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| Policy Name: | MCNEIL DISCLOSURE | | |
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| Issued By: | SUPPORT SERVICES BUREAU | Approved By: | SURREY POLICE BOARD |
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RELATED POLICIES

AD 2.9 Service Record of Discipline

1. PURPOSE

- 1.1. To ensure the Surrey Police Service (SPS) has established rules and procedures regarding first party disclosure of service records of discipline to Crown Counsel, where the conduct is determined to be relevant and serious, to comply with the Supreme Court of Canada decision in *Regina v. McNeil*, 2009 SCC 3.
- 1.2. To ensure SPS has established rules and procedures regarding first party disclosure of Service Records of Discipline during provincial violation ticket prosecutions.

2. SCOPE

- 2.1. This policy applies to all SPS Members and Employees in the Court Liaison Unit.

3. POLICY

“First Party” Disclosure

- 3.1. The 2009 Supreme Court of Canada judgment in *Regina v. McNeil* fundamentally changed disclosure requirements demanded of police officers involved in an investigation. Members are now required to disclose, as part of the first party disclosure package to Crown Counsel, records relating to serious misconduct by Members involved in an investigation, where the misconduct is related to the investigation, or where the misconduct, though separate from the investigation, could be relevant to the accused’s case.

- 3.2. “First Party” disclosure refers to material that is in the possession of, or kept by, the Crown and therefore, presumptively disclosable by the Crown. The party seeking disclosure of this material does not need to approach a third party to seek that disclosure.
- 3.3. The Crown requirement to disclose continues to be guided by the principles stated in *Regina v. Stinchcombe*, [1991] 3 S.C.R. 326 (Supreme Court of Canada). Crown Counsel must disclose all relevant material in the possession of Crown, whether the information is favourable or not, to the accused as soon as it becomes available. In terms of defining "relevant", the Supreme Court of Canada stated that "relevant" includes any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence to a charge.

“Third Party” Record Production

- 3.4. The production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of the first party disclosure package referred to above continues to be governed by the *O'Connor* regime to produce third-party records.
- 3.5. “Third Party” records refer to records that are regarded as being in the possession of or under the control of a third party. Accordingly, the party seeking their disclosure is required to approach the record holder to request production; they cannot argue that the records are to be automatically disclosed, which would be the case for records already in possession of the Crown.
- 3.6. The party seeking disclosure of third-party records must establish the relevance of the records, and the Court then decides if disclosure of the record is appropriate, taking into account the competing interests at stake, including the privacy interests of the party whose records have been requested.
- 3.7. Members are required to complete an electronic *Member Conduct Disclosure Form A* (AD-2501) upon their commencement of employment with the SPS and whenever there is a change in their conduct record. By completing the *Member Conduct Disclosure Form A*, the Member will alert the Professional Standards Section (PSS) to the existence of potentially relevant disciplinary records. This will enable the PSS Disclosure Officer to disclose appropriate records to Crown Counsel.
- 3.8. The PSS Disclosure Officer will review the disciplinary records of Members and will determine whether a particular record will be disclosed to Crown Counsel, based on the guidance provided by the Supreme Court of Canada in *Stinchcombe* and *McNeil*, and considering the facts of the investigation and the role the investigation played by the Member whose records are under review. Once a determination has been made that a particular record is disclosable to Crown Counsel, the PSS Disclosure Officer will forward the record, referred to as a *McNeil Disclosure Package*, to Crown Counsel.

On-going Disclosure Required

- 3.9. The Crown's requirement to disclose is on-going and survives the trial (if the accused is convicted or pleads guilty, until the expiration of the appeal period after the trial/or sentencing).
- 3.10. If the Member's record changes or their involvement in the case changes, the disclosure requirements of the disciplinary record may also change. A Member who has changes to their conduct record must immediately submit an updated electronic *Member Conduct Disclosure Form A* and notify PSS of the update.
- 3.11. The PSS Disclosure Officer will then obtain the affected Member's court commitments and will follow the procedure used for assessing a Member's record. Discussion with Crown Counsel will be expected and encouraged to determine status of the cases associated with the original Report to Crown Counsel (RTCC).

4. PROCEDURE

Sworn Member Responsibilities

- 4.1. Members are required to complete an electronic *Member Conduct Disclosure Form A* (Form AD-2501) upon commencement with employment with the SPS or if there is a change to their conduct record.
- 4.2. By completing an electronic *Member Conduct Disclosure Form A*, the Member will declare whether or not they:
- i. have been convicted or found guilty of an offence under the *Criminal Code* or under the *Controlled Drugs and Substances Act*, for which a records suspension has not been granted;
 - ii. are currently charged under the *Criminal Code* or the *Controlled Drugs and Substances Act*;
 - iii. within the last five (5) years, have been convicted or found guilty of an offence, pursuant to any other federal or provincial statute;
 - iv. have been found guilty of misconduct after a prehearing conference, discipline proceeding or public hearing under the *Police Act* (which has not been expunged); or
 - v. are currently facing a charge of misconduct under the *Police Act*, for which a notice of prehearing conference, disciplinary proceeding or public hearing has been issued.
- 4.3. When a Member is facing a charge of misconduct under the *Police Act* for which an offer of prehearing conference, or a notice of disciplinary proceeding or a public hearing has been issued, PSS will notify the Member of their responsibility to update their electronic *Member Conduct Disclosure Form A*. Once the misconduct has been either substantiated or unsubstantiated, PSS will again notify the Member of their responsibility to update their electronic *Member Conduct Disclosure Form A*.

- 4.4. The Member will also be notified by the PSS Disclosure Officer of an impending expungement on their Service Record of Discipline.
- 4.5. A Member who has a disciplinary record and whose involvement in an investigation substantially changes after the submission of the initial RTCC, must advise the PSS Disclosure Officer of the change.

Court Liaison Unit Responsibilities

- 4.6. The Court Liaison Unit (CLU) will hold a list (treated as Protected “B”) of Members that have service records of discipline. This list (in paper or electronic format) will be kept in a secure location and with strictly controlled access from unauthorized persons, using security protocols consistent with SPS policy and generally accepted and prescribed security standards.
- 4.7. Court Liaison Unit will review each RTCC submitted and:
 - i. if all the Members listed in the RTCC do not have any Service Record of Discipline, CLU will complete, sign, and forward a *Police Witness Disclosure Form B* (Form AD-2502) to Crown Counsel along with the RTCC; and
 - ii. if any Member listed in the RTCC has a Service Record of Discipline, CLU will provide the associated RTCC file number to PSS. The PSS Disclosure Officer will complete a *Police Witness Disclosure Form B* and forward any McNeil Disclosure Packages to Crown Counsel.

Disclosure Officer Responsibilities

- 4.8. The PSS Disclosure Officer will ensure the CLU is promptly provided with an updated list of all Members with Service Records of Discipline or issues with their conduct record whenever required.
- 4.9. The PSS Disclosure Officer, once notified by the CLU that a Member listed in an RTCC has a Service Record of Discipline or other conduct issues, will review the Member’s *Member Conduct Disclosure Form A*. The PSS Disclosure officer will locate the records referred to on the form and will review those records, in addition to the applicable RTCCs. The Disclosure Officer will indicate on a *Police Witness Disclosure Form B*:
 - i. “No Record” if the Member has no record;
 - ii. “No Relevant Record” if the Member has a record, however, the record is not relevant to the proceedings, and complete the second page of *Police Witness Disclosure Form B*; or
 - iii. “Record, McNeil Disclosure Package Attached” if the Member has a record of serious misconduct, or an allegation of misconduct where the misconduct is related to the investigation, or where the misconduct, though unrelated to the subject matter of the investigation, could reasonably impact on the case against the accused.
- 4.10. The PSS Disclosure Officer will assess the following records for seriousness of the misconduct and relevance, on a case-by-case basis, and disclose to the Crown, as appropriate:

- i. Any conviction or finding of guilt for an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* for which a records suspension has not been granted;
 - ii. Any outstanding charges under the *Criminal Code* or the *Controlled Drugs and Substances Act*;
 - iii. Within the last five years, any conviction or finding of guilt pursuant to any other federal or provincial statute;
 - iv. Any finding of misconduct after a proceeding or hearing under the *Police Act* which has not been expunged; or
 - v. Any current charge of misconduct under the *Police Act* for which a notice of prehearing conference, disciplinary proceeding or public hearing has been issued.
- 4.11. The PSS Disclosure Officer will apply a broad definition of “serious misconduct” and “relevancy” in reaching a determination as to what records are appropriately forwarded to Crown Counsel for potential disclosure:
- i. 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 *Regina v. O’Connor*;
 - ii. the PSS Disclosure Officer will review privatized (or invisible) records in carrying out their assessment of the member’s conduct record for potential disclosure.
- 4.12. The PSS Disclosure Officer will keep a record of all decisions made regarding a determination to disclose or withhold a particular record (or records).
- 4.13. When a Member has an on-going complaint investigation against them at the time of the submission of the RTCC, the PSS Disclosure Officer will assess whether disclosure is warranted once the complaint process has reached its resolution:
- i. If the record is to be disclosed, the PSS Disclosure Officer will follow the procedures stated above in s. 4.9; and
 - ii. If the record is no longer disclosable or if the complaint was found to be unsubstantiated, the PSS Disclosure Officer will notify Crown Counsel of this in writing.
- 4.14. The PSS Disclosure Officer will complete and sign a *Police Witness Disclosure Form B* and return the form to CLU. Any McNeil Disclosure Packages will be attached to the *Police Witness Disclosure Form B* in a sealed envelope marked: “*Confidential - For Crown Counsel Use Only*”.
- 4.15. When a Member is facing a charge of misconduct under the *Police Act* for which an offer of prehearing conference, or a notice of disciplinary proceeding or a public hearing has been issued, PSS will notify the Member of their responsibility to update their *Member Conduct Disclosure Form A*. Once the misconduct has been either substantiated or unsubstantiated, PSS will again notify the member of their responsibility to update their *Member Conduct Disclosure Form A*.
- 4.16. The PSS Disclosure Officer will notify any Members with an impending expungement on their Service Record of Discipline.

Seconded Members

- 4.17. The PSS Disclosure Officer will assess all seconded Members' conduct records for seriousness and relevance for disclosure to Crown Counsel, on a case-by-case basis, as requested by the agency to which the Member is seconded. The 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.
- 4.18. The PSS Disclosure Officer will follow the same procedure for assessing seconded Members' records as with non-seconded Members and ensure their timely arrival to the other agency's Disclosure Officer (or equivalent) for forwarding to Crown Counsel.
- 4.19. Records for Members seconded to the SPS will be assessed by the PSS Disclosure Officer (or equivalent) at the Member's home agency. These records will be requested by the SPS PSS Disclosure Officer from the Member's home agency to be forwarded to the appropriate Crown Counsel.

McNeil Disclosure - Provincial Violation Tickets

- 4.20. A Member prosecuting a provincial violation ticket is required to provide disclosure of information about relevant conduct records to the defendant as follows:
- i. if the Member has no Service Record of Discipline or conduct record, disclosure does not need to refer to this category of records, unless specifically asked for by the defendant;
 - ii. if the Member has a Service Record of Discipline or conduct record, but the Disclosure Officer has assessed it as being not relevant, the Member has no requirement to disclose that a record exists, unless requested by the defendant; and
 - iii. if the Member has a relevant Service Record of Discipline or conduct record, the defendant must proactively be given notice of the record, whether requested or not.
- 4.21. Disclosure will be facilitated by the PSS Disclosure Officer, and a Member receiving a request for, or proactively having to provide *McNeil* disclosure in relation to a provincial violation ticket, will advise the PSS Disclosure Officer.
- 4.22. The PSS Disclosure Officer will examine every Member's *Member Conduct Disclosure Form A* and decide 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 Member in question.
- 4.23. In assessing what conduct ought to be considered relevant, the PSS Disclosure Officer must consider the same factors as considered in criminal offence prosecution disclosure.
- 4.24. When in receipt of a request for a *McNeil* disclosure in relation to a provincial violation ticket from a defendant or counsel, the PSS Disclosure Officer will identify whether the member involved has no record, no relevant record, or a possibly relevant record, and take the following actions, as applicable:

- i. When a Member has no record, reply with a letter advising: *"In reply to your request for disclosure in accordance with requirements established in Regina v. McNeil, 2009 SCC 3, and can tell you that no records exist concerning [Rank & Name]."*
- ii. When a Member has a record that the Disclosure Officer has assessed to be not relevant, reply with a letter advising: *"In reply to your request for disclosure in accordance with the requirements established in Regina v. McNeil, 2009 SCC 3. The Surrey Police Service records relating 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."*
- iii. 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 'prosecution disclosure' requirements to you. A matter documented in the employment record of [Rank / Name] may be relevant to your proceedings. If you would like to be informed of this matter, please contact the Surrey Police Service Professional Standards Section, at conduct@surreypolice.ca to obtain details of the matter."*

4.25. If the defendant contacts the PSS Disclosure Officer in response to a letter sent in accordance with paragraph 4.24, information may be provided to the defendant verbally, a record of the information provided must be made, and the PSS Disclosure Officer must inform the Member that disclosure has been provided.

4.26. If the defendant does not contact the PSS Disclosure Officer in response to a letter sent, no further efforts are required to be made to provide disclosure.

In (Traffic) Court Disclosure Request

4.27. A Member who is asked in person, immediately before a hearing or in court, for disclosure in accordance with *R. v. McNeil*, will advise the defendant that:

- i. the SPS ensures that all disciplinary records disclosure requirements are complied with; and
- ii. 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.

4.28. 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 will:

- i. advise the Judicial Justice that the SPS has procedures to ensure that all *McNeil* disciplinary records disclosure requirements are complied with; and
- ii. If necessary, ask that the matter be adjourned in order to seek legal counsel to speak to the matter.

APPENDIX A: DEFINITIONS

“Expungement” means the date that a conduct record is no longer disclosable under the *Police Act*.

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

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

“Member” means a sworn Police Officer appointed by the Surrey Police Board.

“Member Conduct Disclosure Form A” means SPS Form AD-2501, an electronic “Member Conduct Disclosure Form”, as required to be submitted by sworn Members.

“Police Witness Disclosure Form B” means SPS Form AD-2502, the form disclosed to Crown Counsel by either the Court Liaison Unit or the PSS Disclosure Officer.

“Service Record of Discipline” means the record of public trust misconducts and internal discipline matters that are maintained by the Surrey Police Service in accordance with the *Police Act*.

“Serious Misconduct” means:

- a. any conviction or finding of guilt for an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act*, for which a record suspension has not been granted;
- b. any outstanding charges under the *Criminal Code* or the *Controlled Drugs and Substances Act*;
- c. within the last five years, any conviction or finding of guilt under any other federal or provincial statute (this includes being found guilty of police misconduct under the *Royal Canadian Mounted Police Act* or another provincial police act);
- d. any finding of misconduct after a hearing or proceeding under the *Police Act* where the misconduct is related to the current investigation and has not been expunged; or
- e. any current charge of misconduct under the *Police Act* for which a notice of prehearing conference, discipline proceeding, adjudication or public hearing has been issued.

APPENDIX B: REFERENCES

Police Act, R.S.B.C. 1996, c. 367

Regina v. McNeil, [2009] 1 S.C.R. 66, 2009 SCC 3

Regina v. O'Connor, [1995] 4 S.C.R. 411

Regina v. Stinchcombe, [1991] 3 S.C.R. 326