OPCC File: 2024-25237

IN THE MATTER OF THE POLICE ACT, R.S.B.C. 1996 C. 367

AND

IN THE MATTER OF A DISCIPLINE HEARING INTO

ALLEGATIONS OF MISCONDUCT AGAINST

CONSTABLE [redacted] (#366)

FINDINGS AND REASONS OF DISCIPLINE AUTHORITY

(Section 125 *Police Act*)

To:	Mr. [redacted]	(Complainant)
And to:	Constable [redacted]	(Former Member)
And to:	Sergeant [redacted] c/o Saanich Police Department Professional Standards Section	(Investigator)
And to:	Mr. Prabhu Rajan Police Complaint Commissioner	

Introduction

The following misconduct has been alleged against Constable [redacted] (hereinafter the "Former Member"), formerly of the Saanich Police Department, in relation to Mr. [redacted] (the Complainant):

> That on or about January 1, 2024 Constable [redacted] committed neglect of duty pursuant to section 77(3)(m)(ii) of the *Police Act*, by not facilitating access to counsel for Mr. [redacted].

As set out in the attached Form 3, I have concluded that the allegation is proven. These are the reasons for my decision.

Background And History of the Proceedings

The allegation of misconduct arises out of the arrest of the Complainant on January 1, 2024 for being intoxicated in a public place. After his arrest, the Complainant was held for several hours in Saanich Police Department cells until he was sufficiently sober to be released. No charges were laid against him.

By way of background, on the evening of January 1, 2024, a civilian called police to report that a man, later identified as the Complainant, had entered a Circle K convenience store in Saanich and exposed his penis to customers and staff.

A short time later, another civilian called to report a similarly described male holding an alcoholic beverage and screaming randomly at people. Another civilian provided dispatch with information that the same man said he had a gun.

A number of officers attended to the area and located the man, who was later confirmed to be the Complainant. These officers included the Former Member, as well as Cst. [redacted] (Cst. [redacted] and Cst. [redacted] (Cst. [redacted]

Cst. [redacted] informed the Complainant he was under arrest for being in a State of Intoxication in a Public Place. Upon placing his hands on the Complainant to place him in handcuffs, a physical struggle ensued.

The Complainant was placed into handcuffs, and at around 10:27 p.m. the Former Member read him his rights under section 10(b) of the *Canadian Charter of Rights and Freedoms*. The Complainant was transported to the Saanich Police Department and lodged in a cell. He was subsequently released at about 5:50 a.m. the next morning, January 2, 2024.

On January 4, 2024, the Complainant attended hospital, where he was diagnosed with a left-elbow coronoid fracture.

On January 14, 2024, the Complainant filed a written complaint with the Office of the Police Commissioner (OPCC).

The Complainant set out the following narrative in his written complaint:

> I was arrested by the Victoria PD: however, I spent the night in the Saanich Police Department.
>
> I was arrested without due cause.
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> I was harshly treated resulting in bleeding, broken skin, bruising, ripped existing stitches, punctured lip and a fractured elbow along with the inability to work.
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> I was denied my 'right' to contact my lawyer after being read 3 different versions of my 'rights'.

I was refused to be breathalyzed or blood tested upon the accusation of being intoxicated.

I was strip searched and was ridiculed for my choice of undergarments and humiliated by the officers.

I was kept in a cell without a blanket or pillow and the air conditioning was turned on due to my requests for help, and demands to speak with a lawyer.

My light t-shirt and pants nearly skidded into the toilet when they threw them in the corner of the dirty cell.

I repeatedly asked for medical attention and a blanket but was ignored and left in excruciating pain despite the other prisoner that I observed being offered both upon his intake.

My pain was so severe, I was unable to sleep.

The inventory provided was incorrect and my refusal to sign resulted in a threat to lock me up again and I was denied badge numbers or file numbers. No offer to help dress, or recover my possessions upon demand despite the pain the officers must have seen and which should be viewable on the CCTV recordings, and then was pressured to leave or risk being locked up again.

I was released into the street on foot: thirsty - after being denied water, hungry and in agony without reason for the arrest.

On May 3, 2024, the Police Complaint Commissioner found the complaint to be admissible, and on May 13, 2024 an investigation was initiated pursuant to Division 3 of the *Police Act*. Sergeant [redacted] (hereinafter "the Investigator") was assigned to investigate an allegation of abuse of authority for unnecessary force in relation to the arrest of the Complainant and two allegations of neglect of duty, one for failing to provide access to medical care for the Complainant while in custody in police cells and one for failing to provide access to counsel. He identified Cst. [redacted] Cst. [redacted] and the Former Member as the arresting officers. He identified Cst. [redacted] (Cst. [redacted] with respect to the allegation of failing to provide access to medical care, and the Former Member with respect to the allegation of failing to provide access to counsel.

On November 13, 2024, the Investigator submitted his Final Investigation Report to the Discipline Authority, who issued a decision on December 11, 2024, which concluded that none of the allegations of misconduct appeared to be substantiated.

The Police Complaint Commissioner reviewed the decision of the Discipline Authority and confirmed that the allegation of abuse of authority was not substantiated against any of the officers, but he did not agree regarding the allegations of neglect of duty .

Accordingly, pursuant to section 117 of the *Police Act*, the Police Complaint Commissioner appointed me, as a retired judge, to conduct a review of the Final

Investigation Report and the evidence and records referenced therein, and to make a decision on the matter.

In a Decision dated February 5, 2025, I found that the evidence appeared sufficient to substantiate the allegation of neglect of duty against the Former Member for not facilitating access to counsel for the Complainant, and against Cst. [redacted] for not facilitating access to medical care for the Complainant.

The allegation against Cst. [redacted] was resolved following a pre-hearing conference under section 120(6) of the *Police Act*, but the allegation against the Former Member was not, and accordingly, that matter was set for a Discipline Hearing.

The Discipline Proceeding

The Former Member failed to attend at the Discipline Proceeding on August 13, 2025, notwithstanding that he had been notified. Accordingly, the Discipline Proceeding proceeded in his absence pursuant to section 130 of the *Police Act*, which provides:

> **130** If a member or former member whose conduct is the subject of a discipline proceeding fails to attend or remain in attendance at the discipline proceeding and the discipline authority is satisfied that the member or former member has been served with notice of the discipline proceeding, the discipline authority may
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> (a) proceed with the discipline proceeding in the absence of the member or former member,
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> (b) draw an adverse inference from that failure, and
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> (c) make any finding and propose any disciplinary or corrective measure that the discipline authority considers appropriate.

At the Discipline Proceeding, the allegation of misconduct against the Former Member as set out above was read out, and there was a deemed denial of the allegation.

Sergeant [redacted], The Investigator entered into evidence as Exhibit 1 a computer USB Drive containing his Final Investigation Report and the materials referred to therein. The Final Investigation Report is 118 pages long, and the evidence and records attached to it comprise several hundred more pages.

Written submissions of the Complainant were marked as Exhibit 2.

No other witnesses were called to testify at the Discipline Proceeding.

I have received no written or oral submissions. Pursuant to section 125 of the *Police Act* I am required to make a finding in relation to the allegation of misconduct of the Former Member within 10 business days, that is by August 27, 2025. As set out in the

attached Form 3, I have concluded that the allegation is proven. These are the reasons for my decision.

Alleged Misconduct – Neglect of Duty

"Misconduct" is defined in section 77(1) of the *Police Act* as including a disciplinary breach of public trust under section 77(3). For present purposes, sections 77(3)(m) and 77(4) are relevant:

> **77** (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:
>
> ...
>
> (m) "neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:
>
> (i) properly account for money or property received in one's capacity as a member;
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> (ii) promptly and diligently do anything that it is one's duty as a member to do;
>
> (iii) promptly and diligently obey a lawful order of a supervisor.
>
> (4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

The allegation against the Former Member is that he neglected his duty and thereby committed a disciplinary breach of trust by not facilitating access to counsel for the Complainant, pursuant to section 77(3)(m)(ii) of the *Police Act*.

It is significant that under the *Police Act* in British Columbia the statutory definition of "neglect of duty" uses the qualifier "without good or sufficient cause", which is distinct from the notion of "without lawful excuse". The test of "without good or sufficient cause" under section 77(3)(m)(ii) of the *Police Act* involves an objective standard of reasonableness.

Analysis

As will be apparent, this case is unusual because the evidence before me on this Discipline Proceeding is virtually identical to the evidence that I considered in reaching my decision on section 117. In my reasons dated February 5, 2025, I wrote:

To substantiate an allegation of neglect of duty pursuant to section 77(3)(m)(ii) of the *Police Act*, it must be established that the officer had a duty to do something, which he neglected to promptly and diligently do, without good or sufficient cause.

[The Former Member] was involved in the apprehension of the Complainant, and he is the officer who read him his *Charter* section 10(b) rights after [Cst. [redacted] arrested him for being intoxicated in a public place.

Having assumed the responsibility of complying with section 10(b) of the *Charter*, [The Former Member] had a duty to ensure that both the informational, and the implementational components of section 10(b) were carried out, either by doing this himself, or by handing off that task to another officer.

Section 10 of the *Canadian Charter of Rights and Freedoms* provides:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefore,
>
> (b) to retain and instruct counsel without delay and to be informed of that right, and
>
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

According to the evidence contained in the Final Investigation Report and the evidence and records referenced therein, [The Former Member] told the Complainant he was under arrest for being intoxicated in a public place, and he recited section 10(b) of the *Charter* to him at that time. This was described as a "protracted thing" because the Complainant was trying to talk on top of [The Former Member].

Unfortunately, it does not appear that [The Former Member] ever confirmed with the Complainant that he understood the explanation of his rights, nor did he confirm whether the Complainant wished to exercise those rights by contacting counsel. According to the Complainant, he asked to speak with his lawyer, but no arrangements were ever made to carry that out.

In his interview with the Investigator, the Complainant described it this way:

> They told me I was under arrest, you know, I don't want to be there and then they tell me that, hm, you've got, you're allowed, uh, mm, telephone a lawyer. I gave my lawyer's name and this was still kind on intake. Um. And it was, uh, I don't know. You know they didn't necessarily scoff at it, whatever. They just kind of ignored that whole aspect and, um. We're gonna hold you here

> because you're drunk or something like this and uh, brought me down in the cell.

It appears that [The Former Member] and the other officers were concerned that the Complainant was too intoxicated and uncooperative to facilitate access to counsel at the time of his booking-in, and they wanted him to have some time in the cells to sober up. However, neither [The Former Member] nor any of the other officers revisited this issue later in the evening.

In *R. v. Suberu* 2009 SCC 33, the Supreme Court of Canada held that the duty imposed upon the police in section 10(b) of the *Charter* arises "immediately" upon detention, subject to concerns about officer or public safety:

> [42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

And in *R. v. Taylor*, 2014 SCC 50, the Supreme Court of Canada emphasized that the implementational component of the duty includes facilitating access to counsel:

> [24] The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention (*Suberu*, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (*R. v. Luong* (2000), 2000 ABCA 301 (CanLII), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

> [25] This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights and facilitate access to those rights where requested, both without delay. This includes "allowing [the detainee] upon his request to use the telephone for that purpose if one is available" (*Manninen*, at p. 1242). And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so (see *Brownridge v. The Queen*, 1972 CanLII 17 (SCC), [1972] S.C.R. 926, at pp. 952-53).

> If [The Former Member] was not going to complete both the informational and implementational components of section 10(b) immediately upon arrest out of concern for officer or public safety or because the Complainant was too intoxicated to understand, then he had a duty to monitor the situation and ensure that the Complainant's right to counsel was facilitated as soon as he was sufficiently sober. If [The Former Member] could not do this himself, due to shift changes or other circumstances, then he had a duty to assign this task to be completed by another officer.
>
> As it turned out, the Complainant spent the night in cells and was released in the morning, without ever being offered the opportunity of consulting with counsel.
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> I find, therefore, that the evidence referenced in the Final Investigation Report appears sufficient to substantiate the allegation that there was a neglect of duty by [The Former Member] for not facilitating access to counsel for the Complainant, and that this appears to require the taking of disciplinary or corrective measures.

Of course, a finding under section 117 of the *Police Act* is not determinative of the result following a Discipline Proceeding under sections 123-125 of the *Police Act*, because the finding under section 117 is based on whether the evidence "appears sufficient to substantiate" the allegation of misconduct, whereas the test on this Discipline Proceeding is whether the evidence proves the allegation on a balance of probabilities.

In this case, the only additional material to be considered on the Discipline Proceeding, over and above the material already considered under section 117, is the submission of the Complainant, which was filed as Exhibit 2. I will not quote from it extensively, as the Complainant indicated that he prefers the matter to remain somewhat private. The gist of his submission, however, is that he was more concerned about the conduct of the officer who failed to respond to his medical needs when he was in custody, and he was less concerned about the conduct of the Former Member. Indeed, he wrote that The Former Member "acted appropriately due to the situation" and that in general he found "his conduct to be correct under the circumstances."

On all the evidence before me on this Discipline Proceeding, I am satisfied on a balance of probabilities that the Former Member had a duty to facilitate the Complainant's access to counsel, and that he neglected to do so.

The final question under section 77(3)(m) of the *Police Act* is whether this failure was "without good or sufficient cause." Applying an objective standard of reasonableness, I am satisfied that there was no good or sufficient cause. Certainly, the Complainant's intoxication or belligerence would not be good or sufficient cause, for the reasons already stated, namely,

> If [The Former Member] was not going to complete both the informational and implementational components of section 10(b) immediately upon arrest out of concern for officer or public safety or because the Complainant was too intoxicated to understand, then he had a duty to monitor the situation and ensure that the Complainant's right to counsel was facilitated as soon as he was sufficiently sober. If [The Former Member] could not do this himself, due to shift changes or other circumstances, then he had a duty to assign this task to be completed by another officer.

I conclude, therefore, that the allegation against the Former Member of neglect of duty pursuant to section 77(3)(m)(ii) of the *Police Act*, by not facilitating access to counsel for the Complainant, has been proven on a balance of probabilities.

Pursuant to section 125(2) of the *Police Act*, the Former Member may make submissions as to the appropriate disciplinary or corrective measures within 10 days of receipt of the Form 3 that accompanies these reasons.

Dated at Vancouver, British Columbia this 25th day of August, 2025.

Hon. William Ehrcke,
Retired Judge of the Supreme Court of British Columbia, Discipline Authority