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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 290-1999
February 11, 1999

****** This Order has been subject to Judicial Review ******

INQUIRY RE: The application of section 3(1)(h) by the Vancouver Police Department

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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 October 26, 1998 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 the Vancouver Police Department's application of section 3(1)(h) of the Act to records relating to the applicant's complaints about several police officers.

2. Documentation of the inquiry process

There are two access requests, both dated April 29, 1998. One request is for records showing sources and the records provided by sources checked by a Police Department constable in connection with a motor vehicle accident involving the applicant's children. The other request is for copies of an investigation report, a complaint form under the *Police Act*, witness list and statements, and documents relating to service of the complaint form.

On June 4, 1998 the Police Department informed the applicant that due to the large volume of records that needed to be searched in order to respond to the applicant's request, it was extending the time limit for responding by thirty days under section 10 of the Act.

On July 22, 1998 the Police Department informed the applicant in writing that it was unable to respond to the applicant's request, since the records related to two ongoing public inquiries. It cited no section of the Act. On July 27, 1998 the applicant requested a review of this decision.

On September 28, 1998 the Police Department issued a second response letter to the applicant indicating that he had been denied access to the requested records, since they were outside of the scope of the Act in accordance with section 3(1)(h).

On September 29, 1998 the applicant informed my Office that he wished to proceed to an inquiry. On October 5, 1998 the Office provided both the applicant and the Police Department with written notification that a written inquiry would be held on October 26, 1998.

The following details of the relevant matters between the parties under the *Police Act* and the *Police (Discipline) Regulation* can be gleaned from their submissions:

- The applicant has *Police Act* "public inquiries" pending before Vancouver Police Board disciplinary tribunals against a Detective, a Sergeant and a former Constable. These were scheduled to go forward in late October 1998. (Beth Nielsen Affidavit, sworn October 13, 1998, paragraphs 4-8)

- Internal disciplinary proceedings against the Detective were completed on August 21, 1996 (Applicant's Submission, paragraph 30, and Appendix 1, which is the Form 5 dismissing formal disciplinary proceedings). The applicant appears to have launched a judicial review about this. (Submission of the Applicant, paragraph 31)

- The applicant's complaint against the Constable was investigated and dismissed on September 15, 1995. (Submission of the Applicant, paragraph 32)

- The applicant's complaint against the Sergeant was also dismissed on May 12, 1997. (Submission of the Applicant, paragraph 33 and Appendix 2)

3. Issue under review and the burden of proof

The only issue in this inquiry is the Police Department's application of section 3(1)(h) to the records requested by the applicant. Section 3(1)(h) provides 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:
> …

(h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

….

The Police Department takes the position that the Act does not apply to the records in dispute, because they constitute records relating to a prosecution in circumstances where all proceedings in respect of the prosecution have not been completed. The onus lies on the Police Department to demonstrate that section 3(1)(h) of the Act applies to exclude the records from the scope of the Act.

4. The applicant's case

The applicant makes two points. First, he says that section 3(1)(h) of the Act does not apply, because the disciplinary proceedings and complaints against the officers referred to in his requests for information have concluded. Second, he says that a "public inquiry" under the *Police Act* does not trigger section 3(1)(h) of the Act (see Submission of the Applicant, paragraph 36):

> ...a public inquiry under section 60 of the *Police Act* is not a "prosecution of an offence under an enactment of British Columbia or Canada." It is an appeal by a complainant of a decision of a disciplinary authority to a disciplinary tribunal. A disciplinary tribunal does not prosecute complaints against police officers. It can only either approve or reject the disciplinary action intended to be taken by the disciplinary authority.

The applicant also refused to make reply submissions in this inquiry on the basis that I had lost jurisdiction over his request for a review because the inquiry continued beyond the ninety-day time period specified in section 56(6) of the Act.

5. The Vancouver Police Department's case

The Police Department's position is quite simple. Section 3(1)(h) provides that the Act does not apply to a record relating to a prosecution, if all proceedings in respect of the prosecution have not been completed. "Prosecution" is defined as follows in Schedule 1 of the Act:

> "prosecution" means the prosecution of an offence under an enactment of British Columbia or Canada;

The Police Department takes the position that a pending "public inquiry" before the Vancouver Police Board under the *Police Act* is a pending prosecution of an offence under an enactment of British Columbia. Section 3(1)(h) of the Act therefore applies.

The Police Department relies upon a decision of the B.C. Court of Appeal, which determined that a "disciplinary default" under the *Police Act*, R.S.B.C. 1979, c. 331 (as it then was) is an "offence": *Police Board and District of Matsqui v. Matsqui Policemen's*

Association, Local No. 7 (1987) 14 B.C.L.R. (2d) 88 (C.A.). From this case, the Police Department derives the following proposition:

> ...a *Police Act* disciplinary proceeding is a prosecution of an offence under an enactment of British Columbia or Canada as set out in Schedule 1 of the *Freedom of Information and Protection of Privacy Act*. Therefore, the *Freedom of Information and Protection of Privacy Act* does not apply to these records until the disciplinary proceeding has been fully completed pursuant to section 3(1)(h)....

6. Analysis

Timeliness of Inquiry under section 56(6) of the Act

Subsections 25(2), (4) and (5) of the *Interpretation Act*, R.S.B.C. 1996, c. 238 provide as follows with respect to the calculation of time:

> 25(2) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.
>
> …
>
> (4) In the calculation of time expressed as clear days, weeks, months or years, or as at least or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.
>
> (5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

Following the formula for calculating time in section 25 of the *Interpretation Act*, the ninety-day period for this inquiry was extended from Sunday, October 25, to Monday, October 26, 1998, because Sunday was a holiday. The scheduling of the inquiry for October 26 therefore was not problematic, and I find the applicant's submissions in this regard to be without merit. I also note, parenthetically, that if the objection had been sustainable, it would have defeated the applicant's own request for review.

The Police Act and the Police (Discipline) Regulation

On July 1, 1998 the *Police Act* was substantially amended. Because this inquiry concerns matters between the applicant and the Vancouver Police Department, which arose and may be pending under the old system, the following analysis refers to the state of the legislation before July 1, 1998.

The *Police Act* and the *Police (Discipline) Regulation* contemplate two streams of police disciplinary proceedings. The internal discipline stream is described in section 74(2)(c) of the *Police Act*, and Parts 1 and 2 of the *Police (Discipline) Regulation*. The citizen complaint stream is described in Part 9 of the *Police Act*, and in Part 3 of the *Police (Discipline) Regulation*. The hallmark of the internal disciplinary process is that it

is private - victims, witnesses, and members of the public have no right of participation. The hallmark of the citizen complaint process is that it is a public process initiated and participated in by citizen complainants. The two streams are also interrelated. A matter which is the subject of the internal disciplinary process may also be the subject of a citizen complaint, and vice versa. Appeals from decisions in both streams are to a police board, then to the Police Commission. Police Board and Police Commission inquiries which flow from the citizen complaint stream include review of the police investigation of the complaint and any internal disciplinary action intended to be taken.

Proceedings relating to the applicant and the Vancouver Police Department

The *Police Act* and *Police (Discipline) Regulation* proceedings relating to the Police Department and the applicant are not described as clearly as they might be in the parties' submissions. On the one hand, the Police Department claims that the applicant has pending "public inquiries" before the Vancouver Police Board. This suggests that there are pending hearings flowing from citizen complaints made by the applicant under Part 9 of the *Police Act*. On the other hand, the applicant's submission appears to refer to internal disciplinary investigations and proceedings, which he maintains are concluded. On the parties' submissions, I have not found it possible to sort out conclusively whether the proceedings each refers to are the same, different, or perhaps different but related. For instance, it appears possible under the *Police Act* that the internal disciplinary process may be concluded with respect to the applicant's complaints, but there may still be pending proceedings before the Vancouver Police Board relating to citizen complaints he has made against the Police Department.

Both parties' submissions focus on the requirement of section 3(1)(h) of the Act that a prosecution must not yet be completed. If, as argued by the Police Department, there are pending hearings relating to the applicant's citizen complaints against it and those matters are "prosecutions" under the Act, then section 3(1)(h) applies to exclude the application of the Act to all records relating to the pending hearings. If, as argued by the applicant, citizen complaint inquiries are not "prosecutions" under the Act and the relevant internal police disciplinary processes have been concluded, then section 3(1)(h) of the Act does not apply to his access to information requests.

I have concluded below that a "prosecution" within the meaning of the Act includes neither the internal disciplinary process nor the citizen complaint process under the *Police Act* and the *Police (Discipline) Regulation*. As a result, it is unnecessary to establish which stream(s) under the *Police Act* or the *Police (Discipline) Regulation* the proceedings between the applicant and the Police Department have been or are flowing. Since neither process is a "prosecution" under section 3(1)(h), the exclusion from the scope of the Act does not apply, whether or not the proceedings are concluded.

The Matsqui case

The *Matsqui* case is the linchpin of the Police Department's position. In that case, the Court of Appeal interpreted the word "offence" in section 54.1 of the *Police Act* (now

section 22 of the *Police Act*, R.S.B.C. 1996, c. 367) to include a disciplinary default under the *Police (Discipline) Regulation*.

The relevant wording of section 54.1 (now section 22) provided that, where a municipal constable had been charged with an "offence" against a regulation of the Province in connection with the performance of his duties, the council of the municipality in which he was employed could pay his costs connected with the charge.

A Matsqui police officer was subjected to internal disciplinary proceedings under the *Police (Discipline) Regulation*. He sought to have his costs reimbursed by his employer, the municipal council. It refused for reasons which included lack of statutory authority to indemnify, because "offence" in section 54.1 was confined to an offence under the *Offence Act* and did not encompass a disciplinary default.

The Court of Appeal upheld a wider meaning of "offence" in the context of section 54.1 of the *Police Act*. Carrothers J.A. spoke for the Court as follows:

> I advert to the well-established law on the construction of statutes. Words in a statute are primarily to be construed in their ordinary meaning or common or popular sense, unless the context requires some special or particular meaning to be used. The word "offence" is not defined in the *Offence Act* for the purposes of that statute. The word "offence" is not defined in the *Police Act* or the *Police (Discipline) Regulation* for the purposes of those enactments. Nor is "offence" defined in the *Interpretation Act*, R.S.B.C. 1979, c. 206, for purposes of construing all British Columbia statutes. This absence of definition indicates legislative intent that the word "offence" is to be coloured differently from statute to statute, as to its precise meaning and connotation, by the context and nature of its use within the framework of the particular statute under review.
>
> This is in keeping with another well-established law on construction of statutes that, although the words of a statute are normally to be construed in their ordinary meaning, due regard must be had to their subject matter and object and to the occasion on which and the circumstances with reference to which they are used, and they should be construed in the light of their context rather than their strict sense. General words must receive general construction, unless there is in the statute itself some grounds for restricting their meaning.
>
> In this case, I believe it is common ground that the word "offence" is used appropriately with respect to criminal charges (public law) but not with respect to civil grievances (private law). We have in this case of a police force a quasi-military disciplinary proceeding somewhere in between. The difficulty arises in this case because the constable was charged with an internal "disciplinary default" as contemplated by the *Police (Discipline)*

> *Regulation* rather than an "offence" as contemplated by the *Police Act*. Clearly, this does not constitute a civil grievance proceeding under the collective agreement at the other end of the spectrum from a criminal proceeding. How then is the "disciplinary default" to be characterized and classified? Does it fall within or without the ambit of the word "offence" found in section 54.1 of the *Police Act*?
>
> According to the Oxford Universal Dictionary, the word "offence" connotes the act or fact of offending, wounding the feelings of, or displeasing another; a breach of law, duty, propriety or etiquette; a transgression, sin, wrong, misdemeanor or misdeed; and nuisance. It runs the gamut from criminality, through tort and morality, to mere etiquette. In ascertaining the connotation of attributes commonly associated with the word "offence," as used in a statute, one must look to the occasion and setting of its use in the statute in question. The authorities are helpful in this regard.

Carrothers J.A. also referred to the case of *Re Trumbley and Fleming* (1986), 29 D.L.R. (4th) 557, in which the Ontario Court of Appeal had held that an officer charged with an offence against discipline under regulations under the Ontario *Police Act* was not charged with an "offence" within the meaning of section 11 of the *Canadian Charter of Rights and Freedoms*. His Lordship then drew a context specific conclusion about the meaning of "offence" in section 54.1 of the *Police Act*:

> ...We must not make the mistake of attempting to define "offence" in a vacuum but rather in the context and setting of its use. Here the occasion of the use of the word "offence" is in relation to a provincial regulation providing for procedures and proceedings dealing specifically with internal "disciplinary defaults." This context and circumstance of the word "offence" appearing in section 54.1 of the *Police Act* especially as applicable to an infraction of a provincial regulation, compels me to construe "offence" as extending and having application to a "disciplinary default" under the *Police (Discipline) Regulation*....

Other jurisprudence

After *Matsqui* was decided, the Ontario Court of Appeal's decision in *Trumbley* was upheld by the Supreme Court of Canada (see (1987), 45 D.L.R. (4th) 318). In *Trumbley* and three concurrently released decisions, *Wigglesworth v. The Queen* (1987) 45 D.L.R. (4th) 235; *Trimm v. Durham Regional Police Force* (1987), 45 D.L.R. (4th) 276; and *Burnham v. Ackroyd* (1987), 45 D.L.R. 309, the Supreme Court held that the word "offence" in section 11 of the *Charter* refers to proceedings which are either penal in nature or carry true penal consequences (i.e., imprisonment). In that context, "offence" does not refer to "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited

sphere of activity": per Wilson J. in *Wigglesworth* at 251. Wilson J. also stated that (at 252):

> …[t]here is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of offence proceedings to which section 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which section 11 is applicable.

The Supreme Court found that internal police disciplinary proceedings are not penal in nature and, therefore, only constitute "offence" proceedings within the meaning of section 11 of the *Charter* when they entail true penal consequences. This is a rare occurrence, which is triggered by neither internal nor public complaint proceedings under the British Columbia *Police Act* and *Police (Discipline) Regulation*.

The importance of context

Context is an essential consideration in statutory interpretation. The different meanings given to the word "offence" in the Matsqui case versus the section 11 *Charter* cases reflect the different statutory contexts.

Contextual cues in the *Charter* were important to the section 11 line of cases. In *Wigglesworth* at 247-248, Wilson J. stated:

> The Ontario Court of Appeal in *Re Trumbley and Fleming*... in concluding that section 11 is concerned only with criminal or penal matters, properly observed that "the clear impression created by section 11, read as a whole, is that it is intended to provide procedural safeguards relating to the criminal law process." Section 11 contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty," "reasonable bail," "punishment for the offence," "acquitted of the offence," and "found guilty of the offence." Indeed, some of the rights guaranteed in section 11 would seem to have no meaning outside the criminal or quasi-criminal context.

Contextual cues were also important in the *Matsqui* case. Despite the fact that the word "offence" is most frequently associated with prosecutions of a criminal or quasi-criminal nature, the Court of Appeal sought to give meaning to the words in section 54.1 of the *Police Act* "charged with an offence against a … regulation of the province … in connection with the performance of his duties..." In the specific context of the *Police Act* and the *Police (Discipline) Regulation*, those words could only be given meaning if they

included an internal disciplinary proceeding under the *Police (Discipline) Regulation*, even though such a proceeding is not criminal or quasi-criminal in nature, nor does it carry with it true penal consequences.

The weakness of the Police Department submission is that it requires the meaning of "offence" in section 54.1 (now section 22) of the *Police Act* to be transported into section 3(1)(h) and the definition of "prosecution" in the Act, without any contextual analysis which would justify the same interpretive treatment of that word in both environments. The Police Department has assumed that, if an internal disciplinary proceeding is an "offence" for purposes of section 22 of the *Police Act*, then it must also be the prosecution of an "offence" for purposes of the Act. This reasoning ignores a contextual analysis of the meaning of "prosecution" under the statute now in issue - the *Freedom of Information and Protection of Privacy Act*.

According to the exhaustive definition in Schedule 1 of the Act, "prosecution" in section 3(1)(h) means "the prosecution of an offence under an enactment of British Columbia or Canada." Contextual cues are then found in at least two other definitions: the "exercise of prosecutorial discretion" and "law enforcement." The definition of "exercise of prosecutorial discretion" is revealing because it only has meaning in the context of a criminal or quasi-criminal prosecution:

> "exercise of prosecutorial discretion" means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (a) to approve or not approve a prosecution,
>
> (b) to stay a proceeding,
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> (c) to prepare for a hearing or trial,
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> (d) to conduct a hearing or trial,
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> (e) to take a position on sentence, and
>
> (f) to initiate an appeal.

This narrow conception of "prosecution" is also supported by section 15(4) of the Act in that it only contemplates the existence of a "decision not to prosecute" in connection with "a police investigation" where there may be a "victim."

In contrast, the definition of "law enforcement" is not restricted to criminal and quasi-criminal matters:

> "law enforcement" means

(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.

The risk of penalty or sanction referred to in the definition of "law enforcement" is wider than true penal consequences associated with offence prosecutions under section 11 of the *Charter* and has been so interpreted in conjunction with the section 15 exception in the Act. Thus the Act distinguishes between "law enforcement" matters which may be criminal, quasi-criminal, regulatory, or disciplinary in nature, and "prosecution" matters which are limited criminal or quasi-criminal processes.

A further consideration, which favours a narrow interpretation of "prosecution" in the Act, is that the Police Department's position would result in an inconsistent application of section 3(1)(h). That is, if an external statute used the word "offence" to describe a disciplinary or regulatory proceeding, records relating to that proceeding would be excluded from the scope of the Act so long as the proceeding was underway. Yet section 3(1)(h) would not apply to records relating to a disciplinary or regulatory proceeding which was of the same essential nature as the first example, if its home statute did not use "offence" language. It seems unlikely that the scope of the Act was intended to extend or retract in such an unprincipled manner.

Conclusion on the section 3(1)(h) issue

I have concluded that the *Matsqui* case does not accord with the definition of "prosecution" in the Act. This is because the context of the Act does not support the same approach as under section 54.1 of the *Police Act*. In my opinion, "prosecution" in Schedule 1 of the Act, and thus also in section 3(1)(h) of the Act, means a prosecution of a criminal or quasi-criminal offence. Since police disciplinary proceedings under the *Police Act* or the *Police (Discipline) Regulation* do not meet this parameter, section 3(1)(h) of the Act does not apply to the applicant's requests for information from the Police Department.

7. Order

I find that section 3(1)(h) of the Act does not apply to the records in dispute. Therefore, under section 58(3)(a), I require the Vancouver Police Department to comply with the Act by processing the applicant's requests as requests for records which do fall under the scope of the Act.

Under section 58(4) of the Act, I require the Vancouver Police Department to complete its review of the records in dispute within thirty days of this order and to provide the applicant with a response as required by section 8 of the Act.

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David H. Flaherty
Commissioner

February 11, 1999