



VANCOUVER POLICE DEPARTMENT

REPORT TO THE VANCOUVER POLICE BOARD

REPORT DATE: March 31, 2016
BOARD MEETING DATE: April 14, 2016
BOARD REPORT # 1604C01
Regular

TO: Vancouver Police Board
FROM: Drazen Manojlovic, Director, Planning, Research and Audit Section
SUBJECT: The Vancouver Police Department Response to OPCC's Recommendations on the Administration of the Restaurant Watch Program

RECOMMENDATION:

That the Vancouver Police Board (VPB) Service and Policy Complaints Review Committee approve this report and forward it to the Office of the Police Complaint Commissioner.

SUMMARY:

In February 2015, an individual complained to the Office of the Police Complaint Commissioner (OPCC) that he was ejected from a restaurant in Vancouver by Vancouver Police Department (VPD) police officers under the Restaurant Watch Program (RW). This complaint was forwarded to the VPB Service and Policy Review Committee who, on July 15, 2015, accepted the report's recommendation to dismiss the complaint.

The OPCC reviewed the July 2015 report, along with other similar complaints, and have identified what they believe are issues with respect to the possible inconsistent application of RW by VPD officers due to a "lack of clear and objective policy to guide their approach." The OPCC recommends that the VPB develop and implement policy in relation to RW that includes, but is not limited to, the following areas: jurisdiction; program criteria; application of the Province of British Columbia (BC) *Trespass Act*, and; the recording of patron information.

RW is a public safety initiative focused on reducing violence in and around Vancouver restaurants resulting from the presence of gang members, organized criminals and their associates. RW is supported by legislation and it has clear criteria and consistent training. To comprehensively review the issues raised by the OPCC, the VPD has sought legal opinions regarding the implementation of RW. The issues raised by the OPCC are addressed in this report and it has been deemed by the VPD, and supported by legal analysis, that no policy is required for RW and it is recommended that this report be forwarded to the OPCC.

POLICY:

The VPD does not have policy and procedure on the implementation of RW; however, the applicable documentation or legislation is:

- The BC *Trespass Act*, sections 1, 3, 4, 8 and 10
- Relevant RW documentation:
 - Inadmissible Patron Agreement
 - Authorization Agreement
 - Restaurant Watch & Barwatch – Operational Reference Guide

DISCUSSION:

Background on RW

RW is a public safety initiative committed to providing a safe environment for the public. Specifically, RW is focused on reducing violence in and around Vancouver restaurants that results from the presence of gang members, organized criminals, and their known associates. It is a partnership between the Vancouver restaurant industry, the British Columbia Restaurant and Foodservices Association, and Restaurants Canada, which authorizes members of the VPD to act on behalf of the participating restaurants.

RW's goal is to deny entry to, or remove any person from, restaurants because their lifestyle, associations, or activities are related to gang involvement and violent crime, thus their presence in restaurants poses a significant risk to public safety (i.e., the other patrons and employees present). There have been many examples of RW's success as a proactive measure to prevent crime. For example, members of the Gang Crime Unit, while conducting a RW check, recently seized a loaded handgun from a gang member inside a Vancouver restaurant.

RW relies on the legislative authority of the BC *Trespass Act* to enforce ejections of people from a restaurant. RW has criteria for authorizing members of the VPD to eject inadmissible patrons (IPs). The specific criteria for ejecting IPs are:

- Organized Crime and Gang members
- Associates of Organized Crime and/or Gangs
- Involvement in the drug trade
- History of serious and/or violent criminal activity
- History of firearms offenses

In conjunction with our regional policing partners, the VPD investigates gang members' activity and monitors which of their associates is active in the gang lifestyle. It is the threat of potential violence that a gang member, or an associate, brings with them (again based on how active they are in the gang lifestyle), which is often the deciding factor in an ejection.

RW, along with other programs (e.g., Barwatch), and focused investigative and enforcement tactics, have contributed to a significant improvement in reducing the amount of gang and organized crime related violence in Vancouver. For example, in 2005 there were 95 'confirmed shots fired' calls for service in Vancouver, compared to 10 in 2015. Further, between the years 2005-2009, the annual average of organized crime related homicides was nine, compared to three between 2010 and 2015. In fact, there was only one organized crime related homicide in 2015. RW, combined with other programs and tactics, sends a clear message to gang members, organized criminals, and their known associates that they are not welcome in Vancouver.

How Does RW Work?

- Restaurants voluntarily choose to participate in RW because they share the VPD's goal of maintaining public safety by reducing the potential for gang-related violence.
- An important aspect of a restaurant joining RW is that they are educated and provided information on gang-activity and how dangerous people active in the gang lifestyle are. The restaurant is fully aware of the risk to public safety such individuals bring to their business and, as part of the RW agreement, the restaurant is stating that they do not want these people in their premises at any time, regardless if the person is behaving properly or not.
- Under section 1 of the *Trespass Act*, the owner/occupier/agent of a restaurant can authorize any person to act on their behalf. RW is based on the legally supported premise that VPD officers are 'authorized persons'.
- When VPD officers are conducting RW, and when they approach a patron(s) to determine if they're an IP, the officers are acting as an authorized person with the authority of the owner. The officers will ask for identification (ID) to assist in determining if the patron is an IP. This request for ID is not tied to any authority as a police officer; rather it is based on the authority the owner has given the authorized person to request ID (this authority is specified in the RW Agreement).
- A patron is not legally required to provide ID to the authorized person, but an owner is legally allowed to establish rules that patrons need to follow in order to remain welcome in the owner's establishment (this is akin to the 'no shirt, no shoes – no service' rule many restaurants enforce). As such, the patron isn't legally bound to show ID but the owner is well within their rights to advise the patron that by not providing ID as requested that they will no longer be served, will be asked to leave, and if they choose not to leave the patron will then be notified that they are trespassing and have a 'practicable' amount of time to leave.
- Owners have the right to enforce such a rule based on the legal premise that proprietors' have the private authority to exclude whom they choose from their premises (provided such exclusion is not against prohibited human rights grounds).
- Consequently, when RW officers are requesting ID from a patron of a RW-participating restaurant, they are doing so as an authorized person following a rule set by the owner. When a patron refuses to provide ID, the officer advises they will no longer be served and asked to leave. If the patron does not wish to leave then they will be notified that they are trespassing and will be given a practicable amount of time to leave. The authority for all of these interactions stems from the authority the owner has provided to the authorized person (the RW officer).
- If the patron hasn't left, after they've been notified that they are trespassing and been given a practicable amount of time to leave, then the patron has committed an offense under the section 4 of the *Trespass Act* and they are subject to arrest under section 10 of the *Trespass Act*. To clarify, if it gets to that stage, the RW officer's authority to arrest now stems from the *Trespass Act* and they are now acting as a peace officer and are no longer acting as an authorized person.

In summary, RW is a civil crime prevention approach that combines the authority that private owners possess with the knowledge police have in determining IPs, while using the *Trespass Act* as its legal foundation.

The OPCC's Recommendations

Jurisdiction - in their correspondence, the OPCC states the following:

1. *Based on the Restaurant Watch/Bar Watch Agreement and the above provisions of the Trespass Act, it appears that police officers act as a delegate of the occupier. This relationship places them in a conflict of interest whereby they are simultaneously acting as private citizens and peace officers.*
2. *My review of the XXXXX complaint as well as similar complaints revealed that this conflict can become particularly problematic in circumstances where officers' conduct arrests pursuant to s.129 of the Criminal Code for obstructing a peace officer, although they are acting pursuant to the authority of an occupier – a private authority.*
3. *I recommend that the Board create policy that clearly identifies the jurisdiction of police officers when enforcing the Trespass Act in the context of the Program. That policy should encourage a consultation process with owners/occupiers in which officers advise the occupier of an alleged Inadmissible Patron and ask if the occupier wants that patron to leave the premises.*

The issue of whether officers are acting simultaneously as 'private citizens' and as peace officers as part of RW is a highly technical, and debateable, legal interpretation. As previously mentioned, restaurants voluntarily choose to participate in RW because they share the VPD's goal of maintaining public safety by reducing the potential for gang-related violence. Although this is their private interest, it is perfectly aligned with the VPD's public interest and duty. There is no conflict of interest in terms of the private and public interest.

The OPCC is concerned that the construct of RW is a conflict of interest. The OPCC doesn't define what the conflict is, but we interpret this to mean police are potentially acting as the private security for the restaurant. In this case we ask 'as part of being in RW, what private benefit has the restaurant achieved by having police act as authorized persons?'

- Have they increased revenue that evening? – No
- Have they used police to bar people contrary to the BC Human Rights Code? – No
- Have they benefited by having the RW officers do extra policing tasks around or in their property, such as moving a panhandler from the front of the business? – No
- Have they benefited by having the RW officers 'turn a blind eye' to other enforcement issues within their property? (e.g., under-age drinking) – No
- Have they benefited from getting any other form of special treatment or attention from the VPD? – No
- Are the police acting as an employee of the owner? - No

VPD officers are required to act as intermediaries and inform IPs to leave the restaurant to protect the owner, staff, and patrons from potential harm that IPs bring with them by their presence. Police officers act independently from the owner/manager and are never under the direction of the owner/manager. There are many instances where owners/managers are concerned that a patron(s) may meet the IP criteria and they call for service under RW. Officers arrived at the premises, investigated these patrons, and determined that they did not meet the criteria for ejection.

While technically the officers are acting as an authorized person when they initially determine that a person is an IP – by making that determination on behalf of the owner/occupier of the premises – and then following up by requesting the person to leave the premises, again on behalf of the occupier, this is not a legally impermissible role/function for a police officer to engage in. When doing so, the officer is not acting in some purely private capacity, solely in the interest of the owner/occupier, but in a dual role by acting in both the interests of the restaurant

owner/manager and also acting in the public interest, in furtherance of the police's duty to ensure public safety.

RW is a non-traditional but lawful use of the *Trespass Act*. The common, fundamental interest shared both by the police officer and the private organizer/owner/manager is public safety, not advancing or enforcing a private interest.

Program Criteria - the OPCC offers the following opinion about RW:

The Program itself is broad in scope and without clear criteria and objective policy regarding when a patron meets the threshold for ejection as an Inadmissible Patron. According to the Restaurant Watch/Bar Watch Agreement, the VPD criteria to eject a person as an Inadmissible Patron are:

- *Organized Crime and Gang members*
- *Associates of Organized Crime and/or Gangs*
- *Involvement in the drug trade*
- *History of serious and/or violent criminal activity*
- *History of firearms offenses*

The OPCC opines that these criteria lack clarity, which leads to inconsistent application of RW and they recommend that the Board create policy in terms of the threshold as it relates to when the police may eject IPs.

RW clearly defines an IP as a person whose lifestyle, associations, and activities poses a risk to public safety, either directly or from third parties. The high risk behaviour of these individuals is the main focus of RW. IPs are typically involved in gangster-like activity such as, but not limited to, drug trafficking, extortion, kidnapping, home invasions, and the use of firearms, etc. This can mean that the IP is directly involved in such activities, as typically committed by gang and organized crime groups. IPs can also be involved in the facilitation of such activities and crime such as, but not limited to, money laundering, aiding and abetting, obstruction of justice, etc.

RW is coordinated by a police officer designated as the RW Coordinator. The training for the RW is consistent throughout the VPD, which is provided by the RW Coordinator and/or his designate. RW provides training on how an individual is determined to be an IP and what relevant database and information sources are used by police officers (e.g., PRIME, CPIC, intelligence bulletins, and police knowledge).

Furthermore, the VPD has a detailed RW operational reference guide which is posted in the Mobile Police Officer's Resource Tool, where police officers can access the material directly on their mobile data terminals. The operational reference guide provides specific guidance and direction to officers on topics such as IP criteria, authority for ejection and arrest, protocols to notify supervisors and communication, and documentation. There is no need to develop policy in addition to the existing comprehensive operational reference guide.

The combination of RW's criteria, the training provided, the operational reference guide, and access to police information and databases, all allow VPD officers to subjectively determine, and to objectively verify, the status of the IP.

Application of the Trespass Act - the OPCC writes "officers have demanded government issued identification, citing the Restaurant Watch/Bar Watch Program as their authority to do so.

Officers then conduct database queries of the individuals to determine if they are Inadmissible Patrons". The OPCC cites patrons are only required to provide their correct name and address under the *Trespass Act*. The OPCC is concerned that officers are demanding government issued identification absent a legislated or common law authority to do so.

Further, the OPCC states some officers have arrested individuals for obstruction pursuant to section 129 of the *Criminal Code*, whereas other officers have arrested individuals pursuant to section 10 of the *Trespass Act*. Both scenarios involve officers citing a failure to provide government issued identification as grounds for the arrest.

The OPCC therefore recommends that the Board outline clear policy on the application of the *Trespass Act* to the RW, including but not limited to:

- i. authority and procedures for requesting a patron to identify themselves;*
- ii. authority and procedures conducting an arrest pursuant to the Trespass Act; and*
- iii. application of section 129 of the Criminal Code to the Program, including guidance on whether that section may be utilized and, if so, in what circumstances.*

As previously explained in the section titled "How Does RW Work", the RW Agreement stipulates that patrons in RW businesses must present identification upon request. This is a rule that participating restaurants can legally invoke and the following is an excerpt from the RW Authorization Agreement:

- (2) to request, and to be provided with, valid identification from certain persons within the premises, based on the prior knowledge, beliefs and/or observations of the attending members of the Vancouver Police Department and its partner police agencies, and;*
- (3) to instruct those specific persons from paragraph (2), who refuse to provide identification, that they will no longer be served and to then to escort those specific persons out of the premises as soon as reasonably practicable.*

RW's training and operational reference guide provide clear direction on the steps required for police members to eject or arrest IPs. RW instructs officers to advise IPs that they will be refused service and asked to leave. If an IP refuses to leave, they are notified that they are trespassing and be given a practicable time to leave. If they do not leave after the trespass notification, then they are deemed as trespassers under the *Trespass Act*, and in this circumstance, officers will arrest IPs pursuant to section 10 of the *Trespass Act*. The VPD reinforces this practice by detailing it in the operational reference guide.

The OPCC does not provide a specific example of when section 129 of the *Criminal Code* was used, and therefore it is difficult to provide an answer to this question without knowing the circumstances.

Patron Information - the OPCC states that all ejections from establishments under RW are documented in PRIME. They are concerned that the retained data could have a "long lasting, significant negative impact on an individual, yet it does not appear that the VPD has policy to ensure that the information is accurate and reliable, nor is there a process whereby an ejected individual may appeal the ejection or their identification under the RW if they believe they have been unjustly evaluated."

There is an avenue for ejected persons to have a fair and objective review of their admissibility under RW. They are welcome, and individuals have been encouraged, to contact the Gang Crime Unit, and/or the RW Coordinator, to provide more information that will be considered. IPs who have been ejected are noted in a General Occurrence (GO) report; however, such a report

does not constitute a criminal record or a record that would be revealed if a person requested a Police Information Check as required by a prospective employer or a volunteer organization. Furthermore, records of these ejections are kept for the purpose of transparency and allow the VPD to follow-up on any complaints received regarding the conduct of our officers.

CONCLUSION:

RW is a public safety initiative focused on reducing violence in and around Vancouver restaurants resulting from the presence of gang members, organized criminals and their associates. RW is supported by legislation; it has clear criteria, consistent training and an operational reference guide for VPD officers to follow. The issues raised by the OPCC have been addressed and it has been deemed by the VPD, and supported by an obtained legal analysis, that no policy is required. As such it is recommended that this report be forwarded to the OPCC.

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Submitting Executive Member:

Chief Constable Adam Palmer Date: April 5, 2016