



Office of the
Police Complaint Commissioner

British Columbia, Canada

October 23, 2015

2015-10584-01

VIA E-MAIL: Patti.marfleet@vancouverpoliceboard.ca

His Worship Mayor Gregor Robertson
Chair, Vancouver Police Board
3rd Floor, City Hall
453 West 12th Avenue
Vancouver, BC V5Y 1V4

Dear Mayor Robertson:

Re: Service or Policy Complaint - Vancouver Police Department (VPD)

On August 18, 2015, the Office of the Police Complaint Commissioner (OPCC) received a copy of your August 12, 2015, letter dismissing [REDACTED] complaint. Your letter detailed the steps taken with respect to [REDACTED] complaint and attached a report, authored by Sergeant Tran of the Vancouver Police Department (VPD), which outlined the investigation into [REDACTED] complaint.

On October 1, 2015, I requested the background information upon which Sergeant Tran's reasons for decision were based and learned that the VPD has no policy related to the Restaurant Watch program (also known as Bar Watch or the Inadmissible Patron Program), hereafter referred to as *the Program* (unless specifically identified). We were provided with the Restaurant Watch Agreement, which is signed by the VPD and participating Establishments.

The OPCC recognizes the fundamental principles of the Program as a public safety initiative. However, I have reviewed [REDACTED] complaint as well as other similar complaints and have identified issues with respect to inconsistent application of the Program by officers due to a lack of clear and objective policy to guide their approach.

Specifically, I have identified the need to create clear and consistent policy regarding the jurisdiction of the officers acting pursuant to the Program, the criteria upon which patrons are deemed inadmissible and the application of the *Trespass Act* to the Program.

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Police Complaint Commissioner

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Section 173 of the *Police Act* states:

(1) Subject to subsection (2) of this section, whether or not the person who made the complaint has requested a review under section 172 (2) [if investigation or study is initiated under section 171] the police complaint commissioner may do any of the following:

- (a) Review the decisions of a board under section 172;
- (b) Recommend to the board further investigation, study, courses of action or changes to service or policy;
- (c) Make recommendations to the director under section 177(4)(e) [general responsibility and functions of Police Complaint Commissioner].

Reasons for Decision

Sergeant Tran's July 2, 2015, Report to the Police Board included the following excerpts:

1. *Restaurant Watch 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 known associates. Participating restaurants enter an agreement with the VPD authorizing members of the VPD to act on their behest to deny entry to a restaurant, or remove from a restaurant, any patrons who meet the program's criteria.*
2. *Restaurant Watch's legislative authority is found in the B.C. Trespass Act, which authorizes the owner of a property, or their designate, to compel a person to leave the property. If a person does not leave the premises as soon as practicable, after being told to leave or attempts to re-enter, the person is deemed to have committed an offense. Essentially, the Trespass Act lawfully permits an owner of a private business to delegate their right to remove an individual from their premises to the VPD (provided that the removal is for bona fide reasons and not based on factors that would violate B.C.'s Human Rights Code). The Restaurant Watch program clearly outlines criteria for authorizing members of the VPD and its partner agencies to eject patrons, which 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*

Analysis

Although the complainant was convicted more than 25 years ago, the seriousness of his criminal conviction for firearms and explosives possession as well as for escaping lawful custody should not be understated; however, this past conviction was a secondary factor when it came to this ejection. Furthermore, a lack of criminal convictions in Canada does not preclude a person from being ejected, as not all people actively engaging in criminal activity have criminal records.

In this case, it is clear the nature of complainant's recent association with gang members was the reason he was ejected. The complainant is the subject of recent (within the past five years) police-documented incidents, based on reliable information, of the complainant's association with gang

members and his active participation this criminal lifestyle. His ejection was appropriate under the criteria of the Restaurant Watch program.

Conclusion

The Restaurant Watch program is a partnership between the VPD and the various restaurant groups, designed to provide a safe environment for everyone. Participating restaurant owners authorize members of the VPD to act on their behalf to remove any patrons (or deny entry) who meets one or more of the program's criteria. VPD members found the complainant inside a Restaurant Watch establishment and confirmed he met one or more of the ejection criteria. As per the agreement with the Coast Restaurant, VPD members ordered the complainant to leave the restaurant with cause. As such, I recommend this complaint be dismissed with reasons.

From my review of this matter and similar complaints involving VPD officers, as well as the Program itself, it appears that aspects of the Program are mired in confusion. Pursuant to section 173(1)(b) of the *Police Act*, I recommend that the Board develop and implement policy in relation to the Restaurant/Bar programs that include, but not limited to the following areas of:

Jurisdiction

A review of the Program agreement in general demonstrates that the VPD and restaurants/bar owners participating in the Program enter into a private contract. A key component of that contract is that it "authorizes sworn members of the VPD and its partner agencies to act on behalf of the owner" to: deny entry and/or remove Inadmissible Patrons, request valid identification, and to escort persons who refuse to provide identification out of the premises.

I note that the following definitions pursuant to section 1 of the *Trespass Act*:

"authorized person" means a person authorized by an occupier of premises to exercise a power or perform a duty of the occupier under this Act

"occupier", in relation to premises, means

(a) if the premises are land, including enclosed land, foreshore and land covered by water, or are property described in paragraph (a) of the definition of "premises", a person entitled to maintain an action of trespass in respect of those premises,

(b) if the premises are property described in paragraph (b) or (c) of the definition of "premises", a person lawfully entitled to possession of those premises, and

(c) if the premises are water, a person described in paragraph (a) of this definition in relation to the land under the water,

and includes a person who

(d) has responsibility for and control over the condition of the premises or the activities there carried on, or

(e) has control over persons allowed to enter the premises

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. My review of the [REDACTED] 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.

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.

Program Criteria

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*

Sergeant Tran's report also appears to create another criterion in his reasons for decision on page 1, wherein he writes, [REDACTED] the subject of "recent (within the past five years) police-documented incidents based on reliable information..." Sergeant Tran's analysis did not clarify when those incidents occurred or how they objectively satisfied the criteria to become an Inadmissible Patron.

A lack of clearly defined criteria leads to inconsistent application of the Program. Therefore, I recommend that the Board create clear, objective policy in terms of the threshold as it relates to when the police may eject patrons pursuant to the above criteria, including but not limited to explanations of:

- a. what constitutes an "associate";
- b. what constitutes "involvement in the drug trade";
- c. what constitutes "serious and/or violent criminal activity";
- d. what type of incidents/offenses are relevant "police-documented incidents";
- e. the required classification of a person in relation to a "police-documented incident" (suspect, complainant, other?);
- f. whether suspicion, charges or a conviction is necessary with respect to meeting any criteria of Inadmissible Patrons;
- g. the time frame for which a person's "history" is sufficiently recent to be relevant; and
- h. clear, objective guidance regarding what attention is to be attributed to a person's history.

Application of the *Trespass Act*

A further area of confusion regarding the Program relates to Sergeant Tran's application of the BC *Trespass Act*. Sergeant Tran's report stated that "Restaurant Watch's legislative authority is found in the B.C. *Trespass Act*, which authorizes the owner of a property, or their designate, to compel a person to leave the property. If a person does not leave the premises as soon as practicable, after being told to leave or attempts to re-enter, the person is deemed to have committed an offense."

In similar complaints involving the VPD, 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 demand for government issued identification appears to be based on the Program's "Restaurant Watch Authorization Agreement (Operator's Copy)", which is signed by occupiers to authorize the VPD and partner agencies to:

- (2) "...request and be provided with, valid identification from certain persons in the premises..."
- (3) "instruct those specific persons from paragraph (2), who refuse to provide identification, that they will no longer be served and to escort those specific persons out of the premises as soon as reasonably practicable."

Consistent with the Supreme Court of Canada decision in *R. v. Moore*, [1979] 1 S.C.R., the *Trespass Act* does not require patrons to provide government issued identification, only their correct name and address. Furthermore, patrons are only required to provide their correct name and address when:

- i. they enter premises that are enclosed land;
- ii. enter premises *after* receiving notice that entry is prohibited;
- iii. continue engaging in a prohibited activity *after* receiving notice that the activity is prohibited; or
- iv. fail to leave the premises as soon as reasonably practicable *after* being directed to do leave the premises by the occupier or authorized person.

(see *Trespass Act*, RSBC 1996 ch. 462, sections 4 and 8)

I am concerned with a practice of demanding government issued identification absent a legislated or common law authority to do so, as such a practice may be considered akin to a street check or "carding", an issue that has been raised with other police boards in Canada, most notably Ontario. A recent submission by the Ontario Ombudsman's Office on street checks criticized the practice as a violation of human rights and recommended safeguards to protect those rights if the practice is to continue.¹ The Ontario Provincial Government plans

¹ See Andre Marin Ombudsman of Ontario, *Street Checks and Balances Submission in response to the Ministry of Community Safety and Correctional Services' consultation on proposed Ontario regulation for street checks* (29 September 2015), online: https://ombudsman.on.ca//Resources/Speeches/2015/Written-Submission-to-the-Ministry-of-Community-Sa.aspx#APPENDIX:LIST_OF_RECOMMENDATIONS

create policy to ensure the practice is free from bias and done in a way to promote public confidence.²

I also note that similar VPD complaints regarding the Program indicate that there is some confusion regarding powers of arrest. 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.

I recommend that the Board outline clear policy on the application of the *Trespass Act* to the Program, 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.

Patron Information

My review of the available information identified that all ejections from establishments under the Program are to be documented in PRIME. 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 Program if they believe they have been unjustly evaluated.

I recommend that the Board create clear policy with regard to obtaining and retaining information about persons identified under the Program, including but not limited to:

- a. a review process to ensure that persons have been appropriately identified under the Program and, if so, that the information is accurate and reliable; and
- b. a process whereby persons can appeal their identification as and the retention of that identification on PRIME.

Having had the opportunity to examine the Board's decision, this office recommends pursuant to section 173 of the *Police Act*, that the Board further investigate and examine my recommendations and comments with the purpose of identifying and developing policy where necessary regarding the administration of the Program.



Stan T. Lowe
Police Complaint Commissioner

Copy: Chief Constable Adam Palmer, Vancouver Police Department

² Adam Miller, "Ontario set to standardize police carding policy" *Global News* (16 June 2015)
<http://globalnews.ca/news/2056852/ontario-set-to-introduce-new-carding-rules/>