

Item No. 7.1

Request for Consideration		
<input checked="" type="checkbox"/> Agenda Item (Submitted to Municipal Clerk's Office by Noon at least 5 working days prior to the meeting)	<input type="checkbox"/> Added Item (Submitted to Municipal Clerk's Office by Noon at least one day prior to meeting)	<input type="checkbox"/> Request from the Floor <input type="checkbox"/> Notice of Motion
Council or Committee: Halifax Board of Police Commissioners:		
Date of Meeting: November 15, 2021		
Subject: Drafting of HRP and RCMP communication policy where police complaint investigation is ongoing or a complaint is reasonably foreseeable		
Motion for Council to Consider: <p>That the Board of Police Commissioners prepare a draft of a communication policy (to be received and reviewed by the Board at their January meeting) which will apply to the HRP and will be recommended to apply to the RCMP. This policy will limit but not prohibit the ability of police to make public statements about matters that: (1) are currently the subject of a police complaint investigation, or (2) for which it is reasonably foreseeable that a complaint will be filed in the near future.</p>		
Reason: 1. Rationale <p>This policy is intended to address a concern first raised in correspondence from Councillor Wayne Mason who, in a letter to the board dated July 20, 2021, wrote in part (emphasis added):</p> <p>I am writing to you today regarding an email sent regarding an active police complaint that was sent to some Halifax Regional Councillors regarding by the Acting Chief Officer of the Halifax Division on Sunday July 18 (attached).</p> <p>In summary my concerns are:</p> <p>a. <u>the complaint process will run per the Police Act and this update may have been inappropriate while that independent process plays out;</u>¹</p> <p>Both the <i>Police Act</i> and the <i>Royal Canadian Mounted Police Act</i>, RSC 1985, c R-10, provide for schemes under which members of the public can file complaints against the police. Under both statutes, police officers are designated to conduct the investigations arising from these complaints. In his 2017 <i>Report of the Independent Police Oversight Review</i>, Justice Michael Tulloch of the Ontario Court of Appeal wrote (emphasis added):</p> <p>7.340 – Investigations 143. There is broad consensus among members of the public and policing stakeholders that an effective public complaints system depends in part on the integrity of the investigative</p>		

¹ <https://www.halifaxexaminer.ca/wp-content/uploads/2021/10/10.1.2021.pdf>

process. Public and policing confidence requires thorough and competent investigations, conducted with fairness and impartiality.

...

150. A commonly expressed view at my consultations was that “the police should not be investigating police.” Nonetheless that is the current state of affairs. The [Office of the Independent Police Review Director] is largely a screening body and not an investigative one.²

Public perceptions of the impartiality of police complaint investigations—and thus public confidence in the complaints system more generally—may be negatively impacted in circumstances where police make public statements about matters that are currently subject to investigation. The same may also be the case where police officers make public statements concerning matters about which the police know or ought to know that one or more members of the public may soon file a complaint. In either case, the negative impact may be especially acute where a public statement is made by an officer who outranks, or is publicly perceived to outrank, the officer who is designated to complete the complaint investigation.

2. Contents of the proposed policy

Although the contents of the proposed policy will ultimately be a matter for the Board to decide, I offer the following by way of clarification.

a. When would the policy apply?

The policy would apply in two circumstances: (1) when a police complaint is ongoing and (2) when it is reasonably foreseeable that one or more members of the public may in the near future file a complaint regarding the conduct of one or more officers, or a complaint against the police generally.

The first of these circumstances should be straightforward. The policy needs to apply in this circumstance to avoid the risk that a public statement made by the police may cause actual or perceived prejudice to an ongoing police complaint investigation.

While the first circumstance is intended to safeguard the integrity of ongoing investigations, the second is intended to protect possible, future investigations.

Consider an example. A member of the public perceives that they have had some sort of negative interaction with the police. For whatever reason, the police subsequently release a public statement about this interaction claiming that the interaction was entirely appropriate and in keeping with their policies.³ In such a circumstance, the public statement may have a “chilling effect” that causes the complainant to lose confidence in the police complaint system, ultimately dissuading them from filing a complaint.

To clarify, the criterion of “reasonable foreseeability” would not be the same standard as in the law of negligence. Instead, the policy would enumerate factors that would need to be applied for the purpose of determining whether a public complaint is reasonably foreseeable. These factors **could** include:

- The nature and circumstances giving rise to the incident
- Whether the incident was covered by the media, or otherwise publicized by some other means
- Whether the incident involved the use of force
- Public statements made by the potential complainant

b. What would the policy limit the police from doing?

² The Honourable Michael Tulloch, *Report of the Independent Police Oversight Review* (Toronto, ON: Province of Ontario 2017): 7.340, paras 143, 150, https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/

³ <https://www.cbc.ca/news/canada/nova-scotia/halifax-police-chief-says-force-s-actions-appropriate-in-face-of-aggressive-and-armed-crowd-1.6146714>

The policy would **limit but not prohibit** the police from making public statements about matters when either or both of the circumstances just described are met.

There may be situations where the police need to release information about any number of matters, including incidents, investigations, or interactions police have with members of the public. This policy would not prevent this.

Instead, in those circumstances where it would apply, the police would prevent the police from:

- commenting on factual matters that are subject to dispute, as in the case identified by Councillor Wayne Mason; and
- commenting on the appropriateness of police actions (e.g., whether or not they constituted a disciplinary default, or were in compliance with police policies)

3. Legislative authority

a. HRP

i. Relevant sections of the legislation

Section 55(1) of the *Police Act*, SNS 2004, c 31 reads:

- 55 (1) The function of a board is to provide
- (a) civilian governance on behalf of the council in relation to the enforcement of law, the maintenance of law and order and the prevention of crime in the municipality; and
 - (b) the administrative direction, organization and policy required to maintain an adequate, effective and efficient police department

According to legal counsel for HRM, the language in 55(1) which requires the Board to provide policy, as well as similar language in the by-law and MOU, make it clear that the Board's authority goes beyond mere recommendation of policies.⁴ However, the Board's power in this regard is limited by the exclusion in s 55(1) which states that the Board shall not exercise jurisdiction relating to the actual day-to-day direction of the police department.

Additionally, s 55(3) reads in part:

- (3) Without limiting the generality of subsection (1), a board shall
- ...
- (d) ensure that police services are delivered in a manner consistent with community values, needs and expectations;
 - (e) act as a conduit between the community and the police service providers

ii. Policy and operations

In *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, Chief Justice Beverley McLachlin of the Supreme Court of Canada wrote: "core policy government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."⁵

The HRM legal opinion described the policy/operations distinction in the context of the Board's work as:

Essentially this distinction can be boiled down to granting the Board the power to determine where the police service is heading, and the end goals and objectives it works towards. The Chief then has the power to determine how those goals and objectives will be met.⁶

⁴ Katherine Salsman, *Roles and Responsibilities of the Board of Police Commissioners* (Halifax: Halifax Regional Municipality, 2017): 5, <https://www.halifax.ca/sites/default/files/documents/city-hall/boards-committees-commissions/170619bopc913.pdf>.

⁵ *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 74.

⁶ Katherine Salsman, *Roles and Responsibilities of the Board of Police Commissioners*, 5.

British Columbia's *Police Act*, RSBC 1996, c 367 also provides for the creation of municipal police boards, whose relationship to municipal police forces is based on the policy/operations distinction. Their Police Board Handbook describes this distinction as follows:

Governance refers to controlling and directing the making of policy, as well as directing and influencing decisions made by the organization. ... Effective governance involves setting policies that address end results and specifying what *cannot* be done in the course of trying to accomplish them. Consideration of policy results involves answering the following questions:

- What are the benefits/results this organization will produce?
- For whom will these results be produced?
- At what cost?

By specifying what *cannot* be done, the board is setting executive limitations and is staying out of the "means", which is the domain of the Chief. ...

Day-to-day professional operational decisions are matters for the department itself. The authority of the individual constable to investigate crime, to arrest suspects and lay information before the justice of the peace comes from the common law, *Criminal Code* and other statutory authority and must not be interfered with by any political or administrative body.⁷

By contrast, the actual day-to-day direction of the police department with respect to the enforcement of law and the maintenance of discipline within the department are operational matters, and solely the responsibility of the chief officer as per section 38(5) of the *Police Act*.

iii. Why this is a policy matter

As noted, core policy government decisions are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social, and political factors.⁸

In setting "executive limitations" on the ability of police to communicate with the public in circumstances where a complaint investigation is ongoing or a complaint is reasonably foreseeable, the decision to enact this policy is a decision as to a course of action that is based on social and political factors—namely, the need to safeguard public perceptions of the impartiality of police complaint investigations, and thus public confidence in the complaints system more generally.

In a more recent decision, *Nelson (City) v. Marchi*, 2021 SCC 41, Justices Karakatsanis and Martin, for the Supreme Court of Canada, further clarified the policy/operations distinction by enumerating four factors intended to help assess whether something is a policy or operational decision:

- (1) the level and responsibilities of the decision-maker;
- (2) the process by which the decision was made;
- (3) the nature and extent of budgetary considerations; and
- (4) the extent to which the decision was based on objective criteria.⁹

The Court noted that the underlying rationale for the policy/operations distinction is to protect the core institutional roles and competencies of different branches of government, so the four factors must be assessed with reference to this rationale.¹⁰ This underlying rationale is highly relevant to the work of the Police Board in light of the recognized need to avoid interfering in the operational and day-to-day activities of the police force.

⁷ Government of British Columbia, *BC Police Board Resource Document on Roles and Responsibilities Under the Police Act*, (British Columbia: BC Ministry of Justice, 2015), <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/boards/bc-police-board-handbook.pdf> (emphasis added).

⁸ *Imperial Tobacco Canada Ltd.*, at para 74.

⁹ *Nelson (City) v. Marchi*, 2021 SCC 41 at para 3.

¹⁰ *Ibid.*

Applying the four factors enumerated in *Nelson (City)*, the communications policy proposed in this motion is a policy matter and not an operational matter.

(1) The level and responsibilities of the decision-maker

“What is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles.”¹¹

The Board provides civilian governance of the HRP on behalf of Regional Council, which is a democratically-elected and -accountable body. Three of the Commissioners on the Board are Councillors, in accordance with section 44(4) of the *Police Act*. The Board’s duties under sections 55(3)(d) and (e) to “ensure that police services are delivered in a manner consistent with community values, needs and expectations” and “act as a conduit between the community and the police service providers” necessarily involve the assessment and balancing of public policy considerations. Further, the Board is not charged with implementation of policy, and is specifically prohibited from same under section 55(1)(e).

(2) The process by which the decision was made

“The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.”¹²

If the Board decides to move ahead with drafting this communications policy, it will be as a result of deliberation amongst the Commissioners in a public setting (i.e., the Board’s meeting), will involve input from different levels of authority and stakeholders (e.g., the Chief, legal, etc.), and will be intended to apply to the entire HRP on a go-forward basis.

(3) The nature and extent of budgetary considerations

“A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions ‘concerning budgetary allotments for departments or government agencies will be classified as policy decisions’ because they are more likely to fall within the core competencies of the legislative and executive branches ... On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.”¹³

This factor is not relevant in this case as the proposed policy has no known budgetary implications.

(4) The extent to which the decision was based on objective criteria

“The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own

¹¹ *Ibid*, at para 62.

¹² *Ibid*, at para 63.

¹³ *Ibid*, at para 64.

value judgment. ... Conversely, the more a decision is based on “technical standards or general standards of reasonableness”, the more likely it can be reviewed for negligence.”¹⁴

The Board’s duties under sections 55(3)(c),(d), and (e) are highly relevant to this factor, insofar as these provisions explicitly task the Board with making value judgements regarding both policing priorities, objectives, goals, programs and strategies, and the actual delivery of policing services on behalf of the larger municipal community. If the Board decides to enact this proposed policy, it will be on the basis of these “community values, needs, and expectations,” and not either technical standards or general standards of reasonableness.

b. RCMP

Section 68(1) reads:

68 (1) The function of an advisory board is to provide advice to the council in relation to the enforcement of law, the maintenance of law and order and the prevention of crime in the municipality, but the advisory board shall not exercise jurisdiction relating to complaints, discipline, personnel conduct or the internal management of the Royal Canadian Mounted Police.

Additionally, section 68(3) reads in part:

- (3) Without limiting the generality of subsection (1), an advisory board shall, subject to the police contract or policing agreement,
- ...
 - (d) ensure that police services are delivered in a manner consistent with community values, needs and expectations;
 - (e) act as a conduit between the community and the police department;
 - (f) recommend policies, administrative and organizational direction for the effective management of the police department.

Outcome Sought: To prepare a draft communication policy to deal with circumstances where a police complaint investigation is ongoing or a complaint is reasonably foreseeable.

Commissioner Harry Critchley

¹⁴ *Ibid*, at para 65.