



# WEST VANCOUVER POLICE DEPARTMENT

## Administrative Policy

### AC0136: Disclosure – Conduct Records (R. v. McNeil)

#### 1.0 PURPOSE

1.1 The purpose of this policy is:

- a) to establish procedures that will satisfy the obligation imposed by a Supreme Court of Canada (R v McNeil, 2009) ruling for the disclosure of disciplinary and criminal records, related to misconduct of any Member who is a police witness in a criminal case;
- b) to ensure all Members are aware of the obligation imposed as a result of R v McNeil and the Department disclosure process; and
- c) to ensure all privacy concerns are met and sensitive information related to a Member's discipline and criminal records is appropriately protected.

#### 2.0 DEFINITIONS

2.1 For the purposes of this policy, the following definitions will apply:

"Act" means the BC Police Act, RSBC 1996, Chapter 367, as amended from time to time.

"Category "A" Record" means any disciplinary and criminal record relating to findings of misconduct by police witnesses where that misconduct:

- a) is related to the criminal case in question (e.g. the accused makes an allegation of excessive force against the arresting officer); or
- b) could reasonably impact on the case against the accused (e.g. a record of excessive force where the accused is charged with Assault PO and is advancing a self defense argument; or any record that bears upon the police witness' integrity, such as a disciplinary finding of guilt for deceit, criminal conviction for perjury or fraud, etc.).

## **Disclosure – Conduct Records (R. v. McNeil)**

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“Category “B” Record” means any other disciplinary or criminal records relating to findings of misconduct by police witnesses, if those records have been subject to judicial review pursuant to an O’Connor application and are ordered to be disclosed.

“CCC” means the Criminal Code of Canada, R.S.C. [1985, c. C-46], as amended from time to time.

“CDSA” means the Controlled Drugs and Substances Act [S.C. 1996, c. 19], as amended from time to time.

“Conduct Record” means:

- a) any criminal conviction or finding of guilt under the CCC or the CDSA for which no pardon has been granted;
- b) any outstanding charges under the CCC or the CDSA;
- c) any conviction or finding of guilt under any other federal or provincial statute for which no pardon has been granted, excluding finding of guilt for minor provincial traffic or regulatory offences;
- d) any finding of guilt for misconduct after a Prehearing Conference, Discipline Proceeding, Review on the Record or Public Hearing under the Act (which has not been expunged); and
- e) any current allegation of misconduct under the Act where a Notice of Prehearing Conference, Notice of Discipline Proceeding, Notice of Review on the Record or a Notice of Public Hearing has been issued.

“DCC” means the Deputy Chief Constable of the Department

“Department” means the West Vancouver Police Department.

“Disclosure Officer” means the Professional Standards Section Sergeant.

“Member” means a sworn peace officer employed at the Department.

“Member Conduct Disclosure Form” means the form completed by Members for internal use and forwarded to the Crown Liaison Officer to be used for McNeil Disclosure purposes.

“Police Witness Disclosure Form” means the form that is forwarded to Crown Counsel with disclosure information for police witnesses as part of an RTCC submission.

## Disclosure – Conduct Records (R. v. McNeil)

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“RTCC” means Report to Crown Counsel.

### 3.0 POLICY

- 3.1 The Department is committed to meeting the obligations imposed by the Supreme Court of Canada in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, for the disclosure of all relevant disciplinary and criminal records related to the misconduct of a Member who is a police witness in a criminal case, while ensuring the protection of sensitive information and the privacy of that Member.

### 4.0 PROCEDURES

#### General

- 4.1 The Supreme Court of Canada ruling places an obligation on the police to disclose records which can be defined as either Category “A” Records or Category “B” Records.
- 4.2 Category “A” Records require disclosure **in the first instance** under *R v Stinchcombe* and include:
- a) any criminal conviction or finding of guilt under the CCC or the CDSA for which no pardon has been granted;
  - b) any outstanding charges under the CCC or the CDSA;
  - c) any conviction or finding of guilt under any other federal or provincial statute for which no pardon has been granted, excluding findings of guilt for minor provincial traffic or regulatory offences. All findings of guilt for minor provincial traffic or regulatory offences more than three (3) years previous are deemed minor and therefore not subject to disclosure. *The Disclosure Officer* will determine which offences are subject to exclusion;
  - d) any finding of guilt for misconduct after a Prehearing Conference, Discipline Proceeding, Review on the Record or Public Hearing under the Act (which has not been expunged); or
  - e) any current allegation of misconduct under the Act where a Notice of Prehearing Conference, Notice of Discipline Proceeding, Notice of Review on the Record or a Notice of Public Hearing has been issued.
- 4.3 Category “B” Records require disclosure **only upon a Court Order** after defense has filed an *R v O’Conner* application and a judge has conducted an inquiry to determine if the records in question should be disclosed.

## Disclosure – Conduct Records (R. v. McNeil)

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### **Member Responsibilities**

- 4.4 All Sworn Members are required to complete a WVPD Member Conduct Disclosure Form available on the Department Intranet annually or when their conduct record changes and forward it in hard copy to the Crown Liaison Officer. All forms received will be maintained in a private folder for reference by the Crown Liaison Officer in compiling McNeil disclosure packages.
- 4.5 By completing a WVPD Member Conduct Disclosure Form, the Member will declare whether or not the Member has a Conduct Record to disclose, or if they are unsure there is a Conduct Record to be disclosed. A Conduct Record means a Member:
- a) has been convicted or found guilty of an offence under the CCC or under the CDSA, (for which a pardon has not been granted), or is unsure of that fact;
  - b) is currently charged with an offence under the CCC or under the CDSA, or is unsure of that fact;
  - c) has been convicted or found guilty of an offence under any other federal or provincial statute for which no pardon has been granted, excluding findings of guilt for minor provincial traffic or regulatory offences more than three (3) years previous or is unsure of that fact;
  - d) has been found guilty of misconduct after a Prehearing Conference, Discipline Proceeding, Review on the Record or Public Hearing under the Act (which has not been expunged), or is unsure of that fact; or
  - e) is currently facing an allegation of misconduct under the Act, for which a Notice of Prehearing Conference, Notice of Discipline Proceeding, Notice of Review on the Record or Notice of Public Hearing has been issued, or is unsure of that fact.
- 4.6 Any time a Member's Conduct Record changes, that Member will as soon as practicable:
- a) ascertain, through JUSTIN and other means, the Department file numbers for all active criminal cases in which the Member is a police witness, currently in possession of Crown Counsel or before the Courts, including any cases in the appeal process; and
  - b) complete and forward in hard copy an updated WVPD Member Conduct Disclosure Form to the Crown Liaison Officer, indicating the form is an update to the initial submission. The Member will identify the active

## Disclosure – Conduct Records (R. v. McNeil)

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criminal cases the Member is involved in that may require further review for possible McNeil disclosure.

### **Crown Liaison Responsibilities**

- 4.7 If all Members involved in an investigation where a criminal charge is likely or has been laid indicate “No” to all questions on the Member Conduct Disclosure Form, the Crown Liaison Officer will complete, sign and forward a WVPD Police Witness Disclosure Form directly to Crown Counsel along with the RTCC.
- 4.8 If any Member indicates “Yes” or Unsure” in relation to a federal or provincial statute other than the Act, the Crown Liaison Officer will assess the following records for relevance on a case by case basis, and disclose to the Crown, as appropriate:
- a) any conviction or finding of guilt for an offence under the CCC or the CDSA for which a pardon has not been granted;
  - b) any outstanding charges under the CCC or the CDSA; or
  - c) any conviction or finding of guilt under any other federal or provincial statute other than the Act.
- 4.9 The Crown Liaison Officer will indicate one of the following on a WVPD Police Witness Disclosure Form:
- a) “No Record” if the Member has no record;
  - b) “No Relevant Record” if the Member has a record, however, the record is not relevant to the proceedings, and complete the back of the WVPD Police Witness Disclosure Form; or
  - c) “Record, McNeil Disclosure Package Attached” if the Member has a record of misconduct or an allegation of misconduct where the misconduct is related to the investigation or where the misconduct, though separate from the investigation could reasonably impact on the case against the accused.
- 4.10 The Crown Liaison Officer will apply a broad definition of “relevancy” in reaching a determination as to what records are appropriately forwarded to Crown Counsel for potential disclosure.
- 4.11 Discussion with Crown Counsel regarding records that are not disclosed at the outset is expected and encouraged in order to avoid unnecessary third party applications under *R v O'Connor*.

## **Disclosure – Conduct Records (R. v. McNeil)**

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- 4.12 If a Member indicates “Yes” or “Unsure”, in relation to the Act, the Crown Liaison Officer will forward those forms to the Disclosure Officer for review.
- 4.13 In the event a WVPD Member Conduct Disclosure Form is forwarded to the Disclosure Officer for review, the Crown Liaison Officer will only forward the RTCC to Crown Counsel when a completed WVPD Police Witness Disclosure Form has been returned by the Disclosure Officer. In the event of a temporary absence of the Disclosure Officer, the RTCC submission and McNeil Disclosure, if required, will be made as soon as practicable.
- 4.14 For in-custody RTCCs, the Crown Liaison Officer will:
- a) forward the completed WVPD Police Witness Disclosure Form and the RTCC to Crown Counsel if all Members indicate that they have no conduct record on their respective WVPD Member Conduct Disclosure Form; or
  - b) forward only the RTCC to Crown Counsel if any Members indicate that they have a conduct record on WVPD Member Conduct Disclosure Form. Crown Liaison will forward a WVPD Police Witness Disclosure Form, once completed, as soon as practicable thereafter.
- 4.15 Upon receipt of an “updated” WVPD Member Conduct Disclosure Form, the Crown Liaison Officer will follow the same review procedure previously described, for each criminal case provided by the Member.
- 4.16 The Crown Liaison Officer will review privatized (or invisible) records in carrying out the assessment of a Member’s conduct record for potential disclosure.
- 4.17 The Crown Liaison Officer will keep a record of all decisions made with respect to a determination to disclose or withhold disclosure of any record.
- 4.18 The Crown Liaison Officer will keep a copy of the records reviewed and relied upon in reaching a disclosure decision, including a copy of the RTCC.
- 4.19 In cases where the Crown Liaison Officer intends to submit a McNeil Disclosure Package to Crown Counsel, the Crown Liaison Officer will notify the Member in writing and provide that Member with an opportunity to make submissions with respect to that disclosure within 12 days of the notice having been sent to the Member. The onus is on the Crown Liaison Officer to provide notice to the Member as soon as practicable after forming the intention to disclose.
- 4.20 If the Crown Liaison Officer determines that a particular record will be submitted to Crown Counsel, any Member submissions regarding that disclosure will be included with the McNeil Disclosure Package for Crown Counsel to review.

## **Disclosure – Conduct Records (R. v. McNeil)**

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- 4.21 If the Crown Liaison Officer accepts a Member's submission to withhold a particular record, the Crown Liaison Officer will:
- a) refrain from disclosing the record(s) in question;
  - b) retain the Member's submissions and the Crown Liaison Officer's reasons for accepting the Member's submissions on file; and
  - c) advise the Crown Counsel of the record which was not disclosed by forwarding to Crown Counsel a completed and signed WVPD Police Witness Disclosure Form.
- 4.22 When a Member has an on-going investigation against him/her at the time of the submission of the RTCC, the Crown Liaison Officer will assess whether further disclosure is warranted once the matter has been resolved and:
- a) will follow the procedures in this policy if the record is to be disclosed; and
  - b) will notify Crown Counsel in writing, if the record is no longer subject to disclosure or if the complaint was found to be unsubstantiated.
- 4.23 Records deemed not relevant will be identified on the back of the WVPD Police Witness Disclosure Form for the purposes of any *R v O'Connor* application for production of third party records that may follow.
- 4.24 The Crown Liaison Officer will ensure all completed and signed WVPD Police Witness Disclosure Forms and any McNeil Disclosure Packages are placed in a sealed envelope marked with the file number and: "Confidential – McNeil Disclosure, For Crown Counsel Use Only" and forward the envelope to Crown Counsel.
- 4.25 Should the Crown Liaison Officer become a police witness in a criminal matter, the Disclosure Officer will perform all the review and assessment duties normally held by the Crown Liaison Officer.
- 4.26 The Crown Liaison Officer has sole responsibility for maintaining all relevant McNeil Disclosure records in a central repository. This includes records received from the Disclosure Officer regarding disclosure decisions relating to matters pertaining to the Act.

### **Disclosure Officer Responsibilities**

- 4.27 The Disclosure Officer will review all WVPD Member Conduct Disclosure Forms which have a "Yes" or "Unsure" indicated to any Member Misconduct question pertaining to the Act, and assess the following records for relevance, on a case by case basis, and disclose to the Crown, as appropriate:

## Disclosure – Conduct Records (R. v. McNeil)

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- a) any finding of misconduct after a hearing or proceeding under the Act where the misconduct is related to the current investigation;
  - b) any finding of misconduct after a proceeding or hearing under the Act (which has not been expunged); or
  - c) any current charge of misconduct under the Act for which a Notice of Prehearing Conference, Notice of Discipline Proceeding, Notice of Review on the Record or Notice of Public Hearing has been issued.
- 4.28 The Disclosure Officer will indicate on a WVPD Police Witness Disclosure Form:
- a) “No Record” if the Member has no record
  - b) “No Relevant Record” if the Member has a record, however, the record is not relevant to the proceedings, and complete the back of the WVPD Police Witness Disclosure Form; or
  - c) “Record, McNeil Disclosure Package Attached” if the Member has a record of misconduct, or an allegation of misconduct, where the misconduct is related to the investigation, or where the misconduct, though separate from the investigation, could reasonably impact on the case against the accused.
- 4.29 The Disclosure Officer will apply a broad definition of “relevancy” in reaching a determination as to what records are appropriately forwarded to Crown Counsel for potential disclosure.
- 4.30 Discussion with Crown Counsel regarding records that are not disclosed at the outset is expected and encouraged in order to avoid unnecessary third party applications under *O'Connor*.
- 4.31 The Disclosure Officer will review privatized (or invisible) records in carrying out the assessment of a Member’s conduct record for potential disclosure.
- 4.32 The Disclosure Officer will record all decisions made with respect to a determination to disclose or withhold disclosure of any record, and forward the decision records to the Crown Liaison Officer.
- 4.33 The Disclosure Officer will copy all records which existed and which were reviewed and relied upon in reaching a disclosure decision, including a copy of the RTCC, and forward these records to the Crown Liaison Officer.
- 4.34 In cases where the Disclosure Officer intends to submit a McNeil Disclosure Package to Crown Counsel, the Disclosure Officer will notify the Member in



## Disclosure – Conduct Records (R. v. McNeil)

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- writing and provide that Member with an opportunity to make submissions with respect to that disclosure within 12 days of the notice having been sent to the Member. The onus is on the Disclosure Officer to provide notice to the Member as soon as practicable after forming the intention to disclose.
- 4.35 If the Disclosure Officer determines that a particular record will be submitted to Crown, any Member submissions regarding that disclosure will be included with the McNeil Disclosure Package for Crown Counsel to review.
- 4.36 If the Disclosure Officer accepts a Member's submission to withhold a particular record, the Disclosure Officer will:
- a) refrain from disclosing the record(s) in question;
  - b) retain the Member's submissions and the Disclosure Officer's reasons for accepting the Member's submissions on file; and
  - c) advise the Crown Counsel of the record which was not disclosed by forwarding to Crown Counsel a completed and signed Police Witness Disclosure Form.
- 4.37 When a complaint has been made against a Member, or an investigation has been commenced against him/her that is of a serious nature and it appears even at the early stages there is a reasonable likelihood of a full investigation at the time of the submission of the RTCC, disclosure to Crown Counsel is appropriate. The final authority to determine whether complaints or investigations are subject to disclosure resides with the Discipline Authority.
- 4.38 The Disclosure Officer will follow the procedures in this policy if the record is to be disclosed.
- 4.39 The Disclosure Officer will notify Crown Counsel in writing, via the Crown Liaison Officer, if the record is no longer subject to disclosure or if the complaint was found to be unsubstantiated.
- 4.40 The Disclosure Officer will complete and sign a WVPD Police Witness Disclosure Form and return the form to the Crown Liaison Officer. Records deemed not relevant will be identified on the back of the WVPD Police Witness Disclosure Form for the purposes of any *O'Connor* application for production of third party records that may follow.
- 4.41 Any McNeil Disclosure Packages and the WVPD Police Witness Disclosure Form(s) will be placed in a sealed envelope marked with the file number and: "Confidential – McNeil Disclosure, For Crown Counsel Use Only" and forwarded to the Crown Liaison Officer for submission to Crown Counsel.

## **Disclosure – Conduct Records (R. v. McNeil)**

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- 4.42 Should the Disclosure Officer become a police witness in the criminal investigation that is the subject of disclosure, the DCC will determine who will perform the review and assessment duties as required for any matter pertaining to the Act.

### **Seconded Members**

- 4.43 The Crown Liaison Officer or Disclosure Officer, as the case may be, will assess all seconded Members' Conduct Records for relevance for disclosure to Crown Counsel, when requested by the agency to which the Member is seconded.
- 4.44 The Crown Liaison Officer or Disclosure Officer will liaise with the agency's representative in charge of disclosure for that case to obtain details from the RTCC to assist with the evaluation of the record.
- 4.45 Member submissions with respect to disclosure will be provided to the Crown Liaison Officer or Disclosure Officer at the Department, not to the seconded agency.
- 4.46 The Crown Liaison Officer or Disclosure Officer will follow the same procedure for assessing seconded Members' records as with non-seconded Members and ensure their timely arrival, in a sealed envelope marked "Confidential – For Crown Counsel Use Only" directly to Crown Counsel.
- 4.47 Seconded Members will abide by Department policy where conflict exists with any policy of the seconding agency.

### **Inter-jurisdictional Investigations**

- 4.48 When a Member becomes a police witness in a criminal case where another Canadian law enforcement agency (federal or provincial) assumes the lead role, the Member, Crown Liaison Officer and Disclosure Officer will follow the procedures in this policy, including the submission of disclosure documents to Crown Counsel.
- 4.49 When a police officer from another Canadian police agency becomes a police witness in a criminal case where the Department assumes the lead role, the Department's lead investigator will liaise with the representative from the other agency responsible for disclosure, to ensure the McNeil disclosure process is completed and to determine who will submit any disclosure documents to Crown Counsel.

### **McNeil Disclosure Records**

- 4.50 The Crown Liaison Officer will ensure that the following documents, related to a McNeil Disclosure, are placed in a sealed envelope, marked "Confidential -

## Disclosure – Conduct Records (R. v. McNeil)

McNeil Disclosure” and held separate from the respective criminal file, in a secure and restricted access location:

- a) all original WVPD Member Conduct Disclosure Forms;
- b) a copy of all WVPD Police Witness Disclosure Forms;
- c) a copy of each McNeil Disclosure package sent to Crown Counsel;
- d) a copy of all Conduct Records reviewed by the Crown Liaison Officer and Disclosure Officer;
- e) a copy of all disclosure specific correspondence between the Crown Liaison Officer/Disclosure Officer, the Member and Crown Counsel; and
- f) a record of all decisions made with respect to a determination to disclose or withhold disclosure of any record.

4.51 McNeil Disclosure documents in possession of the Department will be destroyed at the conclusion of the appeal period if no appeal is filed. When a Member Conduct Record changes as a result of an expunged Police Act matter, the Member will submit in hard copy a revised Member Conduct Disclosure Form to the Crown Liaison Officer. The Crown Liaison Officer will ensure any previous Member Conduct Disclosure Form containing the expunged matter is destroyed.

Date Approved: WVPD Executive: 2012-02-06 Policy & Procedure Comm.: 2012-02-21 Police Board: 2012-03-28	Date Published: 2012-05-03
Date Approved: WVPD Executive: 2014-05-08 Policy & Procedure Comm.: 2014-06-09 Police Board: 2014-06-26	Date Published: 2014-07-14
Date Approved: WVPD Executive: 2015.05.27 Policy & Procedure Comm.: 2015.06.01 Police Board: 2015.06.23	Date Published: 2015
Date Approved: WVPD Executive: 2017-05-24 Policy & Procedure Comm.: 2017-06-28 Police Board: 2017-06-22	Date Published: 2017-07-07
Date Approved: WVPD Executive: 2019-04-03 Policy & Procedure Comm.: 2019-05-09 Police Board: 2019-05-24	Date Published: 2019-06-20