

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 129-1996
November 8, 1996**

INQUIRY RE: A decision of the Vancouver Police Board to withhold records from an applicant relating to a proceeding under the *Police Act*

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on August 16, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Vancouver Police Board (the public body) to exclude and withhold records in response to the applicant's request.

2. Documentation of the review process

On April 26, 1996 the applicant requested "a copy of every record...in respect of my section 58 [of the *Police Act*] review" and a copy of the billing record of the Police Board's lawyer in respect of his work on the applicant's case.

The Police Board located 123 pages of records that responded to the applicant's request. It disclosed some records to the applicant on May 24, 1996. It excluded 5 pages of records under section 3(1)(b) of the Act because they fell within an excluded category of records: "a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity."

The Police Board withheld or severed 12 pages of records under section 14 (solicitor-client privilege), and transferred 6 pages of records under section 11 of the Act to the British Columbia Police Commission within the time limits permitted by the Act. The Police Board advised the applicant that no records existed in respect of the request for billing records of the lawyer. The Police Board withheld about 60 pages of the responsive records because they had been "provided to [the applicant] in our responses to previous FOI requests...."

On May 30, 1996 the Office of the Information and Privacy Commissioner received the applicant's request for review of the Police Board's decisions.

3. Issue under review at the inquiry and the burden of proof

The specific issues to be reviewed in this inquiry is the Police Board's application of section 3(1)(b) to exclude records from coverage by the Act and section 14 to withhold and sever records.

The relevant sections are as follows:

- 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
- ...
- (b) a personal note, communication or draft; decision of a person who is acting in a judicial or quasi-judicial capacity;
14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in a record has been refused, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. In this case, it is up to the Vancouver Police Board to prove that the applicant has no right of access to the records excluded under section 3(1)(b) and withheld or severed under section 14 of the Act.

4. The records in dispute

The records material to this inquiry arise from the deliberations of a Review Panel constituted pursuant to section 58 of the *Police Act*, S.B.C., 1988, c. 53 with respect to a complaint made by the applicant (under that section) about a member of the Vancouver Police Department. Members of the Review Panel are also members of the Vancouver Police Board. Where a Chief Constable, who is the disciplinary authority, has refused to investigate a complaint, the Review Panel may review whether this exercise of discretion was proper.

I have reviewed further below the submission of both the Police Board and the applicant on specific sections of the Act.

5. Discussion

The applicant made submissions on sections 16(1)(b) and 22 of the Act. I agree with the Police Board that, as stated in the Notice of Inquiry, these sections are not at issue in this inquiry. Similarly, the withholding of duplicate records and the transfer of the original request in part to another public body are not issues currently before me. Finally, the applicant raised a number of

other issues that are well beyond my authority as the decision-maker under the Act. (Submission of the Applicant, pp. 2, 3, 23)

The applicant has provided me with the details of how he came to file a complaint against a member of the Vancouver Police Department, one that the Chief Constable subsequently dismissed as frivolous. He also informed me in detail about subsequent developments, which he is planning to present at a public inquiry. I am of the view that none of this is relevant to the disposition of the issues in this inquiry under the Act. In particular, I have no jurisdiction to review the proper application of the *Police Act*. (Submission of the Applicant, pp. 5-8, 9-12, and *in camera* submissions)

Section 3(1)(b): This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;**

The Vancouver Police Board's argument in the present case is that the work of the Review Panel constitutes acting in a quasi-judicial capacity and that certain of its records in dispute in this case are thus outside of the scope of the Act on the basis of section 3(1)(b). (Submission of the Vancouver Police Board, paragraphs 12-22; Affidavit of Beth Nielsen, paragraph 13) The applicant denies that the Review Panel was acting in a quasi-judicial capacity with respect to his complaint. (Submission of the Applicant, paragraph 7.21-7.22 and p. 12)

The Police Board organized the records in dispute in two exhibits, which I accepted on an *in camera* basis. The first comprises five pages excluded under section 3(1)(b). Based on my review of these materials, I find that they are communications or draft decisions of persons acting in a quasi-judicial capacity.

Section 14: solicitor client privilege

The Police Board submits that certain of the records in dispute concern confidential communications between the Police Board's members and employees and two legal counsel to the Police Board (one internal and one external) and that they meet the criteria for protection from disclosure under solicitor-client privilege. (Submission of the Vancouver Police Board, paragraphs 23-35)

The applicant is of the view that certain of the records in dispute do not qualify for the protection of solicitor-client privilege. (Submission of the Applicant, paragraph 8) He made a number of submissions about the appropriate application of section 14, which, based on my review of the records in dispute, have no relevance to the actual contents of these records. (Submission of the Applicant, pp. 14-18)

The second exhibit submitted by the Police Board comprises 15 pages, of which the Police Board has not released about ten. It now plans to release another page, which is a fax cover sheet. The Police Board submits that the protected material is covered by solicitor-client

privilege. On the basis of my review of the pages in dispute, I find that they are indeed protected from disclosure on the basis of section 14 of the Act.

6. Order

I find that the head of the Vancouver Police Board is authorized to refuse access to the records in dispute under sections 3(1)(b) and 14 of the Act. Under section 58(2)(b), I confirm the decision of the Vancouver Police Board to refuse access to the records in dispute to the applicant.

David H. Flaherty
Commissioner

November 8, 1996