

Privacy Panel

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SPEAKING NOTES OF JULIANNE DUNBAR, General Counsel, Military Police Complaints Commission

The goal of my presentation is to provide a Tribunal perspective on the issue.

WHAT IS THE MPCC PRACTICE?

- Vast majority of our cases (conduct complaint reviews where the complainant, who is dissatisfied with the Professional standards investigation and/or result, asks the MPCC to conduct a review) we publish de-personalized summaries of these decisions. No names are mentioned and the case is summarized in a page or two on our website.
- This approach is very much accepted by the Privacy Commissioner.
- The same cannot be said for the MPCC practice vis-à-vis those investigations which the Chairperson deems to be in the public interest (Public Interest Investigations or hearings)
- MPCC practice is to post the entire decision on the MPCC website with full names (complainants and subjects). Of course there are exceptions: minors, other persons whose names would disclose minors, victims of sexual assault, medical information, etc. Initials and/or vetting are used in these cases.

- Public interest decisions are written so as to avoid using the names or personal information of third parties that are not involved in making the complaint.
- Therefore, even in the case of public interest decisions that are posted in their entirety on our website, there are times when initials are used to replace names and some information is redacted.

WHY DOES THE MPCC FEEL IT IMPORTANT TO POST DECISIONS AND NAME THE SUBJECT MEMBERS AND COMPLAINANT(S)?

- The rationale is rooted in the creation of the MPCC.
- The MPCC was created in response to recommendations formulated by 2 special advisory groups and the Commission of Inquiry into the Deployment of Canadian Forces to Somalia.
- Result: recommendations for a significantly restructured military justice system and a series of recommendations about the military police, including the need for independence from the chain of command, the development of professional standards, and codes of conduct for Military Police, and oversight of the Military Police.
- One of these important reports (referred to as the Dickson report) stressed the importance of public confidence in the military police:
- (Quote) “It is paramount that the police force be able to enforce internal discipline by demonstrating to its **members and the public** that misconduct will not be tolerated. An

independent review capability is equally essential to ensure confidence and respect for the military police system.”

- Therefore, understanding the background of why the MPCC was created is essential to grasping the Commission’s duty to ensure accountability and transparency in its process.
- Public trust and confidence are essential ingredients for effective policing.
- Important to understand publication of names is only done in public interest cases: where Chairperson has exercised his extraordinary power to convene a Public Interest Investigation or Hearing).
- Very few cases (average 2 per year) are declared in the Public Interest. Great care and consideration is given when deciding if a case is in the Public Interest – such factors include: seriousness of the allegations; has it already generated public interest in the media for example, does it strike at core issues in policing or face major systemic issues that go well beyond the scope of the individual complaint in question....to name a few.
- It is important to stress that a Public Interest Investigation or Hearing may be in the interest of the military police members, or the Military Police overall to re-establish their reputation and their credibility after a certain incident.
- The public’s interest is served by the « right to know » and by ensuring that complaints are properly handled and not simply swept under the carpet.

- It is important for the public to know and understand how the Commission made its findings and recommendations and that the Commission conducted a thorough and proper investigation. This implies knowing who was interviewed, who was not and why, which policies and statutes were examined, as well as document verification.
- We take the position that the authority allowing us to make the reports public flows from this public interest authority and the right to know.
- Ms Daigle noted that the position of the Privacy Commissioner is that we should use random initials instead of naming names and that “Informed public debate about and confidence in the integrity of tribunals’ proceedings is not hindered by the limits the Privacy Act places on disclosure of participants’ names.”
- But is that really so?
- Will the public truly be able to grasp the importance of a decision that uses random initials and would not make reference to their title (because of course that would easily identify the individuals in question)?
- How will the public be assured that the MPCC interviewed all relevant persons in relation to the complaint?
- Or where someone was not interviewed, how will the reader be able to understand why he or she was not interviewed without knowing who the players are?
- How does this serve the accountability mandate of an organization like the MPCC?

- Ms. Daigle also spoke of “temporary failures in judgment” being available for all to read on the internet and this resulting in what is referred to as “loss of social forgiveness.”
- But Commissions like ours do not always find fault - what about the flip side when the reputation of the individual police member is tarnished or the organization as a whole? It is important to bring that issue back in the public eye to restore the reputation where the finding is that there is no fault to be found.

PUBLIC INTEREST INVESTIGATIONS VS. PUBLIC INTEREST HEARINGS

- A Public Interest Hearing is an open hearing where anyone can attend and hear the evidence. It flows that the public should be able to access the decision.
- A Public Interest Investigation is a closed process in that it is an investigation – however, this does not change the fact that it was deemed in the public interest and therefore the public has the same right to know the results by way of publication of the Commission decision.

ROLE OF POLICE:

- Emphasized in the Ontario decision of Southam Inc. v. Canada (1997 decision), where the Court examined if RCMP disciplinary hearings should be held in public. The Court made a few important comments on the nature of a peace officer’s duties.

- The Court drew attention to the public nature of a peace officer's duties and the wide powers entrusted to a peace officer in the performance of his or her duties.
- Quote from the Judge in this case: "They carry out public duties....and are of great public interest."

THE BALANCING ACT - PRIVACY INTERESTS VS. PUBLIC INTEREST

- The MPCC takes the position that the same process to determine if a case should be taken over in the public interest should also be applied to a determination if the public interest outweighs the privacy interests of those concerned.
- In the majority of our cases (conduct complaint reviews) – we feel that the privacy interests outweigh the public interest – as such, we publish depersonalized summaries.
- Only in cases deemed in the Public Interest do we feel otherwise.
- But the Privacy Commissioner in a case (case #1) where a Public Interest Hearing was held, felt that the MPCC did not provide compelling reasons as to how the Public Interest would be served in those cases by publishing the names. Yet – the hearing was an open process which the public could attend.
- Case #1: This public interest hearing was a case about a complainant, a mother of a young cadet who was the suspect in a sexual assault on another cadet. The complainant (the mother) made a complaint about the conduct of the military

police members who were investigating her son. This was a case about a minor who would have been charged with sexual assault on virtually no evidence but for a Crown in a pre-charge screening province determining that no charge should be laid.

- The Chairperson's Final Report made several important findings and recommendations in relation to supervision and training, notably in the area of eyewitness identification and the dangers of tunnel vision.
- The "public interest" aspect in this case was obvious as the case highlighted systemic issues that needed to be addressed.
- Moreover, the writing of the Final Report (which is now posted on our website) was written with great care in ensuring that the names of minors and their parents were not mentioned.
- This report has become mandatory reading for military police members.
- Case #2: also a case where the Privacy Commissioner did not find the Commission's arguments compelling that the public interest outweighed the privacy interests.
- This was a Public Interest investigation in relation to Military Police treatment of snipers in theatre. This was a case that already drew media attention (Maclean's magazine).
- In this case, the Chairperson of the Commission cleared the military police members of any wrongdoing. Based on previous public attention that questioned the military police

members' actions, it was important to ensure the public was aware of the result.

- Important for the credibility of the individual military police members involved and the Military Police organization as a whole.
- The Privacy Commissioner has, in our opinion, set an extremely high threshold (a few examples were provided): “disclosures based on public health risk and overall safety of the Canadian public.”
- The MPCC’s position is that our legislative mandate and obligations under our governing legislation contemplates that personal information can and will be used for a “consistent use” as per the *Privacy Act*.
- Disclosure of personal information in a Final Report is for the purpose for which it was obtained in the first place during the course of the inquiry or hearing and is consistent with that purpose.
- The *National Defence Act* specifically requires the Chairperson of the Commission to release a report outlining his findings and recommendations following a Public Interest investigation and/or hearing... thus a consistent use.

IS THERE A DIFFERENCE BETWEEN DECISIONS POSTED ON THE MPCC WEBSITE VS. BEING MADE AVAILABLE IN HARD COPY?

- There is an interesting discussion of the issues of publication on the internet in an article by Marc-Aurele Racicot – *Revue*

du Barreau. He examines the issue from the point of view of the open court principle.

- He defines the competing interests as being the principle that court proceedings should be open to the public as against what he calls “practical obscurity”.
- This concept recognizes that while records of courts and other administrative tribunals are available to the public, as a practical matter, they are only available to those who wish to take the time to attend the hearing or request the decision from the tribunal.
- While Mr. Racicot’s paper and comments certainly act to define the scope of the competing policy issues, they do not provide any practical guidance on the internet and the “practical obscurity” provided by having records available only to those who have an absolute right to have them or to those who take the trouble to request them of the tribunal.
- It is our opinion that the *Privacy Act* makes no distinction in relation to how the information is published and therefore should not be a factor in the analysis.

INFORMATION COMMISSIONER

- We must also be mindful of the Information Commissioner and the *Access to Information Act* premised on the principle that the public has a right of access to information and government information should be available to the public.

IN SUMMARY

- Section 8 of the federal *Privacy Act* allows the deputy head of that institution to disclose personal information where “the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure.”
- There must be a balance – not advocating all decisions should be published – just those few deemed to be in the public interest.
- It is essential that we remember the reason why civilian oversight bodies were created – question of accountability and transparency.
- It is not about naming names to embarrass publicly the subject military police members; rather it is about holding police accountable for the very extraordinary powers for which they have been entrusted.
- And in other cases, like the sniper case I spoke of, it is an important mechanism to restore the credibility of the individual police members or their organization as a whole.
- When one balances the public interest mandate of the MPCC and the circumstances under which it was created, general principles of openness, including a specific mandate for open hearings – against the privacy interests involved, it is our view that the publication of the MPCC public interest decisions on our website do not violate the *Privacy Act*.