

1 IN THE MATTER OF: Law Enforcement Review Act
2 Complaint No. 2009/137

3
4 BETWEEN:) Ms. N. A.
5) agent for the Complainant
6 A.A.,)
7) Mr. M. Stonyk
8 Complainant,) for the Commissioner
9 - and -)
10) Mr. P. McKenna
11 CONSTABLE G.G.,) for the Winnipeg Police
12 Respondent.) Association
13)
14) Judgment delivered
15) January 21, 2010

16 _____
17
18 LERNER, P.J. (Orally)

19 The complainant in this matter has filed a
20 written complaint, which was received by the LERA
21 commissioner on June the 23rd of 2009. The complainant
22 alleges a disciplinary default on the part of the
23 respondent as a result of a breach of section 29(g) of The
24 Law Enforcement Review Act, specifically, a violation of
25 privacy within the meaning of The Privacy Act. The
26 complainant identifies the person affected by the alleged
27 disciplinary default as being her son, A.

28 Without reciting all of the background details of
29 the complaint, from the material filed it appears that the
30 complainant's son was the subject of a sentencing order,
31 that being a nine month conditional discharge granted by
32 Judge Chartier of this court pursuant to the provisions of
33 The Youth Criminal Justice Act on April 9, 2009. The
34 substance of the complainant's complaint is that a copy of

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1 this court document was disclosed to school officials at
2 Grant Park High School, Kelvin High School and/or the
3 Winnipeg School Division and that she, quote, speculates
4 that the disclosure was made by the respondent officer,
5 Constable G. G., who, from the material filed, appears to
6 be a Winnipeg Police Service school resource or community
7 officer. The complainant alleges that the disclosure of
8 this information breached the provisions of The Privacy Act
9 and thereby constitutes a disciplinary default on the part
10 of the respondent officer.

11 I will begin by noting that notwithstanding Ms.
12 A.'s speculation to the contrary, investigation by the Law
13 Enforcement Review Agency's investigator, which
14 investigation was relied upon by the commissioner,
15 disclosed that the copy of the court order in question was
16 provided to the vice principal of Kelvin High School by one
17 of the parents of the three youths who were named in the
18 court order. The three youths in question were individuals
19 who the complainant's son was not to contact or communicate
20 with during the duration of the order.

21 As noted by the commissioner in his decision,
22 there is no evidence to support the complainant's
23 speculation that the document in question was disclosed to
24 school or school division officials by the respondent
25 officer. To the contrary, the evidence obtained by the
26 LERA investigator was that the document was disclosed by
27 someone other than the respondent.

28 Section 119(1)(d) and (g) of The Youth Criminal
29 Justice Act provides that a victim of an offence shall,
30 upon request, be given access to an order of this type
31 under certain circumstances and the same applies to access
32 by a peace officer. Section 125(6) of the same Youth
33 Criminal Justice Act authorizes a peace officer to disclose
34 any information contained in a Youth Criminal Justice Act

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1 record to a person engaged in the care of a young person,
2 which would include a parent, or a representative of any
3 school or school division. Any information contained in an
4 order of this nature is to ensure the safety of staff,
5 students or other persons or to facilitate the
6 rehabilitation of the young person who is the subject of
7 this order.

8 In this case, as noted, the conditional discharge
9 order discloses that the order was made as against the
10 complainant's son following a sentence being imposed upon
11 him and this was following a finding of guilt, apparently,
12 with respect to the offence of assault with a weapon.

13 As noted, after an investigation in this case,
14 the commissioner found that the order in question was not
15 disclosed by the respondent officer. He went on to observe
16 that even had the officer disclosed the noted order, he
17 would have had lawful authority to do so for the reasons
18 that I have identified in terms of the various provisions
19 of The Youth Criminal Justice Act.

20 The commissioner concluded that the subject
21 matter of the complaint did not fall within the scope of
22 section 29 of The Law Enforcement Review Act, in that the
23 act of disclosure apparently was not performed by the
24 officer. That appears to be the thrust and substance of
25 the commissioner's decision. I will talk more about that
26 in a moment.

27 As a result, in a letter dated July 27th, 2009
28 the commissioner declined, pursuant to section 13(1)(a) of
29 the Act, to take further action on the complaint made by
30 the complainant on behalf of her son. The complainant has
31 now, of course, asked a provincial court judge to review
32 the decision of the commissioner and in this case, The Law
33 Enforcement Review Act codifies and governs the process in
34 this case. The Act specifies that the burden is on the

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1 complainant to satisfy the judge that the commissioner has
2 made a mistake and declined it to take any further action,
3 in other words, in declining to order a hearing before a
4 judge.

5 The law in the area of judicial review has quite
6 recently been clarified by the Supreme Court of Canada in
7 the Dunsmuir decision, 2008, SCJ, number 9. The decision
8 governs how this type of review must proceed and clarifies
9 the test to be applied in this type of review. There are
10 two standards of review. The first is correctness. The
11 standard of correctness applies only if the commissioner
12 has committed an identifiable jurisdictional error. And by
13 jurisdictional error I mean that the commissioner has
14 failed to act within the parameters of his jurisdiction by
15 either applying a wrong test or misapplying a right test
16 when coming to a decision.

17 If an issue as to jurisdictional error arises I
18 have to determine whether the commissioner's decision with
19 respect to the jurisdictional issue was the correct one.
20 In this case, as I explained to counsel for the respondent
21 and the commissioner, I had some concern as to whether
22 there was a jurisdictional error. Notwithstanding the
23 finding of the commissioner, it is clear to me that the
24 subject matter of this complaint would fall within the
25 scope of section 29 if there had been a breach of privacy
26 contrary to The Privacy Act.

27 A conclusion that the subject matter of a
28 complaint does not fall within the scope of section 29
29 would be available, for example, if the subject matter of
30 the complaint did not fall within one of the enumerated
31 categories in section 29, for example, if the respondent
32 was alleged to have done something outside the scope of his
33 duties in the course of -- something unrelated to his
34 duties as a police officer. And that is not the case here.

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1 But as I also suggested to counsel,
2 notwithstanding the language used by the commissioner, it
3 is abundantly clear that what the commissioner has actually
4 and effectively found is that there is insufficient
5 evidence that the respondent has committed the default
6 alleged, in other words, has found, effectively, that there
7 is no evidence that the officer respondent has committed
8 the default alleged. And I am going to proceed with my
9 analysis on that basis as that appears to be the thrust and
10 substance of the commissioner's decision here.

11 Accordingly, I find that there is no
12 jurisdictional error in this case, based upon the decision
13 that the commissioner has effectively reached and I will
14 proceed with my analysis on the standard of reasonableness.

15 The Supreme Court of Canada, in Dunsmuir, defined
16 reasonableness in the following way:

17
18 "In judicial review reasonableness
19 is concerned mostly with the
20 existence of justification,
21 transparency and intelligibility
22 within the decision-making process
23 but it is also concerned with
24 whether the decision falls within
25 a range of possible acceptable
26 outcomes which are defensible in
27 respect of the facts in the law."
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29 In November of 2008 my brother Judge Preston
30 ruled on this issue in the decision of LERA complaint
31 number 2005-186 where he stated the following:
32

33 "The question to be answered is
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1 this: did the commissioner assess
2 the evidence reasonably. In other
3 words, have the commissioner's
4 reasons been transparently,
5 intelligently and rationally
6 articulated. My function is to
7 see if the commissioner has made a
8 reasonable assessment of the
9 evidence. In other words, I must
10 examine whether the commissioner
11 drew a rational conclusion, one
12 that could be reasonably be drawn
13 on the facts of this case."

14

15 As also noted by Preston, P.J. in that decision:

16

17 "The LERA commissioner does
18 possess a limited but significant
19 power to waive the evidence
20 gathered during the course of the
21 LERA investigation. The Law
22 Enforcement Review Act mandates
23 the commissioner to weigh all the
24 evidence and to draw a conclusion
25 on its sufficiency. This includes
26 the weighing of disputed evidence
27 in order to determine its
28 efficiency. If that were not the
29 case, each time there was a
30 contradiction on any fact in issue
31 the matter would have to proceed
32 to hearing before a provincial
33 judge."

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1 I have reviewed the LERA investigation file and
2 the commissioner's reasons for declining to take further
3 action on the complaint. As noted, the LERA investigator
4 in this case, upon whose investigation the commissioner
5 relied, interviewed witnesses and determined that the
6 document in question, the court order, was not disclosed to
7 school officials by Constable G. but rather by a parent of
8 one of the children named in the order.

9 I do accept that there is no evidence that a
10 request had been made of the court for release of the noted
11 document. As a result, I need not admit the quote unquote
12 new evidence on this point that the complainant proposed to
13 file at this proceeding. In my view, this is not new
14 evidence. In fact, I am proceeding on the basis that there
15 was no evidence of such a request for disclosure of the
16 document in question and that, in fact, it was the basis
17 upon which the commissioner appears to have proceeded. So
18 there was no basis upon which, in my view, that further
19 document needs to be provided. It is something that was
20 before the commissioner effectively when he reached his
21 decision.

22 But I don't find that the absence of a request of
23 the court for the release of the document in question, that
24 is, the sentencing order with respect to the complainant's
25 son, renders the commissioner's decision unreasonable.
26 Clearly the document was released by someone, whether or
27 not there was a record of same. As noted, there were a
28 variety of lawful ways in which it could have been
29 released. The threshold issue that the commissioner was to
30 decide was whether it was Constable G. who was responsible
31 for release of same.

32 I have concluded that based on a reasonable
33 investigation, the commissioner assessed the evidence
34 reasonably and drew a rational conclusion on the merits of

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1 the complainant's complaint. It may not have been the only
2 conclusion to have been reached in this case but it was
3 certainly an available and rational conclusion. The
4 commissioner's reasons had been transparently,
5 intelligently and rationally articulated.

6 I therefore conclude that the commissioner did
7 not commit an error within the meaning of section 13 of the
8 Act and that therefore, there is no basis upon which this
9 court can interfere with the decision of the commissioner
10 in that regard. That then is the decision of the court
11 with respect to this matter. And, of course, the ban on
12 publication with respect to the respondent's name will
13 continue.

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