

REVIEW ON THE RECORD
(Pursuant to Section 138(1)(d) *Police Act*, R.S.B.C. 1996, c.267)

In the matter of
Review on the Record into the complaint against
Chief Constable Jamie Graham
of the Victoria Police Department

Decision of Adjudicator Alan E. Filmer, Q.C.

To:	Mr. Bruce Dean	(3 rd Party Complainant)
And To:	British Columbia Civil Liberties Association c/o Mr. David Eby	(3 rd Party Complainant)
And To:	Chief Constable Jamie Graham Victoria Police Department	(Member)
And To:	Mayor Dean Fortin, Chair Victoria Police Board	(Delegated Discipline Authority)
And To:	Mr. Stan T. Lowe Police Complaint Commissioner	

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Pursuant to a request made by Counsel acting for Chief Constable Jamie Graham for a review on the record, and a request made by the complainant Mr. Bruce Dean for a public hearing, the Police Complaint Commissioner (PCC) concluded that under Section 138(1)(d) of the Police Act, a Review on the Record was necessary in the public interest relative to the decision of the Discipline Authority (DA) regarding Chief Graham.

I was appointed as the Adjudicator in this matter, and as such, was supplied with all the necessary documentation and written arguments, including two binders with over 500 pages.

Background:

On November 30, 2009, Chief Constable Graham appeared as one of several keynote speakers at the 12th Annual Vancouver International Security Conference, held at the Marriott Hotel in Vancouver B.C. During his keynote address, Chief Graham stated that the protesters of the Olympic Torch Relay had hired a bus on the Vancouver – Victoria ferry, and that “there was a cop driving the bus”.

These comments were in reference to security operations for the 2010 Olympic Torch Relay, scheduled to arrive in Victoria on October 30, 2009, where they would travel across Canada to herald the 2010 Winter Olympic Games held in Vancouver B.C.

The Discipline Authority process began as a result of a complaint made December 15, 2009, by Mr. Bruce Dean regarding Chief Graham's comment. In his complaint, Mr. Dean alleged that Chief Graham disclosed "the identity of an undercover officer to the general public" and that by disclosing the identity he was "jeopardizing the safety of the officer". I attach the said Notice containing an accurate chronology of events which followed in this matter.

Issues Dealt With During the Disciplinary Proceeding:

During the course of this proceeding, several issues arose. The first issue was the appointment of two separate investigators. The initial investigation was conducted by Chief Superintendent Harrison. All parties agreed that investigation was flawed. As a result, the PCC, in a letter dated 26 July 2010 to Assistant Commissioner MacIntyre of the RCMP, requested that a fresh investigation be undertaken and that it be performed by a senior officer other than Chief Superintendent Harrison. The new investigation was conducted by Chief Superintendent Taylor.

Concern was registered by Chief Graham's Counsel that the PCC did not indicate the section of the Act, or the power used, in his request for a second investigation. It is my view that the new Police Act came into effect 31 March 2010, and that Section 93(1) in this Act gives the necessary authority for the second investigation. It is also my view that following receipt of Superintendent Taylor's investigative report to the DA, this matter proceeded correctly.

The second issue that was dealt with before the DA was whether to use S.77(3)h of the new Police Act, or S.5 of the old Code of Professional Conduct. Counsel for the Chief made a submission that the delict should be that as defined in S.5 of the old Code, not the delict as defined in S.77(3)h. The DA agreed. This agreement avoided a potentially flawed proceeding, and in my view, the DA proceeded correctly in this matter.

Core Issue in This Review:

The core issue before me is the allegation of discreditable conduct by Chief Constable Graham. On 30 November 2009, Chief Graham was a keynote speaker at the Annual Vancouver International Security Conference. During his address, he stated, in part, that on a bus carrying protesters to the Olympic Torch Relay in Victoria, “there was a cop driving the bus”.

It was argued forcefully by Chief Graham’s Counsel that the delict required intentional or reckless behaviour, to wit: a mental element as defined in S.17 of the Code. Counsel submitted that the comment by Chief Graham was “unscripted, spontaneous and inadvertent”, and therefore did not meet the definition of recklessness. He argued that recklessness is defined in the Code as conduct of a person who is aware that there is danger that his conduct could bring about the prohibited result (here, discreditable conduct) but nevertheless persists, despite the risk.

This submission by Counsel must be examined with care because it was not accepted by the DA, who stated that “it is my view that the approach to the interpretation of the phrase should be to apply the ordinary meaning of the phrase ‘likely to discredit’ as opposed to an absolute test”.

Mr. Hern, on behalf of Chief Graham, in his concluding paragraph says:

A review on the record is conducted on a standard of review of correctness (s.141(9)). Here, in failing to consider the mental element that is required to establish the discipline default, the DA committed a fundamental legal error resulting in decision which is clearly incorrect. The DA’s decision should be set aside and substituted with a dismissal of the allegation against Chief Graham.

I have examined this submission as it appears to be the key issue relevant to this review.

The statutory basis for the finding by the Discipline Authority includes the following:

Disciplinary defaults

*S.4(1) In this Code, “disciplinary default” means
(a) discreditable conduct*

Discreditable Conduct

*S.5 For the purposes of section 4 (1) (a), a police officer commits the disciplinary default of discreditable conduct if
(s) the police officer, while on duty, acts in a disorderly manner or in a manner that is
(ii) likely to discredit the reputation of the municipal police department with which the police officer is employed*

Mental element of disciplinary default

S.17 Unless otherwise specified in this Code, a police officer commits a disciplinary default if the police officer intentionally or recklessly committed the act or omission constituting the disciplinary default.

It is clear that under Section 17, either “intention” or “recklessness” is required, but not necessarily both.

As Hon. Ian H. Pitfield states in a 14 January 2011 decision, where he was sitting as an adjudicator under the Police Act, Section 17 of the Code stipulates “that an officer **only** committed a disciplinary default if the officer intentionally or recklessly committed the act or omission constituting the disciplinary default” (emphasis added). (See paragraph 32 of that decision, and page 6 of Mr. Hern’s argument in this matter dated 6 June 2011.)

Sections 5 through 16, which define with more certainty what is meant by Section 4, all require the use of Section 17, the mental element. Examples throughout Sections 5 to 16

are clear that where an intention may be present, such as *signs a false statement*, or with *an intent to deceive, destroys all of an official document*, the element of recklessness need not be proven, as the act of signing the statement intentionally or destroying the document would be sufficient.

Many more examples are included in Section 5 to 16 which require only the intentional commission of an act to result in a disciplinary default (S.4).

Mr. Hern, on behalf of Chief Graham, leans heavily on the requirement of recklessness. He does not discuss “intentionally” in his argument.

The work “reckless” has a range of definitions.

Black’s Law Dictionary defines reckless as *characterized by the creation of a substantial and unjustifiable harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.*

Funk & Wagnalls Dictionary includes in the definition of reckless as *1. foolishly heedless of danger; rash.*

The Concise Oxford Dictionary defines reckless as *lacking caution, regardless of consequences, rash; heedless of danger, etc.*

I do not agree that “reckless” is the sole criterion which should be used in determining that this delict has occurred. It is obvious that a disciplinary default of this nature can occur by intentional conduct. I find the element of intention is present in Chief Graham’s words “there was a cop driving the bus”, whether the intention was to elicit humour from the conference audience, or whether the intention was to make fun of the protesters at the Olympic torch relay.

In addition to the above, I find also a degree of recklessness in the Chief's words, as, under the circumstances, his words were both "heedless" and "rash".

In the course of these proceedings, Counsel for Chief Graham further argued that the comment was not serious, that it was unscripted and spontaneous, and could be characterized as inadvertent.

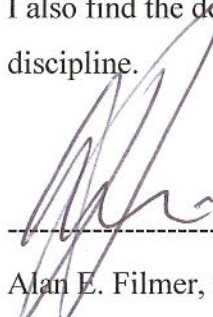
This argument fails to consider adequately the time-honoured principle that nothing should be done or said that may, in any way, disclose the existence of an undercover operation or any of its participants. This principle is especially pertinent here, as the comment was made just one month into the Torch Relay, which was scheduled to continue for another two months until the Olympics.

At the time, Chief Graham apologized immediately to his own Department, to the R.C.M.P., and to those involved with security for the Torch Relay. It is commendable that the Chief recognized his error, and made a full apology. However, as the Discipline Authority said, the apology is in itself an indication of Chief Graham's awareness of the seriousness of such a disclosure by a police officer, and how it could not fail to discredit the reputation of his own police department.

Conclusion:

I find that in applying a standard of correctness to this matter, the proceeding before the Discipline Authority was not flawed in any way.

I also find the decision to require a letter of reprimand was an appropriate level of discipline.



Alan E. Filmer, Q.C., Adjudicator



Date



Office of the
Police Complaint Commissioner

British Columbia, Canada

AMENDED
NOTICE OF REVIEW ON THE RECORD
(Pursuant to Section 138(1)(d) *Police Act*, R.S.B.C. 1996, c.267)

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of the Victoria Police Department

TO: Mr. Bruce Dean (3rd Party Complainant)

AND TO: British Columbia Civil Liberties Association (3rd Party Complainant)
c/o Mr. David Eby

AND TO: Chief Constable Jamie Graham (Member)
Victoria Police Department

AND TO: Mayor Dean Fortin, Chair (Delegated Discipline Authority)
Victoria Police Board

WHEREAS:

1. On November 30, 2009, Chief Constable Graham appeared as one of several keynote speakers at the 12th Annual Vancouver International Security Conference, held at the Marriott Hotel in Vancouver B.C. During his keynote address, Chief Constable Graham stated, in part:

The protestors, very few arrests made, everyone left upset with ah why there wasn't really much action. And then you knew that the protestors weren't really that organized when on the ferry on the way over they all rented a bus. They all came over on a bus. There was a cop driving the bus.

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future correspondence via
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These comments were in reference to security operations for the 2010 Olympic torch Relay that arrive in Victoria on October 30, 2009, as a precursor to the 2010 Winter Olympic Games held in Vancouver B.C.

2. On December 15, 2009, the Office of the Police Complaint Commissioner received a Form 1 Record of Complaint from Mr. Dean. In his Form 1 complaint Mr. Dean alleged that Chief Constable Graham disclosed "the identity of an undercover officer to the general public" and that by disclosing the identity he was "jeopardizing the safety of the officer".
3. On January 4, 2010, Mr. Dean's complaint was confirmed by this office as Public Trust, the *Police Act* investigation was assigned to Chief Superintendent Harrison of the Royal Canadian Mounted Police.
4. On March 31, 2010, a newly amended *Police Act* was enacted. The *Code of Professional Conduct Regulation* was repealed.
5. On May 28, 2010, Chief Superintendent Harrison submitted his Final Investigation Report.
6. On June 16, 2010, based on the Harrison Final Investigation Report, the Discipline Authority in this matter, Mayor Dean Fortin, issued his decision in which he unsubstantiated the allegation of misconduct.
7. On July 7, 2010, the Office of the Police Complaint Commissioner received a letter from Mr. Dean in which he complained about the quality of Superintendent Harrison's investigation and requested a review by a retired judge pursuant to section 117 of the *Police Act*.
8. On July 14, 2010, the BC Civil Liberties Association filed a complaint with the Office of the Police Complaint Commissioner. In his submission Mr. Robert Holmes, the President of the BCCLA, supported Mr. Dean's request for a section 117 *Police Act* review in this matter. Further, Mr. Holmes requested a new investigation into Mr. Dean's allegations be conducted as in their opinion the Harrison investigation and the Discipline Authority's decision was so flawed it would be appropriate to "start anew."
9. On July 15, 2010, I extended the timeline to issue a decision on Mr. Dean's section 117 *Police Act* request to August 25, 2010. On July 26, 2010, after completing a review of Superintendent Harrison's Final Investigation Report, the Discipline Authority's Notice of Decision, Mr. Dean's submission and the BCCLA's complaint I concluded that further investigation of the alleged misconduct was necessary and that the new investigation must be conducted pursuant to Section 93(1)(a) of the *Police Act*.
10. On July 26, 2010, I sent a letter to Assistant Commissioner Al MacIntyre, Criminal Operations Officer for the Royal Canadian Mounted Police. In the letter I formally requested that a further investigation be conducted into the third-party complaint of Mr. Dean into the comments of Chief Graham in relation to the Olympic Torch run protest. Further, in the letter I requested that an investigator other than Chief Superintendent Harrison be assigned the investigation due to concerns raised by Mr. Dean and the BCCLA.

11. On July 30, 2010, I issued an Order for External Investigation pursuant to section 93 of the *Police Act*. In the Order I confirmed that the Royal Canadian Mounted Police had agreed to conduct the external investigation. The investigation limitation period was scheduled to expire on January 30, 2011.
12. On July 30, 2010, I sent a letter to the Discipline Authority including the Order for External Investigation. This letter was carbon-copied to Chief Constable Graham, Assistant Commissioner MacIntyre, Mr. Dean and the BCCLA. In this letter and pursuant to s. 11(3) (d) of the Transitional provisions of the *Police Act* I waived the time limit for the appointment of a retired judge pursuant to s. 117 of the *Act* in relation to the Harrison investigation until the completion of the new ordered investigation and the decision from the Discipline Authority in that matter.
13. Pursuant to s. 93(9) of the *Police Act* I provided both Mr. Dean and the BCCLA information respecting the Taylor *Police Act* investigation as I was of the opinion that their 3rd Party complaint allegations had a direct interest in the Order for External Investigation.
14. On January 25, 2011, the investigator in this matter, Chief Superintendent Taylor submitted the Final Investigation Report into the allegations against Chief Constable Graham to Mayor Fortin, the Discipline Authority. Chief Superintendent Taylor recommended that an allegation of discreditable conduct against Chief Constable Graham be substantiated.
15. On February 8, 2011, the Discipline Authority issued his Notice of Decision in which he determined that the evidence contained within the Taylor Final Investigation Report appeared to substantiate the allegation against Chief Constable Graham.
16. On February 15, 2011, pursuant to section 113 of the *Police Act*, BCCLA provided a written submission on the adequacy of the Taylor investigation.
17. On March 16, 2011, pursuant to section 113 of the *Police Act*, Mr. Dean provided the Discipline Authority with a written submission on the adequacy of the Taylor investigation and his suggestion of what disciplinary or corrective measures were appropriate.
18. On March 31, 2011, the Discipline Authority convened a discipline proceeding which was recorded pursuant to the *Police Act*. Chief Superintendent Taylor provided testimony detailing the *Police Act* investigation which he conducted. Chief Constable Graham, represented by counsel, Mr. Sean Hern, cross-examined Chief Superintendent Taylor. Chief Constable Graham then testified in-chief after which the Discipline Authority asked clarifying questions. At the conclusion of the discipline proceeding Mr. Hern provided submissions to the Discipline Authority.
19. On April 14, 2011, the Discipline Authority issued his Notice of Findings (Form 3) in which he supported the finding of discreditable conduct against Chief Constable Graham.

20. On April 28, 2011, the Discipline Authority received submissions on appropriate disciplinary or corrective measures from Mr. Hern on behalf of Chief Constable Graham.
21. On May 12, 2011, the Discipline Authority issued the Disciplinary Disposition Record (Form 4). After considering a number of mitigating and aggravating factors the Discipline Authority concluded that the appropriate disciplinary or corrective measures in this case was a written reprimand.
22. On May 26, 2011, the Discipline Authority issued the Review of Discipline Proceedings pursuant to section 133(1) (a) of the *Police Act*.
23. On June 6, 2011, on behalf of Chief Constable Graham, Mr. Hern submitted a request that pursuant to section 141 of the *Police Act*, I arrange a review on the record of the Discipline Authority's decision.
24. On June 8, 2011, Mr. Dean submitted a written request to my office that I arrange a public hearing in this matter.
25. On July 5, 2011, pursuant to s. 109(1)(a) of the *Police Act* I issued a letter of discontinuance in relation to the Harrison investigation of Mr. Dean's Form 1 Record of Complaint allegations against Chief Constable Graham.
26. Having reviewed this matter, including the record of the disciplinary decision, I have determined that pursuant to s. 138(1) (d) that a review on the record is necessary in the public interest. In arriving at this determination I have reviewed all the relevant factors including, but not limited to the following:
 - **S.138 (2) (a) Police Act – The nature and seriousness of the complaint and alleged misconduct:** The complaint involves the actions of a Chief Constable and engages concerns related to the integrity of security operations amongst police agencies.
 - **S. 138(2) (d) (i) Police Act – Whether an arguable case can be made that there was a flaw in the investigation:** A legal issue arises from the proceedings with respect to the application, interpretation and jurisdiction of legislation, as relied upon during the course of the investigation.
 - **S. 138(2) (d)(iii) Police Act - Whether an arguable case can be made that the discipline authority's interpretation or application of the part or any other enactment was incorrect:** A legal issue arises from the proceeding in regard to the interpretation of the law as it relates to the retrospective application of new legislation. A further legal issue arises in terms of the Discipline Authority's interpretation of "discreditable conduct" as defined under the Act.
 - **Nature of adjudicative review:** In the circumstances of this complaint, a review on the record is a more efficient and effective means of adjudicative review having regard to the sufficiency of the record of disciplinary decision and the issues engaged.

27. It is therefore alleged that Chief Constable Jamie Graham committed the following disciplinary default pursuant to section 77 of the *Police Act*:

Discreditable Conduct: contrary to section 77 of the *Police Act*, subject member committed the disciplinary default of discreditable conduct, which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department.

NOW THEREFORE:

1. A review on the record is arranged pursuant to section 138(1)(d) of the *Police Act*.
2. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, Alan E. Filmer, Q.C., retired Judge of the Provincial Court of British Columbia is appointed to preside as Adjudicator in these proceedings, pursuant to s. 142 of the *Police Act*.

TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

#501, 947 Fort Street, PO Box 9895, Stn Prov Govt, Victoria, BC V8W 9T8
Telephone: (250) 356-7458 / Facsimile: (250) 356-6503

DATED at the City of Victoria, in the Province of British Columbia, this 13th day of July, 2011.



Stan T. Lowe
Police Complaint Commissioner
for the Province of British Columbia