
LAW ENFORCEMENT REVIEW BOARD

IN THE MATTER OF the Police Act, R.S.A. 2000, c.P-17, and the Police Service Regulation.

AND IN THE MATTER OF a Preliminary Application concerning the admissibility of Involuntary Statements in the appeal of James Best (the "Appellant") before the Law Enforcement Review Board (the "Board").

JUDGMENT OF THE BOARD

(Phillips/Johnson/Mackenzie)

BACKGROUND

[1] The Appellant seeks production for disclosure purposes of the directed explanatory reports (the "Directed Reports") prepared by the Respondent Officers pursuant to Section 10 of the *Police Service Regulation* (the "PSR"). Such disclosure has been objected to by the Respondent Officers. The Chief of the Edmonton Police Service (the "EPS") has respected the Respondent Officers' objections, and has therefore not disclosed the Directed Reports to the Appellant.

[2] The legal issue is whether or not the Directed Reports prepared by police members are exempt from the Chief's disclosure obligations in the course of an appeal to the Board due to the privilege granted by Sections 10(3) and 10(4) of the *PSR*.

POSITION OF THE APPELLANT

[3] The Appellant takes the position that the Directed Reports prepared by the police members, although privileged, are not exempt from the Board's power to compel production of relevant documents. In support of that position the Appellant submits that:

- Section 20 of the *Police Act* (the "*Act*") specifically authorizes the Board to compel production of "All reports, statements, correspondence or other documents or things relating to the matter".
- The wording of Section 20(d) of the *Act* allows the Board to require the production of any statement relating to the matter under appeal.
- The test in determining the scope of production of records is, as in civil litigation, one of relevance not admissibility.
- Nothing in Section 10 of the *PSR* exempts Directed Reports from the specific powers of the Board under Section 20(d) of the *Act*, as such subordinate legislation is not to conflict with the enabling statute.
- Not disclosing the Directed Reports undermines the Legislature's objectives of the *Act* which is to increase public confidence in police services and the investigation of citizen complaints against police.
- Without the Directed Reports a public complainant would be deprived of the information provided by the police members to the Chief of the EPS upon which the Chief renders his disposition of the complaint.
- Procedural fairness requires disclosure of the Directed Reports. The disclosure process helps clarify the issues in dispute, allows parties to assess the strength of their position, shortens proceedings by avoiding "ambush" or surprise, all of which encourage the resolution of disputes whenever possible.

POSITION OF THE RESPONDENTS

[4] The Respondent Officers take issue with the Appellant's submissions and take the position that the Directed Reports are privileged and therefore not properly producible in proceedings before the Board. In support of that position the Respondents submit that:

- The Chief of the EPS has followed a practice of being briefed on the whole investigative file relating to a complaint, including all statements, voluntary or involuntary, given by a police officer subject to a complaint.
- The Chief of the EPS then formulates his opinion as to whether the actions of the police officers constitutes a contravention of the Regulation governing the discipline or the performance or duty of the police officer.
- The decision of the Chief of the EPS is not a finding of guilt or innocence, which can only be done after a disciplinary hearing based upon properly admissible evidence, which may include the evidence of the police officer who is subject to a complaint.
- Directed Reports provided under Sections 10(3) and 10(4) of the *PSR* serve a very narrow purpose and are prepared solely to allow the Chief of the EPS to make a decision as to whether sufficient grounds exist to direct that a disciplinary hearing must be conducted on the matter.
- Directed Reports provided under Sections 10(3) and 10(4) of the *PSR* are statutorily privileged statements, are “not admissible” in evidence in any proceedings carried out under the *Act* against a respondent officer, and therefore, are not producible in any proceedings before the Board.
- Any privilege associated with a Directed Report belongs to the police officer who provided the statement, therefore the Chief of the EPS is not in a position to waive any privilege or to produce the Directed Reports as part of the Chief’s disclosure.
- If interpreted properly there is no conflict between Sections 10(3) and 10(4) of the *PSR* and Section 20 of the *Act*, and the Board has no jurisdiction to order the release of Directed Reports to an Appellant.

POSITION OF THE CHIEF OF POLICE

[5] The Chief has not provided copies of the Directed Reports in view of the position of the Respondent Officers. In support of his position the Chief submits that:

- The *Act* must be interpreted in a manner consistent with the objectives of the legislation. Decision-makers such as the Board cannot interpret the legislation in a manner inconsistent with the plain words of the legislation.
- The Board must consider the rights of both the complainant and the rights of the Respondent Officer whose livelihood may ultimately be in jeopardy as a result of the

disciplinary proceedings.

- The duty of fairness depends on the circumstances of each case. With other information available to the Appellant, it is unlikely to breach the duty of fairness by not disclosing copies of the directed reports.

DECISION

[6] The Board has previously held that the *Act* must be interpreted in a manner that is consistent with the objectives of the legislation. In *Plimmer v. Calgary (City) Police Service*, 2004 ABCA 175, at paragraph 32 the Alberta Court of Appeal articulated the objectives of the hearing and appeal provisions in the *Act* as follows:

"The particular purpose of the hearing and appeal provisions at issue in this appeal, is to allow an avenue for public complaint and a mechanism for inquiring into such complaints, with a view to balancing the need for public confidence with the employment rights of the officer in the context of the safe, efficient and effective operation of the police service."

[7] Similarly, the Board has previously held that one of the main objectives of the *Act*, with its establishment of a complaint and appeal system, is to preserve community confidence in the police (*Malott*, Board Judgment No. 028-2005 at para. 41). The Solicitor General, in a press release dated April 4, 2005 concerning proposed amendments to the *Act*, also referred to a "clear and open process" which is a "cornerstone of public security in Alberta". He said:

"Bill 36... ensures fair and objective investigations into complaints against police and enhances the credibility of the complaint review process..."

"We want to assure Albertans that the handling of public complaints against police is a clear and open process and that justice is done and is seen to be done."

"The Police Act is a cornerstone of public security in Alberta. These amendments reflect Albertans' changing views on how the police should be overseen..."

The Board, therefore, reiterates its view that public confidence in the police is one of the main objectives of the *Act*. This is balanced, of course, by the police officer's employment rights and recognizing the context

of the need for a safe and effective police service.

[8] The specific legislative provisions relating to the Directed Reports is contained in Section 10 of the PSR passed pursuant to the Act. Section 10 provides as follows:

"10(1) Where an investigation is carried out in respect of a complaint as to the actions of a police officer, the police officer shall be advised as to the details of the complaint and be provided with a copy of all statements made by the complainant.

(2) A police officer in respect of whom an investigation is being carried out may, on a voluntary basis, provide the investigator with an explanatory report in the police officer's own words setting out his version of the subject-matter of the complaint.

(3) Where

(a) a police officer in respect of whom an investigation is being carried out is directed by the investigator to provide an explanatory report referred to in subsection (2) setting out the police officer's version of the subject-matter of the complaint, and

(b) pursuant to that direction the police officer provides an explanatory report, that explanatory report shall be regarded as an involuntary statement and shall not be admissible in evidence in any proceedings carried out under the Act, except to prove that the statement is false.

(4) Where

(a) a police officer who might reasonably have knowledge of matters pertaining to a complaint or report is directed by the investigator to provide an explanatory report referred to in subsection (2) setting out his knowledge of any matters pertaining to the matter under investigation, and

(b) pursuant to that direction the police officer provides an explanatory report, that explanatory report shall be regarded as an involuntary statement and shall not be admissible in evidence in any proceedings carried out under the Act against him, except to prove that the statement is false.

(5) A police officer who is directed by an investigator under subsection (3)(a) or (4)(a) to provide an explanatory report shall do so within 14 days of being notified of the direction.

(6) A statement made under subsection (3) or (4) may be used by the chief of police for the purposes of section 45(3) or (4) of the Act and by the chief of police or the police officer in charge of the investigating police service for the purposes of section 46.1(4) of the Act."

[9] The issue before the Board in this application is whether the Directed Reports, regarded as involuntary statements under Sections 10(3) and 10(4) of the *PSR*, are privileged and therefore not producible.

[10] For the purpose of conducting an appeal before it, the Board has the power, under Section 20(1)(d) of the *Act* to require a Chief of Police to produce to the Board, prior to an appeal hearing, copies of all investigative reports, statements, correspondence or other documents or things relating to the matter. Thus, Section 20(1)(d) of the *Act* grants a very broad authority and discretion to the Board with respect to disclosure.

[11] In considering the exercise of this authority and discretion in the circumstances of this particular case, however, the Board is mindful of three significant factors that weigh against disclosing the involuntary statements to the Appellant. First, as the term "involuntary statement" implies, the statements are generated by compulsion, and not freely given. Second, Section 10 of the *PSR* places a broad prohibition on the use of these statements. Third, Section 10 expressly provides for specific narrow exceptions to the prohibition on the use of involuntary statements (ie. by the Chief for the purposes of Sections 45(3), or (4) of the *Act*, by the Chief or the police officer in charge for the purposes of Section 46.1(4) of the *Act*, and to prove that the statement is false). The specific exemptions do not contemplate broad disclosure to complainants. The intent of Section 10 as a whole appears to be to cloak involuntary statements with a degree of statutory privilege.

[12] In "In the Matter of Disclosure Related to Numerous Appeals", Judgment No. 008-2006 ("Judgment No. 008-2006"), the Board stated at paras. 56-61:

"[56] The objectives served by discovery/disclosure is the same in any type of legal proceeding regardless of the forum. Requiring discovery/disclosure is aimed at clarifying issues in dispute between the parties, allowing the parties to assess the strength of the parties' positions, shortening of the proceedings by avoiding "ambush" or surprise, and encouraging the resolution of disputes whenever and as early as possible. ...While disclosure in proceedings before tribunals such as the Board may not be subject to the same level of statutory codification and therefore left more to the discretion of the particular tribunal, pre-hearing disclosure is an important step in such proceedings. In the context of Board proceedings the objectives served by disclosure are the same

as in proceedings before the courts and many of the same principles can and should be applied by the Board when determining what disclosure policies and procedures should be implemented in order to best foster those objectives. ...

In order to foster the objectives which are set out in the preceding paragraph of this judgment, the Board requires the parties to disclose to one another the details of their respective cases. The nature of the Board's direction in relation to disclosure under the Board's new disclosure procedure is set out in paragraph [6] of this judgment. As is usually the case, the appellant discloses the details of their case first and the respondent then responds in kind, each providing sufficient detail to enable preparation in advance of the hearing of the appeal.

[58] In most civil proceedings the information and documentation required by a party to comply with discovery procedures is within the control of that party, although there will be cases in which information and records will be in the hands of a third party. However, in the case of proceedings under the Act, most if not all of the documentary evidence related to the investigation of the original complaint will be in the hands of the applicable police service, under the care and control of its chief. Both parties to the appeal will likely require some or all of such documentation in order to prepare their case.

[59] Subsection 20(1)(c) empowers the Board to compel attendance and production in relation to witnesses who will be providing evidence at the hearing of the appeal. While some of the documentary evidence and records required by the parties in order to present their cases at the appeal hearing may be in the hands of persons who will be called as witnesses at the hearing, not all of it will be. More importantly, not requiring production until the hearing leaves disclosure of the documentary evidence to a very late stage in the proceedings. Accordingly, recognizing that important documentary evidence will be in the control and custody of the chief of police and facilitating the objectives of the pre-hearing disclosure, the Board has been granted the additional power, in subsection 20(1)(d), to require a chief of police to produce relevant documentary evidence prior to the hearing of an appeal. In this way the Board can ensure that the parties to appeal proceedings have relevant documentary evidence available early enough in the process to adequately prepare their case. It is important to note that the powers granted to the Board in these subsections confer discretionary power on the Board and do not create rights in favour of the parties. It is the exercise of this discretion (specifically what conditions or limits should be imposed where the Board chooses to exercise it) that is the focus of the issues which gave rise to this judgment.

[60] The parties to proceedings before the Board have a legal obligation to disclose to one another, as do participants in similar quasi-judicial proceedings before other administrative tribunals. Neither of the parties involved in the subject applications disagrees with that principle (although they may disagree with the level of disclosure required of them) and the need to disclose that is not the issue in dispute in this judgment. Their principal disagreement is in relation to the production of documentary evidence by the chief of police. ... As set out in the Board's disclosure letter, appellants and

respondents must provide details of the nature and specifics of their grounds of appeal or response to the grounds of appeal, as a case may be, related to the allegations being pursued in the appeal, a summary description of their evidence (including the identification of the witnesses who will provide it) and a summary of any legal arguments or authorities they intend to rely on. The Board is of the view, however, that in order to do so the parties must be provided with the documentary evidence obtained through the investigation of the complaint. ...

[61] The Board considers that any material that might be relevant to the issues in the appeal be supplied to the parties at an early stage in the proceedings since the parties will be in the best position to determine the relevance and importance of the various materials in light of the case they intend to put forward. Since proceedings before the Board are adversarial in nature and it is up to the parties to present their cases, full disclosure of any relevant materials should be made, subject only to exclusions based on applicable principles (such as those that apply in the case of privileged materials or materials which should not be produced due to health or safety concerns or other reasons clearly founded in the public interest)."

The Board reiterates this view. In these circumstances, there is no conflict between Section 20(1)(d) of the *Act* and Sections 10(3) and 10(4) of *PSR*. This is because full disclosure is subject to "exclusions based on applicable principles", including privilege.

[13] Sections 10(3) and 10(4) of the *PSR* create a statutory privilege for Directed Reports that are produced pursuant to a direction from the investigator. These statements are to be regarded as involuntary statements, and are not be admissible in evidence in any proceeding under the *Act*, except to prove that the statement is false.

[14] As the Directed Reports are protected by statutory privilege under Sections 10(3) and 10(4) of the *PSR*, it follows that only the person holding the privilege has the authority or power to remove or waive such privilege. This would be supported by the comment of Lewis, J in *Klassen v Dachyshyn* 217 A.R. 191 at para. 14 and by the decision of the Alberta Court of Appeal in *Low v Larue* 206 A.R. 397. In the circumstances of this case, the privilege holder is the police officer who provided the Directed Report. The privilege granted, unless waived, prevents its disclosure by the Chief under the appeal disclosure process. It also entitles the Respondent Officer who produced the Directed Report to decline to disclose it to the Appellant.

[15] The Respondent officers took the position that the Directed Reports as provided for in Section 10(3) and 10(4) of the *PSR* serve a very narrow purpose, being solely to allow the Chief of the EPS to make a decision as to whether sufficient grounds exist to direct that a disciplinary hearing be conducted. This interpretation would appear to be supported by the wording of Section 10(6) of the *PSR*.

"10(6) A statement made under subsection (3) or (4) may be used by the chief of police for the purposes of section 45(3) or (4) of the Act and by the chief of police or the police officer in charge of the investigating police service for the purposes of section 46.1(4) of the Act."

[16] This subsection allows a Chief of Police to use Directed Reports as evidence to decide, under Section 45(3) of the *Act*, whether to hold a disciplinary hearing or not to. The *PSR* does not provide a similar authorization for the Board to use the Directed Reports in order to make a decision pursuant to Section 20(2)(b) of the *Act*. Presumably, this is because the Board may hear oral testimony – including direct examination and cross-examination – regarding the events in question. Whatever the rationale, however, section 10(6) of the *PSR* authorizes the use of Directed Reports for only specific purposes, and use as evidence in a hearing before this Board is not one of those specified uses.

[17] Once a decision is made to hold such a hearing, it would appear that such a hearing would then be governed by the provisions of Section 47(1) of the *Act* concerning the conduct of the hearing, the powers of the person conducting the hearing and what evidence may be heard. The power under Section 47 of the *Act* does not appear to include use of Directed Reports as that purpose does not come under the specific statutory exemption provided by Section 10(6) of the *PSR* to the statutory privilege granted under Sections 10(3) and 10(4) of the *PSR*. This issue, however, does not have to be decided in the present case, as the issue of this application is only concerning the privilege of Directed Reports for disclosure purposes in the context of an appeal in a matter where no hearing has been held.

CONCLUSION

[18] Directed Reports, for the reasons set out above, are protected by statutory privilege under Sections 10(3) and 10(4) of the *PSR* and therefore are not properly producible by the Chief of the EPS in his

disclosure obligations to the Appellant unless such statutory privilege has been waived by the Respondent Officer who made the Directed Reports.

COMMENTS ON DISCLOSURE PROCESS

[19] The Board has previously held that its disclosure process has a number of objectives such as clarification of the issues in dispute, and producing more efficient and effective proceedings by avoiding “ambush” and surprise tactics. This allows the parties information to assess the strength of their position, which has the benefit of encouraging the resolution of disputes. These objectives are even more relevant when one considers the interest the public has in “a clear and open process”.

[20] The Board, in addition to its powers specified under the *Act* and subject to the rules of natural justice does have general control over its processes. Part of this process is to ensure that its hearings are as open, transparent and efficient as possible.

[21] With these important principles in mind, the Board strongly discourages any police service from adopting a general policy - written or unwritten - that all investigated police officers responding to a public complaint will be directed to provide an explanatory report, with the result that the Directed Reports are therefore privileged and non-disclosable. Such a policy would, in the Board's view, be counter productive, and could foster the impression with the public that such a police service is trying to hide matters or it could lead to a sense of suspected cover ups. Human nature being what it is, if an officer knows that his or her explanation will not be made public, there could be temptation to colour the description of how the incident transpired. More importantly, a general approach of claiming all explanatory reports provided under Section 10 of the *PSR* as Directed Reports could also lead to a public view that police officers cannot be trusted to tell the truth in an open forum, and therefore lead to a decrease in public confidence in the system. A more transparent process could increase public confidence in the system. The Board notes, incidentally, that any general policy encouraging involuntary statements would be ineffective in any event. This is because it is the Directed Report itself that is cloaked with privilege, not the circumstances of the incident that gave rise to the complaint.

[22] The Board notes that the provisions of Section 10 of the *PSR* are part of the police complaint review process established by the legislation. The first step in this complaint review process is a request for a voluntary statement (Section 10(2) *PSR*). The Board strongly encourages all police services in Alberta to encourage investigated police officers to provide a voluntary statement pursuant to Section 10(2) of the *PSR*, rather than to require a direction from the investigator which leads to a Directed Report. Members of a police service are carefully selected, highly trained and granted much power and authority over the general public. Such high levels of power and authority come with high levels of expectation by the public on its use. Of course, the Board recognizes that Sections 10(3) and (4) allow a police officer to require a direction by the investigator and therefore allow the officer to maintain privilege over the Directed Report. In this context, the Board reiterates its view that all police services ought to encourage police officers to make a voluntary statement rather than to rely on a Directed Report, and most certainly not to have a general policy favouring Directed Reports.

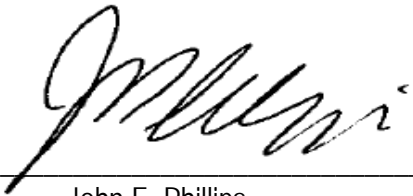
[23] In addition, in cases where a Directed Report has been provided and the accompanying privilege has not been waived, the Board nonetheless expects the Respondent Officer to provide to the Appellant a summary of what occurred in the incident giving rise to the complaint as part of the disclosure process. This allows the Appellant to understand the case they face. The requirement of a summary of events is not dependent on whether the Respondent Officer will testify; it must be provided whether or not the Respondent Officer will testify. It should set out the Respondent Officer's version of the facts in question. The provision of a summary of the events is not dependent on whether or not the Respondent Officer will testify, but should be based on if the Respondent Officer testifies this is what he would say. This approach will prevent surprises that would require the Appellant to request an adjournment to consider what effect undisclosed evidence would have or would have had on the case being presented. This is consistent with the Board Order in Judgment No. 008-2006, set out at para. 6 of that decision.

[24] In addition, the Board is of the view that it is not sufficient to rely solely on the disposition letter of a Chief of Police, because disposition letters vary greatly in the substance and detail of the incident and subsequent investigation. This is also consistent with the Board's view in Judgment No. 008-2006, at para. 71:

"[71] The Board cannot accept the argument of the EPS that because section 47(5) of the Act

requires a chief of police to provide written reasons that all complainants will have full knowledge of the evidence that was gathered in the course of the investigation and the chief's rationale for dismissal. In the Board's experience the level of detail provided in disposition letters issued by chiefs of police in the province of Alberta varies considerably. While some letters are extremely thorough in detailing the underlying evidence and the rationale for the chief's decision (which is not in all cases a decision to dismiss), other letters are less thorough and in rare cases it may be very difficult to determine what evidence was relied on and what the rationale was for the decision made."

[25] Accordingly, the Board directs each Respondent Officer to provide, as part of the disclosure to the Appellant, a statement with the Respondent Officer's summary of what occurred in the incident giving rise to the Appellant's complaint. The Board directs each Respondent Officer to provide this written statement whether or not the Officer intends to testify at the hearing. If the Respondent Officer chooses, he or she may instead waive privilege with respect to the Directed Report and provide a copy of the Directed Report instead of a written summary of his or her testimony.



John E. Phillips
Chair

DATED at the City of Edmonton,
in the Province of Alberta, this
9th day of March, 2010.

cc: Board Counsel
Erika Norheim, Counsel for the Appellant
Lorena Harris, Counsel for the Respondents
Bonnie Bokenfohr, Counsel for the Chief of Police