Nash responded "Absolutely." This occurred a number of times during Sgt. Nash's interview of Cst. Folkestad. Mr. Hickford submitted that Cst. Folkestad's statement to Sgt. Nash in the OPCC investigation is "inextricably

tied to the statement he gave to the IIO as his responses to Sgt. Nash's questions are based on what he said to the IIO."

13. Mr. Hickford then referred to s. 101, found in Part 11 of the *Act* entitled 'Misconduct, Complaints, Investigations, Discipline and Proceedings'. Section 101(1) states: "A member must cooperate fully with an investigating officer conducting an investigation under this Part." Section 101(2) requires a member to "fully comply" with a request to (a) "answer questions in respect of matters relevant to the investigation"; and (b) "provide ... a written statement in respect of matters relevant to the investigation."
14. Mr. Hickford also pointed out that statements given to the IIO and to the investigator on behalf of the OPCC in relation to a complaint of misconduct are admissible in a public hearing pursuant to s. 143(5) of the *Act*. Section 143(5) states "Public hearing counsel, the member of former member concerned, or her or his agent or legal counsel, and commission counsel may [...] (c) "introduce into evidence any record or report concerning the matter".
15. Although Mr. Hickford did not address Cst. Sahota's or Cst. Thompson's application (filed January 12 and January 13, 2026, respectively), his submissions are also applicable to them.

### **Response on behalf of the Police Complaint Commissioner**

16. On behalf of the Commissioner, Mr. Considine referred to a number of policy considerations that are to guide this Public Hearing called by the PCC to provide transparency and accountability for police conduct. He stressed the Legislature in framing the parameters of a public hearing under the *Act* recognized the need for the admission of all appropriate evidence by giving to the adjudicator a broad discretion under s. 143(6)(a). This wide statutory authority is necessary to ensure a full canvassing of the available evidence on the issues to be decided by the adjudicator.

17. Addressing the present application, Mr. Considine made the following submissions:

- There is no bar to admissibility under the *Act* regarding the use of IIO member statements in the OPCC investigation process or at a public hearing as between a “subject officer’s” or a “witness officer’s” statement.
- The designated OPCC investigator who prepared the Final Investigation Report [FIR] was entitled to include and use the statements given to the IIO by the Members. Under the *Act*, the FIR (including IIO and OPCC statements) is automatically received as evidence for use in the processes under s. 112 and s. 117.
- There is nothing in the legislative framework of the *Act* to suggest that IIO statements by members may not be included for OPCC purposes. Furthermore, this is logical, as to spend the additional time and expense for unnecessary duplication covering the same ground would be contrary to public policy.
- As pointed out by Public Hearing Counsel, it is clear in the discussions between Sgt. Nash and Cst. Folkestad, both were specifically addressing the IIO statements. Given the context of these discussions, Cst. Folkestad was essentially adopting his statement to the IIO unless he specified otherwise.
- At the Public Hearing Cst. Folkestad has the option to testify about the events in question. He does not have to testify. However, it is open to the Adjudicator to decide it is necessary for a complete understanding of what took place in the death of Mr. Gray – for the public, the family of Mr. Gray, the Members, and the Adjudicator – that all Cst. Folkestad’s statements be admissible.
- Having all the statements made by the Members to the IIO and the OPCC investigators ruled as admissible at the Public Hearing serves the public interest and ensures transparency.

## **Analysis and Findings**

18. First, I will refer briefly to some statutory provisions in the *Act*.
19. There is nothing in the *Act* that precludes statements made by “witness officers” to an IIO investigator under Part 7.1 of the *Act* from being used in the Part 11 police complaint process for the reasons referred to by counsel for the PCC. Indeed, Public Hearing Counsel indicated that this routinely happens and often, as in the case of Cst. Folkestad, such statements are incorporated by reference in the subsequent statement taken by the OPCC investigator.
20. I do note that section 38.102(1) only provides a narrow, specific limitation on the use of IIO statements that has no application here, namely “A statement provided or an answer given by an officer during an investigation under this Part is inadmissible in evidence in court in a civil proceeding for remedies against the officer in relation to the matter under investigation.”
21. This is markedly different from the very broad protection the *Act* affords to the use of “statements provided or an answer given” in a police complaint investigation to an OPCC investigator (s. 102(1)) and to “[e]vidence given by a witness in a discipline proceeding including the member or former member concerned (s. 131(1)). In these circumstances the statements made or the evidence given is “inadmissible in evidence in court or in any other proceeding, except in a public hearing or review on the record under this Part” (s. 102(1) and s. 131(1) respectively).
22. Thus, statements provided to the IIO potentially face a wide range of possible uses, whereas the statements made in an OPCC investigation or evidence given at a discipline proceeding are broadly inadmissible, except in a handful of instances, a public hearing under Part 11 of the *Act* being one of them. The *Act* does not prohibit the admission of these IIO statements as evidence at this Public Hearing. One of the provisions, s. 143(5)(c), may facilitate their admission by public hearing counsel, the member or former member, or their agent or legal

counsel, and commission counsel as “any record or report concerning the matter”.

23. The fact that, at least in Cst. Folkestad’s case, his designation changed during the IIO investigation from “subject officer” to “witness officer” appears to be to his advantage in terms of the potential for criminal charges to be laid as a possible outcome of the IIO investigation. When he was interviewed by Sgt. Nash in the OPCC investigation he seems to have relied on his IIO statement to check aspects of his statement to Sgt. Nash. As it was made in 2017, as opposed to his subsequent statement to Sgt. Nash (which was made sometime after the suspended complaint investigation was revived on January 29, 2021), it is reasonable to assume his earlier statement to the IIO may reflect a more recent memory.
24. There is no evidence of a change in status in the IIO investigation regarding Cst. Sahota or Cst. Thompson as they both appear to have been designated in the IIO investigation as “witness officers” from the outset.
25. This application concerns the admissibility of statements taken from Constables Folkestad, Sahota, and Thompson by the IIO. In brief, the argument against admissibility is that the Members were characterized as “witness officers”, rather than “subject officers” at the time the statements were taken. In Cst. Folkestad’s case his status changed during the investigation from “subject officer” to “witness officer”. On that basis, the Members were compelled to provide statements whereas, as I understand it, they would not have been similarly compelled had they been “subject officers”.
26. Because the application was framed in this way I have not been provided with the statements, nor have I been invited to consider the relevance, probative value or prejudicial effect of any particular statement. However, the application does not seem to take issue with the relevance of the statements and on that

basis, as well as the purpose for which the statements were taken, I will assume relevance.

27. Similarly, the objection on the basis of prejudice does not point to the content of any particular statement. Instead, it is argued that prejudice arises from the circumstances under which the statements were taken and now, the proposed use of the statements.

28. Against this, in deciding this application I am to consider whether there is a statutory basis that specifically prohibits use of the IIO statements and, if not, whether there is any other basis for excluding this relevant evidence.

29. In this regard I note the *Act* contains another avenue for admission of an IIO statement by a “witness officer” at a Part 11 public hearing in relation to allegations of misconduct. It is to be found in s. 143(6) of the *Act*, which states:

(6) The adjudicator may

- a) receive and accept information that the adjudicator considers relevant, necessary and appropriate, whether or not the information would be admissible in any court, and
- b) without limiting section 145, exclude anything unduly repetitious.

30. Assuming the IIO statements of Constables Folkestad, Sahota, and Thompson are relevant, a key purpose of this Public Hearing is to allow the best evidence to be presented and tested in a transparent way in order that the public confidence in the police and the administration of police discipline is maintained, or perhaps even enhanced. As the PCC stated in the Notice of Public Hearing, “At issue is whether seven VPD members used unnecessary force in an altercation with an unarmed man who lost consciousness and died at the scene... The relevant issues relating to the use of force are indisputably of the utmost seriousness.”

31. Given that the IIO statements of Constables Folkestad, Sahota, Thompson were made regarding the circumstances surrounding Mr. Gray's death after an altercation with police that included these three Members, and they were made closer in time to August 13, 2015, these statements are likely relevant, necessary and appropriate to be received in evidence at this Public Hearing.

32. Therefore, I find that the audio recordings of the IIO statements of Constables Folkestad, Sahota, and Thompson are to be admitted as exhibits, and the transcripts that accompany them marked as aids.

Dated at the City of Kelowna, British Columbia, this 19<sup>th</sup> day of February, 2026

*Elizabeth A. Arnold-Bailey*

The Honourable Elizabeth A. Arnold-Bailey  
Adjudicator