



Office of the
Police Complaint Commissioner

British Columbia, Canada

ROR 2011-03

NOTICE OF 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

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.

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 The *Code of Professional Conduct Regulation* was repealed.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 determined that pursuant to s. 138(1) (d) that a review on the record was necessary in the public interest. In arriving at this determination I 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.

28. On July 13, 2011, Alan Filmer Q.C. retired Judge of the Provincial Court of British Columbia was appointed to preside as Adjudicator in these proceedings, pursuant to s. 142 of the *Police Act*. On August 9, 2011 Adjudicator Filmer rendered his decision based solely on his review of the record of proceedings, based on his interpretation of the *Police Act*. There was no opportunity for submissions or applications for leave to provide submissions by parties involved in the complaint.

29. Having reviewed the provisions of the Police Act relating to a Review on the Record, including its legislative development, I am of the view that a material procedural irregularity has occurred, requiring a new Review on the Record of this matter in the interests of procedural fairness in accordance with administrative law principles.

NOW THEREFORE:

1. A new 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, Mr. Jakob de Villiers, 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 7th day of October, 2011.



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