Order F25-23

VANCOUVER POLICE DEPARTMENT

Rene Kimmett
Adjudicator

March 25, 2025

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Summary: An individual (Complainant) complained that the Vancouver Police Department (VPD) had collected his personal information in violation of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The VPD argued that it did not collect the Complainant's personal information, and, alternatively, that it was authorized to collect the Complainant's personal information under ss. 26(a), (b), and (c) of FIPPA. The adjudicator found that the VPD had collected the Complainant's personal information, and that this collection was not authorized under ss. 26(a), (b), or (c) of FIPPA. The adjudicator ordered the VPD to stop collecting personal information in contravention of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165, ss. 26(a), 26(b), 26(c), 58(3)(e), and Schedule 1; *Police Act,* RSBC 1996, c. 367, ss. 23, 26, and 34(2); *Liquor Control and Licensing Act*, SBC 2015, c. 19, ss. 61, 74, and 77; *Criminal Code,* RSC 1985, c. C-46, s. 31; *Trespass Act,* RSBC 2018, c. 3, ss. 2 and 7.

INTRODUCTION

[1] An individual (Complainant) made a complaint that the Vancouver Police Department (VPD) had collected his personal information in violation of Part 3 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1]

[2] The complaint relates to an incident in which two VPD uniformed police officers (Officer A and Officer B, together, the Officers) asked the Complainant for identification (ID) when he was eating a meal in a restaurant (Restaurant) with

[1] *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165. The VPD is an agency created by the Vancouver Police Board and, therefore, is a public body for the purposes of Part 3 of FIPPA. See FIPPA, Schedule 1, Definitions, "public body", "local public body," and "local government body" (paragraphs (l) and (n)) and *Police Act,* RSBC 1996, c. 367, ss. 23 and 26.

an acquaintance (Acquaintance). Throughout this order, I will refer to the Complainant and his Acquaintance collectively as the Patrons.

[3] The Complainant took his concerns about the interaction directly to the VPD but was unsatisfied with its response. He asked the Office of the Information and Privacy Commissioner (OIPC) to attempt to resolve the complaint. The OIPC's investigation did not resolve the matter, and it proceeded to this inquiry.

[4] The Complainant and VPD both provided submissions in this inquiry. After the inquiry closed, I sought additional information from the parties and received further submissions and evidence in response.

PRELIMINARY ISSUES

Matters outside the Commissioner's jurisdiction

[5] In his submissions for this inquiry, the Complainant questions the legality of Bar Watch, which is the program the Officers referenced when they asked for the Complainant's ID. The Complainant submits that the Bar Watch program violates the *Trespass Act,*[2] the *Canadian Charter of Rights and Freedoms*,[3] the *BC Human Rights Code*,[4] the *Criminal Code,*[5] the *Police Act*, and the VPD's Code of Conduct. He also submits that the conduct of the Officers on the night in question violated these laws and policies.

[6] As an administrative decision-maker, I must only act within the jurisdiction granted to me by legislation. The Complainant has not specified, and I find that I do not have, the statutory authority to make findings in this inquiry about whether the Bar Watch program violates the various laws identified by the Complainant or whether the Officers' actions amounted to misconduct. Although I have read and considered the Complainant's entire submissions, I will only comment on the portions relevant to the issues I must decide in this inquiry.

New issues

[7] The Notice of Inquiry that was provided to the parties before the start of this inquiry states that in this inquiry I must decide whether the public body was authorized under s. 26 of FIPPA to collect personal information under the circumstances and in the manner in which it was collected.[6] The Notice of Inquiry also states that parties may not add new issues into the inquiry without the OIPC's prior consent.

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[2] *Trespass Act,* RSBC 2018, c. 3
[3] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Ac*t, 1982, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).
[4] *Human Rights Code,* RSBC 1996, c. 210.
[5] *Criminal Code,* RSC 1985, c. C-46.
[6] Notice of Inquiry dated May 31, 2024 at 1.

[8] In his inquiry submission, the Complainant makes submissions about the use, retention, disclosure, accuracy, and protection of his personal information by the VPD, the Restaurant, and the Bar Watch program operators.

[9] This inquiry stems from the Complainant's concerns that the Officers collected his personal information in contravention of FIPPA. This alleged collection was the only issue investigated by the OIPC and listed in the Fact Report and Notice of Inquiry. I find that it would not be fair to the VPD, or the organizations mentioned, to add these other issues at this late stage in the OIPC's process, so I decline to do so. If the Complainant has concerns about these issues, he must first raise them directly with the relevant public body or organization before bringing those complaints, if unresolved, to the OIPC.

Complainant's request for records

[10] In his inquiry submissions, the Complainant asks the VPD, the Restaurant, and the operators of the Bar Watch program to provide him with certain information related to his complaint.[7] If the Complainant wishes to obtain this information, he may ask the relevant public body or organization directly for access to this information in accordance with s. 5(1) of FIPPA or s. 27 of the *Personal Information Protection Act* (PIPA). Inquiry submissions are not the appropriate place to make requests for records.

ISSUES

[11] In this inquiry, the following questions are at issue:

1. Did the VPD collect the Complainant's personal information?

2. Was the VPD's collection of the Complainant's personal information expressly authorized under an Act (s. 26(a))?

3. Did the VPD collect the Complainant's personal information for the purpose of law enforcement (s. 26(b))?

4. Was the Complainant's personal information related directly to and necessary for a program or activity of the VPD (s. 26(c))?

[7] Complainant's reply submission at 37; Complainant's supplemental submission #1 at 7-8.

BURDEN OF PROOF

[12] Section 57 of FIPPA sets out the burden of proof for some types of inquiries. However, FIPPA does not specify which party has the burden of proof concerning an inquiry into an unauthorized collection complaint.

[13] The phrase "burden of proof" can be used to describe either of two distinct concepts: the "evidentiary burden" and the "persuasive burden" (also sometimes called the "legal burden").[8]

[14] When an individual complains to the OIPC that a public body collected personal information in contravention of FIPPA, the individual has an initial responsibility to provide enough evidence that the alleged events took place. This responsibility to provide evidence in order to raise an issue is an "evidentiary burden".

[15] In this specific inquiry, the VPD is not arguing that the Complainant has not met his evidentiary burden and, therefore, the Complainant's evidentiary burden is not at issue in this inquiry. For the remainder of this order, when I refer to the burden of proof, I mean the persuasive burden.

[16] The persuasive burden is a party's obligation to prove or disprove a fact or issue to the standard of proof. The standard of proof in the context of this inquiry is "a balance of probabilities" which requires the person with the burden of proof to convince the decision-maker that what the person asserts is more probable than not.[9] Failure to satisfy the burden of proof will result in the party losing on the issue. When there are several issues or facts in dispute the burden of proof may be distributed between the parties or rest with one party, as dictated by the law governing the dispute.[10]

[17] In OIPC Order F07-10, former Commissioner David Loukidelis stated: "Where the legislation is silent, I do not accept that a formal burden of proof lies on either party."[11] He goes onto state:

> In the absence of a statutory burden of proof, it is incumbent upon both parties to bring forward evidence in support of their positions, recognizing, of course, that I must ultimately determine whether or not there has been

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[8] For a concise explanation on the differences between these burdens see: *British Columbia Teachers' Federation v. British Columbia*, 2012 BCCA 326 (CanLII) at para 62 [*Teachers' Federation*].
[9] *R v Layton*, 2009 SCC 36 at para 28, quoting a sample instruction that judges may use to explain the balance of probabilities to a jury in a civil dispute.
[10] Lederman et al., *The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2014) at 93.
[11] Order F07-10, 2007 CanLII 30395 (BC IPC) at para 10.

> compliance with these provisions of FIPPA and that the public body is ordinarily best placed to offer evidence of its compliance.[12]

[18] Following this finding, OIPC orders about complaints under s. 26 tend to simply state that it is incumbent upon both parties to bring forward evidence to support their positions and do not make a formal finding about which party has the burden of proof.[13]

[19] However, I do not agree that, in the absence of a statutory burden, the burden of proof does not lie on either party.[14] If the decision-maker can come to a determinate conclusion based on the evidence, then it may not be necessary to consider which party has the burden, but this does not mean that there is no burden of proof. Indeed, in situations where the evidence leaves the decision-maker in a state of uncertainty, it is necessary to apply the burden of proof to determine the outcome.[15] Therefore, where legislation is silent about which party has the burden, the decision-maker must examine the relevant legislation and determine the burden on a case-by-case basis.[16]

[20] There is no set formula for determining which party bears the burden of proof.[17] Courts have found that the following criteria are relevant to this determination: the mischief at which the statute was aimed; the substance and effect of the enactment; and the practical considerations affecting the burden such as the ease or difficulty that the respective parties would encounter in discharging the burden.[18] Previous OIPC orders have considered which party raised the issue, which party is in the best position to meet the burden of proof, and what is fair in the circumstances, when deciding which party ought to bear the burden of proof.[19]

Parties' submissions

[21] I gave the parties the opportunity to provide submissions on who has the burden of proof in this inquiry.[20]

[22] The Complainant submits that the public body should have the burden to prove that it collected his personal information in compliance with FIPPA

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[12] Order F07-10, 2007 CanLII 30395 (BC IPC) at para 11.
[13] See e.g. Order F14-26, 2014 BCIPC 29 (CanLII) at para 6.
[14] For a similar finding see Order F18-11, 2018 BCIPC 14 (CanLII) at para 13.
[15] Lederman et al., *The Law of Evidence in Canada*, 4th ed. ((Markham, ON: LexisNexis Canada Inc., 2014) at 93.
[16] *Ibid* at 116.
[17] *Ibid* at 117-118.
[18] *Ibid* at 123-124.
[19] Order F21-35, 2021 BCIPC 43 at para 20, citing ***Teachers' Federation, supra*** note 8 at paras 70-72; Order F18-11, 2018 BCIPC 14 (CanLII) at paras 10-21; Order 98-007, 1998 CanLII 18636 (AB OIPC) at paras 12-13.
[20] Adjudicator letter to parties dated September 4, 2024.

because it is in the best position to demonstrate whether its actions align with FIPPA.[21]

[23] The VPD submits that it is appropriate for both parties to put forward arguments and for there to be no burden on one party to prove or disprove the issues. It submits that the issues under s. 26, for example the question of whether a collection occurred or whether a collection was "for the purposes of law enforcement", are questions of "categorization" rather than "persuasion". To support this point, the VPD analogizes to the definition of "fish" in the *Fisheries Act* and submits that, in that context:

> the decision-maker must determine whether something is or is not included in the definition of "fish" in the legislation. In the hypothetical fisheries case, the parties may put forward arguments about what is and is not within the definition of "fish", but there is no presumption that something is a fish and there is no burden on one party to prove (or disprove) that something is a fish.[22]

[24] The VPD submits that, if there must be a determination of the burden of proof, then the burden should fall on the Complainant to first establish that there was a collection of personal information and that the collection "does not clearly fall within one of the listed exceptions in s. 26" at which point, the public body will have the burden to prove why the collection was authorized under FIPPA.[23]

Analysis

[25] As noted above, when determining the burden of proof, courts and the OIPC have looked at the purpose, substance and effect of an enactment, and the practical considerations impacting a party's ability to discharge the burden of proof. I apply this framework here.

Purposes of FIPPA

[26] The express purposes of FIPPA are to make public bodies more accountable to the public and to protect personal privacy by, among other things, preventing the unauthorized collection, use or disclosure of personal information by public bodies.[24] It is clear from these purposes that FIPPA is primarily concerned with the obligations of public bodies and that preventing public bodies from collecting personal information without authorization is one of FIPPA's primary aims.

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[21] Complainant's supplemental submission #1 at 7.
[22] VPD's supplemental submission #1 at para 9.
[23] *Ibid* at para 12.
[24] FIPPA, s. 2(1)(d).

Substance and effect of s. 26

[27] Section 26 of FIPPA states: "A public body may collect personal information only if" one or more of the circumstances listed in subsections (a) – (h) apply. The use of the word "may" empowers a public body to collect personal information but the words "only if" limit that power to the circumstances prescribed in the subsections.[25] If a public body is alleged to have collected personal information contrary to FIPPA, it will, as a practical matter, need to raise a defence or be found in violation of FIPPA.[26] The defences related to an alleged unauthorized collection of personal information are either that a collection did not occur or that the collection was for a purpose set out in subsections 26(a) – (h). Generally, a party seeking to rely on the benefit of a provision has the burden to prove that the provision applies in the specific circumstances.[27]

Practical considerations affecting the burden of proof

[28] On this subject, former Commissioner David Flaherty found:

> It would be illogical to impose the burden of proof on an applicant in these circumstances, since the purposes for which the personal information has been collected may well be unknown to the applicant.[28]

[29] I agree with Commissioner Flaherty's comments. Where a public body believes a collection has not occurred or that a collection was authorized by FIPPA, it has the expertise, knowledge, and resources to put forward arguments on the appropriate interpretation of s. 26 and its application to the facts specific to an inquiry.[29] In contrast, an individual may not know a public body's purpose for collecting personal information. This disparity of knowledge is particularly stark where the public body is not required to, or has otherwise failed to, tell the individual the purpose for collection. I find that it is not unfair to place the burden of proof on a public body, since it is best placed to offer evidence of its compliance with FIPPA.[30]

VPD's submission

[30] For the reasons that follow, I am not persuaded by the VPD's arguments on the burden of proof.

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[25] *Interpretation Act,* RSBC 1996, c. 238 at s. 29 "may"; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008) at 86.
[26] For a similar reasoning, see *Teachers' Federation, supra* note 8 at paras 70-72.
[27] Order F24-71, 2024 BCIPC 81 (CanLII) at para 12, citing *Québec v. (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, 1994 CanLII 58 (SCC), [1994] 3 SCR 3 at 15; *Smith v. Nevins*, 1924 CanLII 70 (SCC), [1925] SCR 619.
[28] Order No. 194-1997, 1997 CanLII 510 (BC IPC) at 4.
[29] While the specific issue in dispute was different, a similar finding about the burden of proof was made in Order F21-35, 2021 BCIPC 43 (CanLII) at para 21.
[30] Order F07-10, 2007 CanLII 30395 (BC IPC) at para 11.

[31] The VPD asserts that neither party should have the burden of proof in the present case because no one has the burden to prove whether a thing is a "fish" in a dispute under the *Fisheries Act.* The VPD did not point me to, and I could not find, any case law that says there is no burden of proof in that context.[31] Accordingly, I do not find this example helpful.

[32] The VPD also does not elaborate on how it came to the conclusion that the burden of proof should fall on the Complainant to first establish that there was a collection of personal information and that the collection "does not clearly fall within one of the listed exceptions in s. 26." For the reasons given above, I have determined that this conclusion is not supported by the purpose or scheme of FIPPA or the practical considerations affecting the parties' ability to discharge the burden. As a result, I am not persuaded by the VPD's submissions on the appropriate burden of proof in this inquiry.

Conclusion

[33] For the reasons given above, I find that in an inquiry into whether a public body has collected personal information in contravention of FIPPA, the public body will have the burden of establishing either that the collection did not occur or that the collection was authorized under s. 26. It makes sense to have the burden of proof placed on the public body because FIPPA allows public bodies to collect personal information only as prescribed and, in many instances, a public body is seeking to rely on one of the circumstances set out in ss. 26(a) – (h). Further, it is easier and more efficient for the public body, as the entity with direct knowledge of the circumstances surrounding the alleged collection, to disprove the allegation.

[34] I recognize that the parties did not have the benefit of my findings about the burden of proof before providing their submissions and I have considered whether this order of events impacts the fairness of this inquiry. As noted above, OIPC orders up to and including Order F07-10, state that the public body will ordinarily be in the best position to prove its compliance with s. 26 of FIPPA. OIPC orders that deal with s. 26 following Order F07-10 state that it is incumbent upon both parties to bring forward evidence to support their positions.[32] Taken together, these orders provide a clear direction to parties, particularly public bodies, about the importance of providing evidence to support their positions. As

[31] At least some disputes under the *Fisheries Act* are strict liability offences in which the Crown has the initial burden to prove beyond a reasonable doubt that the accused committed the "prohibited act" at which point the burden shifts to the accused to prove the defense of due diligence on a balance of probabilities, see e.g. *R. v. Keough*, 2006 NLTD 142 (CanLII) at para 7. If, for example, the "prohibited act" was catching a fish then, I presume, the Crown would need to prove that the thing caught was a fish as defined in the *Fisheries Act* and as interpreted in relevant caselaw.

[32] See e.g. Order F14-26, 2014 BCIPC 29 (CanLII) at para 6.

a result, I find there is no unfairness in continuing the inquiry and basing my findings on the submissions and evidence I received from the parties without them having the benefit of my findings on the burden of proof.

DISCUSSION

Interaction between the Complainant and the Officers

[35] The information in this section sets out my findings of fact about the events surrounding the VPD's alleged collection of the Complainant's personal information. In making findings of fact, I have considered the relevance, reliability, and credibility of the information put forth by the parties based on its internal logic and whether, and the extent to which, the other party disputes the information.

[36] The complaint arises from an incident in which the two Officers asked the Complainant and his Acquaintance for ID when the Patrons were having dinner at the Restaurant on January 23, 2021. The Officers asked the Patrons for ID stating that the request was being made as part of the Bar Watch program.

[37] In this inquiry, the Complainant provided a document titled "Restaurant Watch & Bar Watch – Operational Reference Guide" (Operational Guide), which he received from the VPD in response to an access to information request.[33] This document sets out the framework for the Restaurant Watch and Bar Watch programs. The VPD did not comment on the Operational Guide despite having the opportunity to do so.

[38] The Operational Guide describes Restaurant Watch and Bar Watch as public safety partnerships meant to discourage and deter violent acts in and around Vancouver's restaurants and night clubs. It states that these programs rely on authorization agreements signed by the owner or designated representative of each participating restaurant location. Each authorization agreement authorizes VPD members to act on the owner or designated representative's behalf to request and be provided with a patron's ID in order to determine if they meet the criteria of an "inadmissible patron".

[39] An inadmissible patron is a person that is a member or associate of a gang, is involved in the drug trade, or has a history of violent criminal activity or firearms offences.[34] The Operational Guide states that patrons may be identified as inadmissible based on information from the Police Records Information Management Environment (PRIME), the Canadian Police Information Centre

[33] Complainant's reply submission at para 33.
[34] Operational Guide at 1.

(CPIC), on-duty Gang Crime Unit members, intelligence bulletins and police knowledge.[35]

[40] According to the Operational Guide, when a person gives their ID to the police and is found to be an inadmissible patron, the VPD member is authorized, under the relevant authorization agreement, to:

- inform the person that they are deemed inadmissible under the Restaurant Watch or Bar Watch program, are no longer welcome to dine at the restaurant and must leave;

- arrest the person under the *Trespass Act* if that person does not agree to leave the restaurant after being asked to do so; and

- once outside the restaurant, tell the person the reason they were deemed inadmissible and that the person is "not welcome at this location or any other location participating in Restaurant Watch".[36]

[41] If a person refuses to provide ID, the Operational Guide says that the VPD member is authorized, under the relevant authorization agreement, to:

- warn the person that they will be refused service and asked to leave the restaurant (after paying their bill) if they refuse to provide ID;

- tell the person they must leave the restaurant if that person has been warned of the consequences of failing to provide ID and still refuses to provide ID; and

- arrest the person under the *Trespass Act* if that person refused to provide ID and does not agree to leave the restaurant after being asked to do so.[37]

[42] During the interaction with the Complainant, the Officers explained that Bar Watch helps keep gang violence away from the public[38] and that the Patrons would be ejected from the Restaurant if they refused to provide ID.[39]

[43] The Acquaintance took issue with the Officers saying that they had the authority to eject the Patrons for refusing to provide ID. The Complainant asked

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[35] Operational Guide at 1.
[36] *Ibid,* "Suggested Verbal Instructions" at 2 and "Ejection Flowchart" at 3.
[37] *Ibid.*
[38] Complainant's reply submission at para 10.11.
[39] *Ibid* at para 10.15.

the Officers how the request for their IDs was related to gang violence.[40] In response, Officer B said that the Patrons resembled gangsters and had a higher probability of being involved in criminal or gang activity due to their ethnic background.[41]

[44] The Complainant expressed his belief that the Officers had racially profiled the Patrons.[42] The Officers repeated their request for ID several times[43] and the Complainant eventually provided his driver's license.[44]

[45] The Acquaintance continued refusing to provide ID and was visibly upset.[45] One of the Officers asked restaurant staff to settle the Acquaintance's bill and the Acquaintance "immediately took out his driver's licence in [an] effort to avoid being ejected".[46]

[46] Officer A "queried" the Patrons on his police computer.[47] Specifically, he searched the Complainant's name, date of birth and sex on CPIC, PRIME, and the Law Enforcement Information Portal (LEIP).[48]

[47] CPIC contains information about a person's prior criminal convictions, penalties or outstanding charges and PRIME contains information about, for example, police investigations that do not result in charges and charges approved by Crown Counsel that do not result in convictions.[49] A LEIP query allows officers to view any police incidents associated with the queried person from across the country.[50] When conducted out in the field, a LEIP query provides limited information, such as name, date of birth and incident type (e.g., assault, drug trafficking, etc...).[51]

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[40] Complainant's reply submission at para 10.17.
[41] *Ibid* at para 10.18. The Complainant's ethnicity is listed as Black in the General Occurrence Report (Police Report), which was created by Officer A on the night in question and submitted by the VPD as evidence in this inquiry. The VPD submits that there was a *Police Act* investigation related to the events of January 23, 2021 and that this investigation did not substantiate the Complainant's allegations of racial profiling or discriminatory police conduct (VPD's sur-reply at para 13 and footnote 1; VPD's response submission at paras 11 and 21). I accept that this investigation took place and came to these conclusions. However, the VPD does not submit that I should find, based on the conclusions in the *Police Act* investigation, that Officer B never made the statement about the Complainant's ethnicity. Therefore, I find that Officer B made the statement as recollected by the Complainant.
[42] Complainant's reply submission at para 10.20.
[43] *Ibid* at paras 10.14-10.25.
[44] *Ibid* at para 10.26.
[45] *Ibid* at paras 10.28 and 10.30; Police Report at 3.
[46] *Ibid* at para 10.29; Police Report at 3.
[47] Police Report at 3.
[48] Affidavit #1 of Officer A.
[49] This information about CPIC and PRIME comes from OIPC Investigation Report F12-03, 2012 BCIPC 16 (CanLII) at 8.
[50] Affidavit #1 of Officer A at para 9.
[51] *Ibid.*

[48] From the query, the Officers determined neither the Complainant nor the Acquaintance was an inadmissible patron. However, the Restaurant's manager had been observing the interaction and determined that the Acquaintance was no longer welcome at the Restaurant as a result of his behaviour.[52] The Acquaintance refused to leave the Restaurant, was placed under arrest for breaching the peace, and was escorted outside. The Complainant settled the Patrons' bill and left the Restaurant.[53] The Acquaintance was released, and no further police action occurred.

Did the VPD collect the Complainant's personal information?

Was the information in question "personal information"?

[49] FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information".[54] "Contact information" is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".[55]

[50] The information relevant to this complaint is the information in the Complainant's driver's licence, specifically, his name, photograph, residential address, sex, physical characteristics and driver's licence number.[56] I find all of this information is the Complainant's personal information as defined by FIPPA because it is about the Complainant and is recorded on his driver's licence. I find that this information is not contact information because it does not appear on the Complainant's driver's licence to enable him to be contacted at a place of business.

Did the VPD "collect" the Complainant's personal information?

[51] Having found that the information recorded in the Complainant's ID is his personal information, I must now consider whether the VPD collected this personal information. The word "collect" is not defined in FIPPA.

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[52] The Police Report also states that the Acquaintance was no longer welcome at the restaurant due to his level of intoxication. The Complainant denies that his Acquaintance was intoxicated (Complainant's reply submission at paras 10.5-10.7 and 13). I find it is not necessary, for the purpose of conducting this inquiry, to determine whether the Acquaintance was intoxicated.
[53] Complainant's reply submission at para 10.39.
[54] FIPPA, Schedule 1 "Definitions".
[55] *Ibid.*
[56] Affidavit #1 of Officer A at para 5.

Parties' submissions

[52] The VPD submits that its Officers asking for and receiving the Complainant's ID was not a collection. It submits that the word "collect" in FIPPA means to gather and hold or accumulate and provides dictionary definitions of the word "collect" to support this point.[57]

[53] The VPD submits that the action of checking the Complainant's ID did not amount to a collection of the Complainant's personal information because checking an ID is a "transitory" interaction in which "the document is used merely to check a database or list. Once returned, the identification information is not recorded or used."[58] The VPD submits:

> If ID is checked and the person is not flagged (for outstanding warrants, for instance) […], the ID is returned and no record is created by the police. The interaction is fleeting and it is over. If the police check a person's identification and have no grounds for further action, no police report or document would be created. There is, in this situation, no real "collection."[59]

[54] The Complainant submits that even transient data collection can have significant privacy impacts. He submits that a "collection" under FIPPA occurs when personal information is obtained regardless of whether it is retained. He submits that temporarily possessing an ID and checking it against a police database falls within the meaning of "collect" for the purposes of FIPPA and involves both collecting and using personal data, even where no record is created.[60]

Analysis

[55] The definitions of "collect" provided by the VPD are instructive. These definitions include the following synonyms for the verb "collect": bring or gather together, assemble or accumulate; systematically seek and acquire; obtain or receive; call for or fetch.

[56] I find that the events relevant to this inquiry clearly constituted a collection of the Complainant's personal information. The Officers sought and received the personal information recorded in the Complainant's ID. Officer A held the Complainant's ID in his hand and, in doing so, physically obtained the Complainant's personal information. He confirmed the Complainant's identity by comparing the man he was interacting with to the photo on the driver's licence.

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[57] VPD's response submission at para 18; VPD's sur-reply at paras 15-17, citing the *Concise Oxford Dictionary of Current English* (8th Ed) and *Black's Law Dictionary* (6th Ed).
[58] VPD's sur-reply at para 16.
[59] VPD's response submission at para 18.
[60] Complainant's reply submission at paras 29-30.

He entered the Complainant's name, date of birth, and sex into his police computer.[61]

[57] I accept the VPD's submission and evidence that the interaction was short-lived. However, nothing the VPD says persuades me that personal information needs to be held for any specific duration before its acquisition counts as a collection under FIPPA.

[58] Having found that there was a collection of personal information, the next step is to decide whether the collection was authorized under FIPPA. The VPD submits that it was authorized under ss. 26(a), (b), and (c) to collect the personal information. I will first consider s. 26(c) and then move on to consider s. 26(b) and lastly, I will consider s. 26(a).

Was the Complainant's personal information related directly to and necessary for a program or activity of the VPD (s. 26(c))?

[59] Section 26(c) of FIPPA states that a public body may collect personal information only if the information relates directly to and is necessary for a program or activity of the public body.

Preliminary matter related to the issue of "program"

[60] In its inquiry submissions, the VPD explains that the interaction between the Officers and the Complainant took place as part of the Restaurant Watch program.[62]

[61] However, I note that the Complainant submits that the Officers told him that they were asking for ID as part of Bar Watch.[63] Similarly, the General Occurrence Report (Police Report), which was created by Officer A on the night in question and submitted by the VPD as evidence in this inquiry, states that the Restaurant was a participant in the Bar Watch program and that the Officers explained Bar Watch to the Acquaintance when asking for his ID.

[62] It is not clear and the VPD has not explained why the Officers referenced Bar Watch and not Restaurant Watch in the Police Report and when talking to the Patrons. In any event, since the VPD's inquiry submissions are about Restaurant Watch, and not Bar Watch, I will only consider whether Restaurant Watch is a "program" of the VPD under s. 26(c) and will not consider Bar Watch any further.[64]

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[61] Affidavit #1 of Officer A at paras 6-7.
[62] VPD's submission at para 9.
[63] Complainant's reply submission at para 10.11.
[64] The VPD explains that Bar Watch and Restaurant Watch operate in tandem but under Bar Watch, ID is generally checked at the door (VPD's response submission at para 21).

[63] The VPD does not submit that the information relates directly to and is necessary for any other program or activity of the VPD.

Is Restaurant Watch a "program" of the VPD?

[64] FIPPA states that a "'program or activity' includes, when used in relation to a public body, a common or integrated program or activity respecting which the public body provides one or more services".[65] FIPPA does not define the terms "program" or "activity" individually.

[65] I have reviewed previous orders issued by the OIPC about the meaning of "program" in FIPPA.[66] I have also looked at how other provincial and territorial information and privacy commissioners have interpreted the word "program" under their access to information legislation.[67] From my research, and a plain reading of s. 26(c), I have concluded that the most appropriate interpretation of the word "program" in s. 26(c) is "a series of functions designed to carry out all or part of a public body's mandate."

[66] The VPD submits that Restaurant Watch is a public safety initiative under which the VPD partners with the Vancouver restaurant industry to ensure a safe environment for patrons and reduce shootings and gang-related violence inside bars, restaurants, and night clubs.[68] The Operational Guide describes Restaurant Watch as a public safety partnership to discourage and deter violent acts in and around Vancouver's restaurants.

[67] The Complainant does not make submissions about whether Restaurant Watch is a program of the VPD.

[68] The VPD, as a municipal police department, must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice.[69] I am satisfied that Restaurant Watch, as a public safety initiative, is a series of functions designed to carry out all or part of the VPD's mandate. Therefore, I find that Restaurant Watch is a program of the VPD for the purposes of s. 26(c).

For reference, OIPC Order P09-01, 2009 CanLII 38705 (BC IPC) deals with the iteration of Bar Watch that was in effect at the night club named in that order.

[65] Schedule 1 of FIPPA.

[66] Order 325-1999, 1999 CanLII 4017 (BC IPC) at page 4; Order F16-47, 2016 BCIPC 52 at para 25; and Order F19-37, 2019 BCIPC 41 at paras 25-32.

[67] For example, Nova Scotia Review Report FI-13-52, 2014 CanLII 4519 (NS FOIPOP).

[68] VPD's response submission at paras 7 and 19.

[69] *Police Act,* s.34(2).

Does the information relate directly to and is it necessary for the Restaurant Watch program?

[69] The VPD does not make fulsome submissions about whether the Complainant's personal information related directly to and was necessary for the Restaurant Watch program and instead simply submits that the Officers checked the Complainant's ID pursuant to the Restaurant Watch program and that "Setting aside situations where the officer knows the gangster with absolute certainty, an identity check will be needed for this program to work."[70]

[70] Although I found that Restaurant Watch is a "program" for the purposes of s. 26(c), I find the information collected from the Complainant was not related directly to the program because, for the reasons that I will explain below, the program was not in effect at the time and place where the collection occurred.

[71] I understand, from the Operational Guide, that, in order for the Restaurant Watch program to operate, both the VPD and a restaurant need to agree to participate by entering into a signed agreement. Restaurants that participate in Restaurant Watch do not have access to the police databases, intelligence bulletins or knowledge needed to determine if a person meets the criteria of an inadmissible patron. As a result, the restaurant, as a practical matter, must partner with the VPD to have police officers interact with, and sometimes conduct criminal background checks on, the restaurant's patrons. In this way, the Restaurant Watch program cannot operate without the participation of the VPD.

[72] Similarly, the VPD's officers cannot carry out Restaurant Watch activities in a restaurant without that restaurant first agreeing to participate in the program and signing an agreement authorizing the VPD's officers to act under the program. In other words, the VPD's officers cannot be acting under the Restaurant Watch program if they enter a non-participating restaurant and ID its patrons for the purpose of determining whether the patrons are inadmissible as defined in the program.

[73] The Operational Guide states that the authorization agreement "is the authority [VPD] members should use to demand identification."[71] In this inquiry, the VPD submitted an authorization agreement between itself and the Restaurant (Authorization Agreement). The Authorization Agreement is dated February 5, 2021. The Complainant points out that the Authorization Agreement was signed after January 23, 2021, when the collection at issue took place.[72] The VPD had the opportunity to respond to this point but did not do so. In the absence of an explanation from the VPD, I conclude that the Restaurant only began

[70] VPD's sur-reply at para 3; VPD's response submission at para 19.
[71] Operational Guide at 1.
[72] Complainant's reply submission at para 25.

participating in the Restaurant Watch program after the collection relevant to this inquiry took place.

[74] Having come to this conclusion, I understand the VPD to be saying that the Complainant's personal information was collected pursuant to the Restaurant Watch program even though this program was not in effect at the Restaurant until two weeks after the collection occurred.

[75] I do not see, and the VPD does not adequately explain, how the Complainant's personal information could relate directly to a program that was not in effect when and where the collection occurred. On this basis, I conclude that the information collected from the Complainant does not "relate directly to" the Restaurant Watch program.

[76] Having found that the information does not relate directly to the Restaurant Watch program, I do not need to consider whether the information was "necessary for" the program.

[77] In conclusion, the VPD has not established that its collection of the Complainant's personal information was authorized under s. 26(c) of FIPPA.

Did the VPD collect the Complainant's personal information for the purpose of law enforcement (s. 26(b))?

[78] Under s. 26(b), a public body may collect personal information for the purpose of law enforcement.

[79] FIPPA defines "law enforcement" as

> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[80] The VPD submits the actions taken by the Officers on the evening of January 23, 2021 were policing and that policing clearly falls within FIPPA's definition of law enforcement.[73]

What does policing mean in the context of FIPPA?

[81] The BC OIPC has not, to my knowledge, interpreted the meaning of "policing" as it appears in FIPPA's definition of "law enforcement". However, the

[73] VPD's sur-reply at para 23.

Office of the Information and Privacy Commissioner of Alberta has interpreted "policing" as it appears in Alberta's *Freedom of Information and Protection of Privacy Act,* as follows:

> [in] Order 2000-027 […] former Commissioner Clark stated that 'policing' includes "activities carried out, under the authority of a statute, regarding the maintenance of public order, detection and prevention of crime, or the enforcement of law" (at para. 16). This definition has been applied in subsequent orders and has been found to include investigations into incidents of domestic disputes (see Order F2008-029, at para. 30-33), and an investigation into an individual's reported fear for his or her safety with respect to a public body employee (Order F2006-002, at paras. 25-32). In my view, the investigation carried out by CPS into the call about a child's whereabouts – however brief or easily resolved – falls within the scope of 'policing'.[74]

[82] The VPD submits that policing includes a myriad of common law duties that officers are responsible for discharging and that chief among these duties are preserving the peace, preventing crime, and protecting life and property.[75] In support of this point, the VPD pointed me to the Supreme Court of Canada's (SCC) decision *R. v. Dedman* (*Dedman*).[76]

[83] In *Dedman*, the Honourable Gerald Le Dain, writing for the majority, held:

> In my opinion, police officers, when acting or purporting to act in their official capacity as agents of the state, only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties. The reason for this is the authoritative and coercive character of police action. An individual knows that he or she may ignore with impunity the signal to stop of another private individual. That is not true of a direction or demand by a police officer. It is for this reason, in my opinion, that the actions of police officers must find legal justification in statutory or common law authority.[77]

[84] This quote makes it clear that a police officer may act under a statutory *or* common law authority.

[85] Based on the Alberta OIPC's interpretation of "policing" and Justice Le Dain's findings in *Dedman,* I find that the word "policing" as it appears in FIPPA's definition of "law enforcement" means activities carried out by a police officer under a statutory or common law authority.

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[74] Order F2019-40, 2019 CanLII 103278 (AB OIPC) at para 11.
[75] VPD's response submission at paras 13 and 16 and footnotes #1 and #2.
[76] *R. v. Dedman,* 1985 CanLII 41 (SCC), [1985] 2 SCR 2 [*Dedman*].
[77] *Ibid* at para 58.

Was the collection carried out under a statutory authority or a common law authority?

[86] Having determined the appropriate interpretation of "policing", I will now consider whether the Complainant's personal information was collected for the purpose of policing, and by extension for the purpose of law enforcement.

[87] I accept that the collection of the Complainant's personal information was an activity carried out by police officers. I will now consider whether this collection was authorized by statutory or common law authority.

Statutory authority

[88] The VPD submits that officers have the authority to ensure public safety and prevent and investigate crime under various statutes, including the *Controlled Drugs and Substances Act,*[78] the *Motor Vehicle Act*,[79] and the *Offence Act*[80]*.* The VPD does not provide any further explanation about whether or how these statutes applied in the circumstances of this case and, as a result, I conclude the VPD has not established that its Officers had statutory authority to collect the Complainant's personal information under any of these statutes.

[89] The VPD also raises:

- sections 61, 74, and 77 of the *Liquor Control and Licensing Act;* [81]
- section 31 of the *Criminal Code;* and
- sections 2 and 7 of the *Trespass Act.*

[90] I will consider each of these three Acts, in turn, below.

Liquor Control and Licensing Act

[91] Section 61(6) of the *Liquor Control and Licensing Act* authorizes a peace officer to arrest, without a warrant, a person whom the peace officer believes on reasonable grounds is contravening s. 61(4). Section 61(4) reads:

> (4) A person must not
>
> > (a) remain in a service area, in an establishment or at an event site after the person is requested to leave in accordance with subsection (3) [the licensee/permittee requested the person leave or forbid their entry],

[78] *Controlled Drugs and Substances Act,* SC 1996, c. 19.
[79] *Motor Vehicle Act*, RSBC 1996, c. 318.
[80] *Offence Act,* RSBC 1996, c. 338.
[81] *Liquor Control and Licensing Act*, SBC 2015, c. 19.

> (b) enter a service area, an establishment or an event site within 24 hours after the time the person was requested to leave the service area, establishment or event site in accordance with subsection (3), or
>
> (c) without lawful excuse, the proof of which lies on the person, possess a knife or weapon in a service area, in an establishment or at an event site.

[92] Section 74(2) of the *Liquor Control and Licensing Act* authorizes police officers to arrest a person whom the officer believes on reasonably grounds is intoxicated in a public place.

[93] Section 77 of the *Liquor Control and Licensing Act* prohibits the supply of liquor to minors.

[94] The VPD submits "[an] officer has authority pursuant to section 61 of [the *Liquor Control and Licensing Act*], which enables them to remove a person for intoxication, disorderly conduct, and other reasons [and] verify identification for the purpose of discharging their duties."[82] The VPD also submits

> legislation allows the police to identify persons in a licensed bar or restaurant. This may be needed for the purposes of ensuring compliance with the *Liquor Control and Licensing Act,* SBC 2015, c. 19, including checking identification to verify age (s. 77), or removal for intoxication or disorderly conduct (ss. 61 and 74 depending on the context).[83]

[95] The VPD does not actually submit that the Officers were carrying out any functions under ss. 61, 74 or 77 of the *Liquor Control and Licensing Act* when they collected the Complainant's personal information and instead its submissions are about the general authority of police officers to act under this statute.

[96] The VPD has not established that the Officers reasonably believed that the Complainant was: in the Restaurant after being asked to leave; in possession of a knife or weapon; intoxicated; or a minor. Therefore, I find that the VPD has not established that the Officers were authorized to collect the Complainant's personal information under ss. 61, 74 or 77 of the *Liquor Control and Licensing Act*.

Criminal Code

[97] Section 31 of the *Criminal Code* reads:

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[82] VPD's response submission at para 14.
[83] VPD's supplemental submission #3 at para 3(b).

> 31 (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.
>
> (2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable grounds the peace officer believes has, witnessed the breach of the peace.

[98] The VPD submits "[an] officer may detain or arrest pursuant to section 31 of the *Criminal Code*, if a person's conduct amounts to a breach of the peace [and] may verify identification for the purpose of discharging their duties."[84]

[99] The VPD does not submit that the Officers were acting under s. 31 of the *Criminal Code* when they collected the Complainant's personal information and instead its submissions are about the general authority of police officers to act under this statute.

[100] The VPD has not established that the Officers asked for the Complainant's ID because they witnessed him committing a breach of the peace or reasonably believed he was about to join in or renew a breach of the peace. The evidence before me is that the Complainant was eating his meal peacefully when the Officers approached him to ask for ID. On this basis, I conclude that the VPD has not established that the Officers were authorized to collect the Complainant's personal information under s. 31 of the *Criminal Code*.

Trespass Act

[101] The Complainant submits that the *Trespass Act* does not apply to bars and restaurants and instead typically applies to enclosed land with a lawful fence and clearly visible signs indicating "private property" or "no trespassing".[85] In response, the VPD submits that the Restaurant falls under the definition of "premises" in the *Trespass Act.*[86] I agree with the VPD and find that the Restaurant is a building on land and, therefore, falls under (b)(i) of the definition of premises under s. 1 of the *Trespass Act*.

[102] The VPD submits that an officer's authority to remove a trespasser and verify their identity comes from ss. 2 and 7 of the *Trespass Act*.[87] The relevant parts of these sections read:

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[84] VPD's response submission at para 14; see also: VPD's supplemental submission at para 3(b).
[85] Complainant's reply submission at para 4.4.1.
[86] VPD's sur-reply at paras 25-27
[87] *Ibid* at para 27.

Arrest without warrant

7 (2) A peace officer may arrest without warrant a person found on or in premises if the peace officer believes on reasonable and probable grounds that the person is committing an offence under section 2 [trespass prohibited] in relation to the premises.

Trespass prohibited

2 (1) Subject to section 3, a person who does any of the following commits an offence:

(a) enters premises that are enclosed land;

(b) enters premises after the person has had notice from an occupier of the premises or an authorized person that the entry is prohibited;

(c) engages in activity on or in premises after the person has had notice from an occupier of the premises or an authorized person that the activity is prohibited.

(2) A person found on or in premises that are enclosed land is presumed to be on or in the premises without the consent of an occupier of the premises or an authorized person.

(3) Subject to section 3, a person who has been directed, either orally or in writing, by an occupier of premises or an authorized person to

(a) leave the premises, or

(b) stop engaging in an activity on or in the premises

commits an offence if the person

(c) does not leave the premises or stop the activity, as applicable, as soon as practicable after receiving the direction, or

(d) re-enters the premises or resumes the activity on or in the premises, as applicable.

[103] The VPD submits that the "*Trespass Act,* RSBC 2018, c.3 prohibits trespass on property where the lawful occupier does not agree to a person's presence on private property."[88] It submits that the *Trespass Act* provides officers with the authority to remove individuals who are trespassing and verify identity when doing so.[89]

[88] VPD's supplemental submission #3 at para 3(b).
[89] VPD's response submission at para 20.

[104] The VPD does not submit that the Officers were acting under the *Trespass Act* when they collected the Complainant's personal information and instead its submissions are about the general authority of police officers to act under this statute.

[105] The VPD has not established that the Officers asked for the Complainant's ID because the Restaurant's owner or occupier did not agree to the Complainant being in the Restaurant or because the Officers reasonably believed that the Complainant was trespassing.

[106] Without more information about how the *Trespass Act* applied in the circumstances, I conclude that the VPD has not established that its Officers were authorized under the *Trespass Act* to collect the Complainant's personal information.

Conclusion – statutory authority

[107] In conclusion, I find that the VPD has not established that its Officers had statutory authority, under any of the provisions it references, to collect the Complainant's personal information.

Common Law Authority

[108] I will now consider whether the collection was carried out under a common law authority.

[109] Police have common law police duties, which have been described as the preservation of the peace, the prevention of crime and the protection of life and property.[90] Common law police duties have also been codified in statutes. For example, the *Police Act* tasks police with the following duties: "the preservation of peace, the prevention of crime and offences against the law and the administration of justice".[91]

[110] Police duties place obligations on police officers to act in situations where other people, who are not officers, are not required to act. Police officers have broad discretion to act in furtherance of their police duties. However, police officers are not empowered to undertake any action when exercising their duties.[92] Where the exercise of a police duty interferes with an individual's liberty, the police must ensure that the actions taken in furtherance of a police duty are authorized by law.[93] Therefore, the first question I must answer is: was the police

[90] *Dedman, supra* note 76 at para 14, Dickson C.J dissenting but not on this point.
[91] *Police Act*, ss. 7(2) and 34(2).
[92] *R v Mann,* 2004 SCC 52 at para 35 [*Mann*].
[93] *Dedman, supra* note 76 at para 12, Dickson C.J dissenting but not on this point.

officer's conduct a *prima facie*[94] interference with an individual's liberty?[95] The police conduct relevant to this inquiry is the Officers' collection of the Complainant's personal information. The term "liberty" in this context encompasses both constitutional rights and freedoms and traditional civil liberties.[96]

Prima facie interference with liberty

The VPD's submissions

[111] The VPD does not believe that the collection of the Complainant's personal information interfered with his liberty. The VPD submits the Complainant voluntarily went to a place where he might be asked for ID and could reasonably expect to be asked to leave for failing to provide ID. It submits the Complainant was not moving freely in a public place and instead "had chosen to go to private premises to spend time — with the implied agreement of the lawful occupier, but subject to the occupier consenting to him being there" (emphasis original).[97]

[112] The VPD makes several submissions that the Complainant was not detained and, therefore, his liberty was not interfered with. Specifically, the VPD submits:

- *R. v. Culligan* (*Culligan*),[98] a case that found the accused had not been unlawfully detained when police asked him for ID, is dispositive of the question of whether asking for ID constitutes an interference with liberty.[99]

- the Complainant was at liberty to depart[100] and was not in a situation where he was walking on a sidewalk, stopped and prevented from moving on.[101]

- no force was used, and nothing was confiscated, seized or broken.[102]

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[94] *Prima facie* is a Latin term that, in this context, means at first sight or on its face.
[95] *Dedman, supra* note 76. This preliminary question also asks whether the police conduct interfered with an individual's property. However, since the Complainant is not arguing that the Officers interfered with his property, I have omitted this element to make reading this order easier.
[96] *Fleming v Ontario,* 2019 SCC 45 (CanLII), [2019] 3 SCR 519 at para 46, citing *R. v. Clayton,* 2007 SCC 32 (CanLII), [2007] 2 SCR 725 at para 59 and *Figueiras v. Toronto (Police Services Board),* 2015 ONCA 208 (CanLII) at para 49 [*Figueiras*].
[97] VPD's supplemental submission #3 at para 26.
[98] *R. v. Culligan,* 2019 MBCA 33 (CanLII).
[99] VPD's supplemental submission #3 at para 18.
[100] *Ibid* at para 26.
[101] VPD's supplemental submission #4 at para 2.
[102] VPD's supplemental submission #3 at para 26.

[113] The VPD also submits that the law does not concern itself with trifles[103] and "the unremarkable, transitory and trifling interaction when a person's identification is checked — by a theatre usher or a cigarette vendor or a police officer in a sports bar — does not amount to an 'interference' with civil liberties."[104] The VPD submits that the circumstances of this inquiry can be distinguished from other situations where a court has found an interference with liberty because those situations involved more serious types of police conduct and obvious liberty interests being curtailed.[105]

[114] The VPD argues, in the alternative, that if there was an interference that such interference was "lawful". It submits that the Officers were lawfully entitled to verify identification in private premises, particularly under the *Liquor Control and Licensing Act* and the Restaurant Watch program.[106]

Complainant's submissions

[115] The Complainant submits that the Officers' request interfered with his liberty because his compliance was not voluntary and, instead, he was coerced into providing his ID and threatened with ejection from the Restaurant and arrest if he failed to provide ID.[107]

[116] The Complainant distinguishes the facts in *Culligan* from those of this inquiry.[108] I understand the Complainant to be submitting that he was detained by the Officers when they asked him to either provide ID or leave the Restaurant.

Analysis – interference with liberty

[117] At common law, individuals, including the Complainant, have the right to move about in society free from state coercion.[109] While there are many other potential liberty interests at issue in this inquiry, I find that this liberty interest is the most obviously applicable.

[118] It is clear to me that the Officers' collection of the Complainant's personal information was a *prima facie* interference with the Complainant's right to move about in society free from state coercion.

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[103] VPD's supplemental submission #3 at paras 20-21, discussing the *de minimis* doctrine.
[104] *Ibid* at para 23.
[105] *Ibid* at para 22, referencing *Fleming, supra* note 96 at para 65; *R v Mann*, supra note 92 at para 45; *Dedman, supra* note 76 at para 68; *R v Dillon*, 2006 CanLII 10745 (ONSC) at para 27; *R v F (D)*, 2002 MBCA 171; and *Figueiras, supra* note 96 at paras 66 and 77.
[106] VPD's supplemental submission #3 at para 28.
[107] Complainant's supplemental submission #2 at para 28.
[108] *Ibid* at paras 29-30.
[109] *Fleming, supra* note 96 at para 65*; Figueiras, supra* note 96 at paras 79-82; *Mann, supra* note 92 at paras 1 and 15; *R. v. Heywood,* 1994 CanLII 34 (SCC), [1994] 3 SCR 761 at 798.

[119] The Complainant was engaged in behaviour that is a normal part of our society; he was eating a meal that he had been served and would be paying for in a restaurant open to the public.

[120] The Officers approached the Complainant, asked for ID, and told him that they would be authorized to eject him from the Restaurant if he failed to provide ID. The Officers continued to ask him for ID even after he refused several times. The Complainant did not want to provide ID and did not want to leave the Restaurant. Based on the conduct of the Officers, a reasonable person would conclude that the Complainant had no choice but to comply with the Officers' demand to either provide ID or leave the Restaurant. The Complainant chose to provide ID, not because he wanted to, but because refusing to do so would have resulted in the Officers removing him from the Restaurant.

[121] For these reasons, I find that the Officers' collection of the Complainant's personal information in the Restaurant on the evening of January 23, 2021 interfered with the Complainant's right to move about in society free from state coercion.

[122] In order to provide fulsome reasons, I will now briefly address the VPD's arguments that the collection did not interfere with the Complainant's liberty.

[123] I agree with the VPD that there are circumstances under which a person can reasonably expect they will have to leave a restaurant for failing to provide ID. For example, a person can expect to have to submit to a demand for ID when the demand is authorized by statute. However, the VPD has not established, in the specific facts of this inquiry, that the Complainant ought to have reasonably expected he would need to leave the Restaurant for failing to provide ID.

[124] I accept that the Restaurant is privately-owned. However, the VPD has not provided evidence sufficient to establish that the Restaurant did not consent to the Complainant being on its premises when the Officers approached him to ask for ID. Further, the VPD has not adequately explained its assertion that the Restaurant is "private premises" rather than a "public place".[110] In any event, the Restaurant is clearly part of "society" and, therefore, is included in an individual's right to move about in society free from state coercion.

[125] I have determined that I do not need to consider whether the Complainant was detained because I have already found that the conduct was a *prima facie* interference with the Complainant's right to move about in society free from state

[110] For example, the definition of "public place" in the *Liquor Control and Licensing Act* includes a building to which the public is invited or is allowed access.

coercion.[111] For this reason, I do not need to make findings about whether the Complainant was detained, and I decline to do so.

[126] I find that the Officers collection of the Complainant's personal information was not an "unremarkable" or "trifling" interaction. The Officers told the Complainant that they would be authorized to eject him from the Restaurant for failing to provide ID. A police officer threatening to remove an individual from a space that the individual is lawfully and peacefully occupying because they refuse to submit to a collection of their personal information is not "unremarkable" or "trifling" and, therefore, must be justified under statutory or common law authority.

[127] The VPD does not adequately explain its argument that the Complainant's liberty was not interfered with because the police conduct in this inquiry is less "serious" and the liberty interests are less "obvious" than in the cases it cites. Each case must be considered on its merits. The VPD's submissions are not specific enough to persuade me that I should not find, based on the facts of this inquiry, that the Officers' conduct was a *prima facie* interference with the Complainant's liberty.

The Waterfield test

[128] Having concluded that the Officers' collection of the Complainant's personal information interfered with his liberty, I will now consider the *Waterfield* test. The SCC developed the *Waterfield* test to determine whether a police action that interferes with individual liberty is authorized at common law.

[129] The test has two stages. At the first stage, the court asks: did the police conduct fall within the general scope of any duty imposed on a police officer? At the second stage, the court asks: did the conduct, even though it fell within the general scope of a police duty, involve an unjustifiable use of powers associated with the duty?

[130] To meet the second part of the test:

> The interference with liberty must be <u>necessary</u> for the carrying out of the particular police duty and it must be <u>reasonable</u>, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.[112] (underlining added by me).

[111] For a similar approach, see *Figueiras, supra* note 96 at para 65-66.
[112] *Dedman*, *supra* note 76 at para 69.

The VPD's submissions

[131] The VPD submits that when asking for the Complainant's ID the Officers were acting under their general duties to maintain public peace and enforce the law.[113]

[132] The VPD submits that the Officers needed to check the Complainant's ID because:

- in the past 20 years, "there have been innumerable shootings and killings throughout the Lower Mainland, as drug gangs battle one another."[114]

- "known gangsters pose a clear safety risk to the public"[115] and will endanger the public peace".[116]

- the Officers were engaged in proactive and preventative policing.[117]

- the Acquaintance resembled a known gang member[118] and "police must be afforded the leeway to check not only the individual who resembles a gang member, but that individual's associate."[119]

[133] From these submissions, I understand VPD to be saying that since gang violence in Vancouver restaurants is, or has historically been, a problem, the Officers needed to collect the Complainant's personal information because the Complainant was a person in a restaurant and the Officers thought he might be a gang member because he was sitting next to someone who looked like another person that the police knew to be a gang member.

[134] On the subject of reasonableness, the VPD submits that the Officers' conduct was not an unjustifiable use of police power because the use of power was minimal to the point of triviality,[120] and the Officers could have used more intrusive measures. As examples, the VPD submits that, to confirm someone's identity, police can require a person to submit to a search of their phone or to make a video-call to someone who can identify them.[121]

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[113] VPD's supplemental submission #3 at para 31.
[114] *Ibid* at paras 32.
[115] *Ibid* at paras 32.
[116] *Ibid* at paras 33 and 40.
[117] *Ibid* at para 34.
[118] VPD's response submission at para 22.
[119] VPD's supplemental submission #4 at para 4.
[120] VPD's supplemental submission #3 at para 36.
[121] *Ibid* at para 37.

Analysis – the Waterfield *test*

[135] Courts, including the SCC, exercise caution when recognizing new common law police authorities:

> [..] this Court [the SCC] must tread softly where complex legal developments are best left to the experience and expertise of legislators. As McLachlin J. (as she then was) noted [(citation omitted)] major changes requiring the development of subsidiary rules and procedures relevant to their implementation are better accomplished through legislative deliberation than by judicial decree. […] The Court cannot, however, shy away from the task where common law rules are required to be incrementally adapted to reflect societal change. Courts, as its custodians, share responsibility for ensuring that the common law reflects current and emerging societal needs and values […].[122]

[136] I am not a judge in a court. I am an administrative decision-maker tasked with interpreting and applying FIPPA as the Commissioner's delegate. It is not open to me to recognize a new common law police authority.

[137] I understand the VPD to be saying that police officers have common law authority to demand ID from restaurant patrons with the aim of preventing gang violence, when no specific act of violence is being investigated or believed to be in progress. However, the VPD has not pointed to any existing case law to support this conclusion. In the absence of a clearly cited authority, I find that the Officers were not authorized, under an existing common law authority, to collect the Complainant's personal information in the Restaurant on the evening of January 23, 2021.

[138] Having concluded that the Officers did not collect the Complainant's personal information under an existing common law authority, I do not need to engage with the VPD's submissions that the collection was reasonable and necessary for the performance of a police duty. Even if I were to agree with the VPD that the collection was necessary and reasonable, it is not open to me to recognize a new common law police authority.

Conclusion – s. 26(b)

[139] I conclude that the VPD has not established that its Officers were authorized under statute or the common law to collect the Complainant's personal information. Therefore, I find that the collection of the Complainant's personal information was not "policing". For that reason, I find that the VPD has

[122] *Mann, supra* note 92 at para 17.

not established it collected the Complainant's personal information for the purpose of law enforcement under s. 26(b) of FIPPA.

Final matter related to the issue of policing

[140] Early in considering the facts relevant to this inquiry, I took notice of the VPD's policy "Conducting and Documenting Street Checks (and Police Stops)" (Policy), issued in response to British Columbia's "Provincial Policing Standard 6.2.1 Police Stops".[123] I invited the parties to make submissions on whether the Policy applied to the events relevant to this inquiry.[124] Ultimately, I determined that it is not necessary to make findings about the application of this Policy and I did not consider it further.

Was the VPD's collection of the Complainant's personal information expressly authorized under an Act (s. 26(a))?

[141] Under s. 26(a), a public body may collect personal information if the collection is expressly authorized under an Act.

[142] Under my s. 26(b) analysis, I dealt with the VPD's arguments that its Officers were authorized to collect the complainant's personal information under the *Controlled Drugs and Substances Act,* the *Motor Vehicle Act*, the *Offence Act,* the *Liquor Control and Licensing Act,* the *Criminal Code,* or the *Trespass Act.* I found that the VPD has not established that its collection of the Complainant's personal information was authorized under those statutes.

[143] For the reasons provided in my s. 26(b) analysis, I find that the VPD has not established that the collection of the Complainant's personal information was expressly authorized under an Act. Therefore, I conclude that the VPD was not authorized under s. 26(a) of FIPPA to collect the Complainant's personal information.

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[123] Vancouver Police Department, "Part I Order - 2020-001, 1.6.53 Conducting and Documenting Street Checks (and Police Stops)", online: https://vpd.ca/wp-content/uploads/2021/06/street-check-policy.pdf; British Columbia, "Policing Standard 6.2.1 Police Stops", online: https://www2.gov.bc.ca/assets/gov/law-crime-andjustice/criminal-justice/police/standards/6-2-1-police-stops.pdf.

[124] The VPD submits that the Policy applies "only to interactions occurring in public" (emphasis original) and that "[t]here is no equivalent policy that governs interactions inside entertainment establishments generally, nor police-citizen interactions broadly" (VPD's supplemental submission #1 at paras 13 and 19). The Complainant submits that the interaction with the Officers was more than a casual conversation and impeded where he could and could not go but was not voluntary (Complainant's supplemental submission #1 at 2).

Summary

[144] I find that the VPD collected the Complainant's personal information when the Officers asked for and received the Complainant's ID.

[145] I also find that, when the collection occurred on January 23, 2021, there was no authorization agreement in place between the VPD and the Restaurant authorizing the Officers to collect personal information under the Restaurant Watch program. For this reason, I find that the collection was not related directly to the Restaurant Watch program and, therefore, the collection was not authorized under s. 26(c) of FIPPA.

[146] Finally, I find that the VPD has not established that the collection of the Complainant's personal information was authorized under statute or the common law and, therefore, the collection was not performed for the purpose of law enforcement under s. 26(b) or expressly authorized under an Act under s. 26(a) of FIPPA.

CONCLUSION

[147] For the reasons given above, I find that the VPD collected the Complainant's personal information, and that this collection was not authorized by ss. 26(a), 26(b), or 26(c) of FIPPA.

[148] Under s. 58(3)(e) of FIPPA, I require the VPD to stop collecting personal information in contravention of FIPPA. Specifically, I require the VPD to stop requiring individuals to provide ID for the purpose of determining if they meet the criteria of an inadmissible patron as defined by the Restaurant Watch program in restaurants where there is no Restaurant Watch authorization agreement in place.[125]

March 25, 2025

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F22-90673

[125] For clarity, since the personal information relevant to this inquiry was not directly related to the Restaurant Watch program, I have not made any findings in this order about whether collection of personal information under the Restaurant Watch program is authorized by FIPPA or the *Personal Information Protection Act.*