



DC13

MCNEIL DISCLOSURE

DC13

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POLICY

- Members of the Delta Police Department (Department) are obligated to provide first party disclosure of conduct records to the Crown, balancing the right to a fair trial against the right of an officer to a degree of privacy.

REASON FOR POLICY

- To comply with the Supreme Court of Canada judgment in *R. v. McNeil*.
- To establish the requirement for disclosure of police conduct records in criminal trials and regulatory offence prosecutions where police witnesses are involved.

RELATED POLICIES

DC10 – Complaints (Conduct, Service or Policy)



DC11 – Internal Discipline Rules
DC12 – Service Records of Discipline
EM10 – Employee Records

DEFINITIONS

4. For the purposes of this Policy, the following definitions shall apply:

Disclosure Officer: senior officer in the Professional Standards Section.

Expungement: the date that a conduct record is no longer disclosable.

First Party Disclosure: information deemed to be in the possession of the Crown and, therefore, potentially disclosable.

McNeil Package: the disclosed records of findings of serious police misconduct which pertain to an investigation or may reasonably impact a prosecution of an accused.

Operative Period: the retention period of a conduct record, starting upon confirmation of the decision by the Office of the Police Complaint Commissioner and concluding upon expungement, i.e., two, three or five years for members with substantiated *Police Act* or Internal Investigations.

Serious Misconduct:

- any conviction or finding of guilt for an offence under the *Criminal Code of Canada* or the *Controlled Drugs and Substances Act* for which a pardon has not been granted;
- any outstanding charges under the *Criminal Code of Canada* or the *Controlled Drugs and Substances Act*;
- any conviction or finding of guilt under any other federal or provincial statute;
- any finding of misconduct after a hearing or proceeding under the *Police Act* or *Internal Discipline* where the misconduct is related to the current investigation and has not been expunged;
- any finding of misconduct after a hearing or proceeding under the *Police Act* or *Internal Discipline* which has not been expunged; or



- any current charge of misconduct under the *Police Act* or *Internal Discipline* for which a notice of prehearing conference, discipline proceeding, adjudication or public hearing has been issued.

PROCEDURES

PART 1: McNeil Disclosure General & in Criminal Proceedings

Member Responsibilities

5. Every member is responsible for having an up-to-date electronic 'Member Conduct Disclosure Form' (Form A) for submission with a Report to Crown Counsel (RTCC).
6. With respect to *Police Act* matters, members are responsible for indicating, on their Form A, that there is a McNeil disclosure if:
 - a) an RTCC is submitted during their operative period;
 - b) the date of RTCC offence occurred during an operative period;
 - c) the RTCC is compiled during an operative period; or
 - d) the member is engaged in the court process during an operative period.
7. Members completing a Form A will declare whether or not they:
 - a) have been convicted or found guilty of an offence under the *Criminal Code of Canada* (CCC) or under the *Controlled Drug and Substances Act* (CDSA) for which a pardon has not been granted;
 - b) are currently charged with an offence under the CCC or under the CDSA, or is unsure of that fact;
 - c) have been convicted or found guilty of an offence, pursuant to any other federal or provincial statute, or is unsure of that fact;
 - d) have been found guilty of misconduct after a prehearing conference, discipline proceeding, adjudication or public hearing under the *Police Act* or internal discipline which has not been expunged; and/or



- e) are currently facing a charge of misconduct under the *Police Act*, for which a notice of prehearing conference, disciplinary proceeding, adjudication or public hearing has been issued, or is unsure of that fact.
- 8. Members are required to submit an updated Form A whenever their conduct status changes.
- 9. A member who has a disciplinary record and whose involvement in an investigation substantially changes after the submission of the initial RTCC (e.g., from a peripheral role to a substantial one), must advise the Disclosure Officer of the change.
- 10. Seconded members are to provide their completed Form A to the designated file/McNeil coordinator for the agency to which they are seconded, and if the member indicates 'Yes' on the Form, the member shall request the file/McNeil coordinator to contact the Department's Disclosure Officer and request a determination of the relevancy of the record or whether a McNeil Package will be provided.
- 11. Members who are witnesses for or assist other agencies shall, along with their disclosure, provide their Form A directly to that agency's lead investigator or file coordinator; however, if a member's Form A indicates 'Yes,' then the member shall request the Disclosure Officer to facilitate an assessment of McNeil disclosure.
- 12. Outside agency members assisting the Department's investigations and appearing as police witnesses are to be directed to provide an RTCC 'Will Say,' their notes and their own disclosure form, to the Department's lead investigator or file coordinator, for subsequent disclosure by Court Liaison staff to Crown counsel along with the RTCC.

Court Liaison Responsibilities

- 13. Court Liaison staff shall:
 - a) review every Form A submitted for each RTCC;
 - b) prepare and submit a 'Police Witness Disclosure Form' (Form B) to Crown counsel with the RTCC, if all of the Department's members involved in the investigation leading to a RTCC indicate 'No' on the Form A; and



- c) prepare and submit a Form B to the Disclosure Officer, at the earliest opportunity, if any Department member related to a RTCC indicates 'Yes' on a Form A.

Disclosure Officer Responsibilities

- 14. The Disclosure Officer is required to review conduct records and determine appropriate first party disclosure, on a case by case basis, in relation to RTCCs submitted to Crown and in relation to regulatory offence prosecutions, and to provide disclosure to Crown as determined appropriate, making one of following notations on the Form B:
 - a) 'No Record' – to be noted if the member has either no record or the record is minor (e.g., a traffic violation ticket) such that it can be deemed 'no record';
 - b) 'No Relevant Record' – to be noted if the member has a record, however, the record is not relevant to the proceedings; or
 - c) 'Record, McNeil Package Attached' – to be noted if the member has a record of serious misconduct related to the investigation or the misconduct, though separate from the investigation, could reasonably impact the case against the accused.
- 15. In assessing what conduct records are to be forwarded to Crown as first party disclosure (i.e., 'McNeil Screen'), the Disclosure Officer must give broad consideration to:
 - a) the seriousness of a member's misconduct;
 - b) the relevancy of the conduct to the prosecution;
 - c) the perceived impact of the conduct on the member's credibility and reliability;
 - d) the severity of any resultant discipline;
 - e) whether or not the conduct related to acting in the capacity of a police officer;
 - f) whether the officer conduct was in a significant or peripheral role; and



- g) a member's judgment, as exercised in relation to the conduct.
16. The Disclosure Officer's McNeil Screen assessment may include discussion with Crown counsel, prior to disclosure, and Crown counsel has the final decision on McNeil disclosure and ultimate responsibility as disclosure gatekeeper.
17. The disclosure in a McNeil package is to consist of:
- a) a brief, clear and concise report describing the member's conduct record; and
 - b) any additional disclosure deemed necessary as a result of consultation with Crown counsel, e.g., a redacted notice of decision, other discipline authority finding or adjudicator decision.
18. As assessed appropriate, the Disclosure Officer may disclose to Crown counsel the following:
- a) any conviction or finding of guilt for an offence under the CCC or the CDSA;
 - b) any outstanding charges under the CCC or the CDSA;
 - c) any conviction or finding of guilt under any other federal or provincial statute;
 - d) any finding of misconduct after a hearing or proceeding under the *Police Act* or Internal Discipline where the misconduct is related to the current investigation;
 - e) any finding of misconduct after a proceeding or hearing under the *Police Act* or Internal Discipline;
 - f) any current charge of misconduct under the *Police Act* for which a notice of prehearing conference, disciplinary proceeding, adjudication, or public hearing has been issued;
 - g) allegations of misconduct that are 'sufficiently serious' that could reasonably impact a criminal trial; and



- h) a record of police misconduct arising from the same incident that is the subject-matter of the charge against the accused, irrespective of whether discipline occurred or not.
- 19. The Disclosure Officer shall keep a record of all decisions made to disclose or withhold a particular record.
- 20. The Disclosure Officer shall note which records were reviewed at the time that each disclosure was made.
- 21. When a member is subject to an unconcluded complaint investigation, at the time of the submission of an RTCC, the Disclosure Officer shall assess whether the seriousness of the complaint warrants early disclosure or the disclosure decision can wait until the complaint process has been concluded.
- 22. When appropriate, McNeil packages will be produced by the Disclosure Officer for cases involving Department witness members subject to outside agency investigations, and the McNeil packages will be forwarded directly to Crown counsel, with notice to the member.
- 23. When a member's status changes, the Disclosure Officer must notify Crown counsel in writing and provide an updated Form B, in relation to all matters before the courts involving that member.
- 24. The Disclosure Officer has an ongoing responsibility to review conduct records and potentially disclose to Crown counsel during the life of a criminal trial from the outset to the conclusion.

PART 2: McNeil Disclosure – Provincial Violation Tickets

- 25. A member prosecuting a provincial violation ticket is required to provide disclosure of information about relevant conduct records, to the defendant, as follows:
 - a) if the member has no McNeil record, disclosure does not need to make reference to this category of records, unless specifically asked for by the defendant;
 - b) if the member has a McNeil record, but the Disclosure Officer has assessed it as being not relevant, the member has no obligation to disclose that a record exists, unless requested by the defendant; and



- c) if the member has a relevant McNeil record, the defendant must proactively be given notice of the record, whether requested or not.
- 26. Disclosure will be facilitated by the Court Liaison Unit, and a member receiving a request for, or proactively having to provide McNeil disclosure in relation to a provincial violation ticket, shall advise the Court Liaison Unit.
- 27. The Disclosure Officer shall examine every member's Form A and make a determination whether disclosed conduct ought to be considered relevant to actions of the member in any provincial violation ticket offence prosecution, and provide the determination to the Court Liaison Unit.
- 28. In assessing what conduct ought to be considered relevant, the Disclosure Officer must give consideration to the same "McNeil Screen" factors as considered in criminal offence prosecution disclosure, as listed in section 15 above.
- 29. The Disclosure Officer shall advise Court Liaison staff of each officer who has disclosed conduct that is either not relevant or possibly relevant to actions of the officer in a provincial violation ticket offence prosecution.

Court Liaison Unit Response to McNeil Disclosure Requests

- 30. When in receipt of a request for McNeil disclosure in relation to a provincial violation ticket, from a defendant or counsel, Court Liaison staff will refer to the determination provided by the Disclosure Officer and identify whether the member involved has no record, no relevant record or a possibly relevant record, and take the following actions, as applicable:
 - a) when a member has no record, reply with a letter advising:

We write in reply to your request for disclosure in accordance with obligations established in R. v. McNeil, 2009 SCC 3, and can advise that no records exist concerning [Rank & Name].
 - b) when a member has a record that the Disclosure Officer has assessed to be not relevant, reply with a letter advising:

We write in reply to your request for disclosure in accordance with obligations established in R. v. McNeil, 2009 SCC 3. The Department's records pertaining to the employment of [Rank / Name]



have been independently reviewed and it has been determined that they do not fall within the scope of required disclosure.

- c) when a member has a record that the Disclosure Officer has assessed to be relevant, reply with a letter advising:

We write to fulfill the Department's 'prosecution disclosure' obligations to you. Please be advised that a matter documented in the employment record of [Rank / Name] may possibly be relevant to your proceedings. If you would like to be informed of this matter, please contact the Department's Professional Standards Section, at 604-595-2167 to obtain details of the matter.

31. In reply to a request made by counsel, when a member has a relevant record the Disclosure Officer shall provide McNeil disclosure by letter stating:

We write to fulfill the Department's 'prosecution disclosure' obligations pursuant to R. v. McNeil, 2009 SCC 3. Please find enclosed a record pertaining to the employment of [Rank / Name] that may possibly be relevant to your client's proceeding. The record is being provided subject to the condition that it not be copied or further disseminated to anyone except as is necessary in conducting the defence of your client.

Court Liaison Unit McNeil Disclosure Without Request

32. Court Liaison staff shall, whenever advised by the registry of a scheduled violation ticket dispute hearing (regardless of whether the defendant or counsel has made a McNeil disclosure request), refer to the information provided by the Disclosure Officer, and, if the ticketing member has a relevant record, send a letter to the defendant stating:

We write to fulfill the Department's 'prosecution disclosure' obligations to you. Please be advised that a matter documented in the employment record of [Rank / name] may possibly be relevant to your proceedings. If you would like to be informed of this matter, please contact the Department's Professional Standards Section, at 604-595-2167 to obtain details of the matter.



Disclosure by the Disclosure Officer

33. If the defendant (and not counsel) contacts the Disclosure Officer, in response to a letter sent in accordance with paragraph 31 or 32, information may be provided to the defendant verbally, a record of the information provided must be made, and the Disclosure Officer must inform the member that disclosure has been provided.
34. If the defendant does not contact the Disclosure Officer in response to a letter sent, no further efforts are required to be made to provide disclosure.

In Court Disclosure Request

35. A member who is asked in person, immediately before a hearing or in court, for disclosure in accordance with *R. v. McNeil*, shall advise the defendant that:
 - a) the Department ensures that all McNeil disciplinary records disclosure obligations are complied with; and
 - b) disclosure requests must be made well in advance of the court hearing and the defendant will have to ask the presiding Judicial Justice for an adjournment if the adequacy of disclosure is in dispute.

McNeil Disclosure Challenges in Court

36. If a defendant challenges a member on their McNeil disclosure in the courtroom or if the Judicial Justice does not dismiss any further disclosure requests by a defendant, the member shall:
 - a) advise the Judicial Justice that the Department has procedures to ensure that all McNeil disciplinary records disclosure obligations are complied with; and
 - b) if necessary, ask that the matter be adjournment in order to seek to have legal counsel attend and address the matter.

*Revised Dates:
21 February 2012
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