

IN THE MATTER OF: *The Law Enforcement Review Act* Complaint #2023-01

AND IN THE MATTER OF: An Application for Review pursuant to s. 13 of *The Law Enforcement Review Act*, R.S.M., c. L75

AND IN THE MATTER OF: An Application for disclosure and admission of new evidence

BETWEEN:

F.M.	)	P. Cramer
	)	Counsel for the Complainant/Applicant
<i>Complainant/Applicant,</i>)	
)	
-and -)	
)	
Constable D.W.)	
)	
<i>Respondent.</i>	)	P. McKenna
	)	Counsel for the Respondent
)	
	)	T. Edkins, Counsel to Commissioner of
	)	Law Enforcement Review Agency
)	
	)	S. Hanlin, Counsel to Winnipeg Police
	)	Service
)	
	)	Hearing date: September 13, 2024
	)	Decision date: December 18, 2024

Ban on Publication

These reasons are subject to a ban on publication of the Respondent's name pursuant to s. 13(4.1)(a) of The Law Enforcement Review Act

CARLSON, P.J.

INTRODUCTION

[1] This is a review of the Law Enforcement Review Agency Commissioner’s decision to take no further action on a complaint by the Complainant that the Respondent, a Winnipeg Police Service officer, abused his authority in dealing with her.

[2] The complaint relates to an interaction between the Complainant and the Respondent that took place in a parking lot at 1560 Regent Avenue, in Winnipeg, Manitoba on December 12, 2022.

[3] That interaction was initiated when the Respondent responded to a dispatch call of an incident in the parking lot, reported by a person making allegations against the driver of a vehicle that was identified by licence plate.

[4] When the Respondent attended to the parking lot, he located the vehicle described and initiated contact with the person in the vehicle, who was the Complainant.

[5] The interaction that took place between them is the subject of the Complaint.

Overview and purpose of the relevant legislation

[6] *The Law Enforcement Review Act*, C.C.S.M. c. L75 (“the *Act*”) provides a process for any person in Manitoba to make a complaint about the way that person was dealt with by the police, and a process to have that complaint adjudicated and reviewed.

[7] The *Act* is premised on the foundation that citizens are all to be treated fairly, respectfully, and professionally by police officers.

[8] When a person makes a complaint under the *Act*, and an officer is found to have acted contrary to the standards required of police officers set out in the *Act*, that officer will be sanctioned.

[9] The *Act* provides that a complaint made about police conduct will be investigated by the Law Enforcement Review Agency (“LERA”). The *Act* provides a screening

process whereby the LERA Commissioner (the “Commissioner”) investigates complaints, and must refer matters that meet certain criteria specified in the *Act* to hearings on their merits, and must decline to take action on matters that do not meet that specified criteria.

[10] The screening of complaints by the Commissioner mandated by the *Act*, eliminates unnecessary public hearings.

[11] In cases where the Commissioner declines to take further action and order a hearing on the merits, a complainant may have that action of the Commissioner reviewed by a provincial judge pursuant to the *Act*.

Provisions of the Act relevant to Commissioner’s decision on a complaint

[12] Section 13(1) of the *Act* reads:

Where the Commissioner is satisfied

(a) that the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of section 29;

(b) that a complaint has been abandoned; or

(c) that there is insufficient evidence supporting the complaint to justify a public hearing;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

[13] Section 29(a) of the *Act* sets out the disciplinary defaults by way of acts or omissions, and reads as follows:

A member commits a disciplinary default where he affects the complainant or any other person by means of any of the following acts or omissions arising out of or in the execution of his duties:

(a) abuse of authority, including

(i) making an arrest without reasonable or probable grounds,

(ii) using unnecessary violence or excessive force,

(iii) using oppressive or abusive conduct or language,

(iv) being discourteous or uncivil,

- (v) seeking improper pecuniary or personal advantage,
- (vi) without authorization, serving or executing documents in a civil process, and
- (vii) differential treatment without reasonable cause on the basis of any characteristic set out in subsection 9(2) of The Human Rights Code;

[14] Section 13(2) of the *Act* addresses judicial review of a decision of the Commissioner made pursuant to s.13(1), declining to take further action on a complaint, and reads as follows:

Where the Commissioner has declined to take further action on a complaint under subsection (1), the complainant may, within 30 days after the sending of the notice to the complainant under subsection (1.1), apply to the Commissioner to have the decision reviewed by a provincial judge.

Overview of proceedings relative to this Complaint

[15] This is an application brought by the Complainant, pursuant to subsection 13(2) of the *Act*, for a review of the decision of the Commissioner declining to take further action on her complaint.

[16] On December 23, 2022 the Complainant filed LERA Complaint No. 2023-01 (the “Complaint”) alleging that the Respondent Winnipeg Police Service (“WPS”) officer abused his authority on December 12, 2022 in dealing with her.

[17] After receiving the Complaint, the LERA Commissioner investigated.

[18] Based on that investigation, the Commissioner decided that the evidence required to justify referral of the Complaint to a public hearing was insufficient, and that therefore pursuant to s.13(1)(c) of the *Act*, he must decline to take further action on the Complaint.

[19] The Complainant was advised of the Commissioner’s decision to take no further action by letter dated April 1, 2023.

[20] On April 25, 2023, the Complainant applied for review of the Commissioner’s decision not to take further action on the Complaint, pursuant to s.13(2) of the *Act*.

[21] On May 1, 2023, the Commissioner referred the Complaint for a review of his decision, pursuant to s.13(3) of the *Act*, to a provincial judge.

[22] On September 13, 2024 the review came on for hearing before me.

[23] At that time, I heard submissions from counsel for the Complainant and for the Respondent. Counsel for the Complainant and for the Respondent filed briefs and caselaw.

[24] Counsel for the Commissioner sought leave to make submissions at the review hearing. That leave was granted. Counsel for the Commissioner filed a brief addressing general matters relative to standard of review, the record and procedures followed by LERA in carrying out its investigation.

[25] The evidence provided for the review hearing is the material in the LERA Record. The LERA Record consists of the evidence that was before the Commissioner in making his decision on the Complaint.

The Notice of Application filed by the Complainant

[26] On May 17, 2024, the Complainant filed a Notice of Application seeking an order for disclosure of certain items from the Winnipeg Police Service, and that those items, and an affidavit of the Applicant that was not part of the LERA Record be admitted as fresh evidence on the review hearing.

[27] Counsel for the Winnipeg Police Service filed an affidavit and a brief in response to the Complainant's Notice of Application.

[28] The briefs filed on behalf of the Respondent, on behalf of the LERA Commissioner, and on behalf of the Complainant addressed issues raised by the Notice of Application as well as issues relative to the review of the Commissioner's decision.

[29] Counsel agreed that I should hear submissions as to the Notice of Application at the same time as submissions on the review of the Commissioner's decision.

ISSUES ON THIS REVIEW

[30] The ultimate issue to be decided on this review is whether the Commissioner erred in his decision to decline to take further action on the Complaint. If he did not, I must not interfere with that decision. If he did, I must order the Commissioner to refer the Complaint for a hearing or take such other action under the *Act* respecting the Complaint as I direct (s. 13(3) *Act*).

[31] In order to decide that ultimate issue, the following matters must be addressed:

- (i) The burden and standard of proof on a review;
- (ii) The scope of authority a provincial judge has in reviewing a decision of the Commissioner;
- (iii) The standard of review to be applied;
- (iv) What does "the standard of reasonableness" mean?; and
- (v) How does the standard of reasonableness apply to the Commissioner's decision?

[32] The Complainant's Notice of Application seeks findings relative to issues as to disclosure of information, the introduction of new evidence and ultimately that those issues impact on the reasonableness of the Commissioner's decision.

[33] The issues raised by the Notice of Application will be addressed after setting out the details of the investigation and the Commissioner's decision, and before the analysis of the Commissioner's decision, since if there is to be disclosure of new information and consideration of any new evidence, it would be the analysis that would be impacted.

(i) The burden and standard of proof on review

[34] Section 13(4) of the *Act* puts the burden of proof on the Complainant to demonstrate that the Commissioner erred in declining to take further action on the Complaint.

[35] The standard of proof is a civil standard, that is, on a balance of probabilities.

(ii) Scope of the review by a provincial court judges of the Commissioner's decision

[36] A review by a provincial judge pursuant to s. 13(3) of the *Act* is limited in scope. It is a review only. It is not a hearing on the merits of the complaint (s. 1(2)). Nor is a review an appeal of the Commissioner's decision.

[37] In this case, I am limited to deciding whether the Commissioner acted within the jurisdiction given to him by the *Act*, in deciding to decline to take further action on the Complaint.

[38] The reason for this limited scope of review in LERA matters was recently set out by Judge Rolston (as he then was) in *C.B. v. Cst. D.D. and P/Sgt. C.W.*, LERA Complaint #2020-47(February 28, 2022), at para 9:

In summary, LERA has a role that affords wide latitude to investigate and determine matters of police discipline. LERA has specialized knowledge in that regard, given that the *Act* specifically mandates police disciplinary matters as their one and only function. That being the case, the court's role in reviewing the decision of LERA should be limited to ensuring the principles of justice have been followed, as opposed to inserting its own views in the place of the Commissioner's.

(iii) Standard of review to be applied to the Commissioner's decision

[39] The standard of review to be used on review of the Commissioner's decision pursuant to s.13(2) of the *Act* is the standard of reasonableness, rather than correctness.

[40] The Supreme Court of Canada determined in *R. v. Dunsmuir*, [2008] S.C.J. No. 9, that when an error of jurisdiction is alleged, the standard of review is one of

correctness, and when an alleged error is non jurisdictional, the standard of review is one of reasonableness.

[41] The standard of review was more recently addressed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The principles in *Vavilov* have consistently been applied to s.13(2) review cases under the *Act* (examples include *P.S. v. Constable S.T.*, LERA Complaint #2020-82 (Choy, J., January 28, 2022); *C.B. v. Cst. D.D. and P/Sgt. C.W.*, LERA Complaint 2020-47 (Rolston, J., February 28, 2022)).

[42] The Complainant in this case is not challenging jurisdiction.

[43] Counsel for the Complainant in this case accepted that the correct standard of review is one of reasonableness.

(iv) What does the “standard of reasonableness” mean?

[44] The standard of reasonableness means a reviewing court must decide if the Commissioner’s decision was transparent, intelligent, and justified (*Vavilov* at para 15).

[45] In *Dunsmuir* at para 24, the Supreme Court of Canada described the standard of reasonableness this way:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision -making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

(v) How the reviewing court is to apply the standard of reasonableness to factual findings made by the Commissioner

[46] The reviewing court is to determine only whether the Commissioner assessed the Complaint reasonably and drew a rational conclusion. It need not be the same conclusion the reviewing court would reach. As long as the Commissioner’s conclusion was a

rational one, the reviewing court is not to interfere (*B.J.P. v. Sgt. G.H., Cst. B.Z., and Sgt. G.M.*, LERA Complaint #2005-186 (Preston, J., November 14, 2008).

[47] In making his decision, the Commissioner is able to weigh evidence, in order to determine sufficiency of the evidence and draw a conclusion, including resolving disputes in the evidence (*A.M. v. Constable D.R., Constable G.P., Constable J.M. and Detective Sergeant R.L.*, LERA Complaint # 2005-307(Preston, J., July 17, 2009), at para 35.

[48] My role is not to review the evidence and decide what conclusion I would have come to on the merits of the Complaint. Rather, my role is limited to deciding whether the conclusion of the Commissioner not to refer the Complaint to a hearing on the merits due to insufficiency of evidence, is one of the rational conclusions that could be reached, based on a reasonable assessment of the evidence, and falls within a range of possible legally defensible outcomes, taking into account the Commissioner’s entitlement to weigh all the evidence (*P.S. and Cst. S.T.*, LERA Complaint #2020-80 (Choy, J., January 28, 2022); *C.B. and Cst. D.D. and P/Sgt. C.W.*, LERA Complaint #2020-47,(Rolston, J., February 28, 2022).

[49] The reviewing judge must be deferential to the Commissioner’s powers under the *Act*, including the Commissioner’s discretion and expertise in exercising the screening function mandated by the *Act* (*A.M. and Constable D.R., Constable G.P., Constable J.M. and Det./Sgt. R.L.*, LERA Complaint #2004-30 (Preston, J., July 17, 2009, at para 16).

THE LERA “RECORD”

[50] To ultimately determine whether the Commissioner’s decision was reasonable, I must consider all the information the Commissioner had to review in making his decision.

[51] That information comprises the LERA Record.

[52] The LERA Record consists of the written Complaint, the video (with audio) recording made by the Complainant during the incident complained of (“the Video”), and all the information obtained during the LERA investigation – namely, a summary prepared by the LERA investigator of his interview with the Complainant, the Respondent’s narrative report and notes as to the incident, and a summary prepared by the LERA investigator of his interview with the Respondent.

The Complaint

[53] In her written Complaint, the Complainant alleges that:

- On December 12, 2022, at approximately 10:50, she was sitting in her vehicle at 1560 Regent Avenue.
- Officer Badge Number (the number is provided) approached her car and forcibly opened the door without her permission.
- She asked him why he did that and he said it was because she was not looking at him.
- She explained to the officer that she was not required to look at or speak to him and that his actions had startled and frightened her.
- She asked for permission to close the car door because she was cold, but he refused to allow her to do so.
- The officer then asked her a series of questions while yelling at her.
- She believed he was inquiring about an earlier incident involving a rude woman who had taken her parking spot, called her names, and left the area. This woman was long gone when the officer arrived.
- She declined to answer any of the officer’s questions and asked if she had broken any laws.

- She said it had come to her attention that the officer is extremely biased and was acting on behalf of a female friend or relative of his based on a conversation on the phone she was having before she left.
- The officer used his position of power to harass and intimidate a citizen.
- Although she had done nothing wrong, the officer detained her and prohibited her from leaving.
- He engaged in a casual conversation with a civilian acquaintance while she was still detained.
- She began recording the interaction on her phone at which point the officer got out of his car, pushed her aside and told her to return to her car.
- She believes he did this because he did not want to be recorded while chatting with his acquaintance while she was being detained without justification.
- The Complaint notes that she is a Muslim woman and the officer's physical touch and use of force against her was unwarranted.

The Video

[54] In this case, there is a piece of evidence that is not usually present in LERA complaint investigations and reviews. The Video was made by the Complainant on her phone of her entire interaction with the Respondent. The Complainant provided that video to LERA with her Complaint. Accordingly, the LERA investigator was able to view and hear the entire interaction that is the subject of the Complaint.

[55] The Video is part of the LERA Record. Accordingly, I have also been able to view and hear the entire interaction complained of that is contained in the Video. That gives me the unique opportunity to assess the reasonableness of the Commissioner's decision in light of what I can see and hear on the Video.

[56] It is important to note that the Complainant confirms the Video captures the interaction between her and the Respondent. She asserts in her interview that what is captured by the Video is consistent with the allegations she makes in her Complaint.

[57] A summary of the Video contents made by the LERA investigator, and summarized in the Commissioner's decision letter to the Complainant (referring to the Complainant as "you"), is as follows:

- The WPS involved officer opens your car door and asks, "What is going on?"
- You respond, "Do you have the right to open my door?"
- The officer tells you he is investigating an incident. You ask him, "What incident?"
- He asks you if you argued with a lady over a parking spot.
- You tell him, "I don't know". He asks, "You don't remember?" You respond, "No, no comment."
- The officer says your license plate and the vehicle make were given.
- You state: "no comment."
- The officer asks what you are doing here. You respond that you are doing whatever you want.
- The officer then questions, "Why the attitude?". You respond, "Having an attitude is not against the law". He says, "Wow, nice."
- You tell the officer you must close the door because you are cold. The officer tells you that he needs your name and date of birth. You respond, "you don't need to know nothing". The officer responds, "yes, I do."
- You ask if you broke the law. The officer responds, "I don't know. I need to find out. Do you have I.D. on you?"

- You tell the officer you don't have time for this and ask again if you broke the law. The officer then tells you that you are detained.
- You then request a supervisor. The officer tells you that he is the supervisor.
- You ask the officer, "Did the lady release her dog on me? Are you her dog?" The officer responds, "I don't know."
- You respond, "exactly, you took her word". You then raise your voice and tell him "you came to harass me!".
- The officer stated, "I'm not harassing you. I'm asking you what happened." Then he tells you that he needs your I.D. right now, a driver's licence.
- You tell the officer that you don't have an I.D. and are sitting in your car.
- The officer tells you he doesn't care. You state for sitting in the car that, you do not need to show I.D.
- The officer tells you, "I'm investigating an incident here."
- You tell him you are recording. He tells you that you can record all you want and asks again if you have I.D.
- You ask again if you have broken he law he tells you he isn't sure yet. You repeat, "did I break the law?" He replies, "I am trying to figure that out."
- You tell him that he is harassing you and that he opened your door without your consent.
- You continue to argue with the officer.
- The officer tells you that he will be phoning the other lady.
- You then approach the officer speaking to an unidentified male, and begin to record the conversation. You tell him that you are in the car waiting for him. He tells you that he will be there right away. He tells you that he is still attempting to call the other lady.

- You tell him that you will be speaking with your lawyer and reporting to LERA. He tells you thank you and provides his badge number. You ask him his name. He restated his badge number and states, “Constable W. (he provides his surname), I’m the street supervisor,”
- You yell at him he is abusing his power because a white lady called a white policeman.
- You state, “you telling me I am detained, right?” He tells you to sit in your car and that he is having a personal conversation. You tell him that you don’t have to have a seat. The officer exits his car and guides you towards your car, requesting that you have a seat.
- You tell him that you do not have to sit in the car and that you can sit and stand anywhere. He tells you that you have no visit* by his car.
- You yell at him, “Am I done or not?”. He tells you, “nope, not yet. I will speak with you shortly.”
- You continue to record a private conversation between the officer and an unidentified male.
- The officer is then seen making a phone call while seated in his cruiser car. An additional police unit arrives.
- You can be heard saying “Hi” as you continue to record additional police members speaking to the officer.
- The officer emerges from his cruiser and advises that he is unable to reach the complainant. He tells you that you are free to go and cautions you not to argue over a parking spot because it isn’t worth it.

[58] I note that the word “visit” contained in the summary above and marked with an * is clearly a typographical error in the summary. The word used in the Video is “business”.

Interview of the Complainant by a LERA investigator

[59] At an interview by a LERA investigator of the Complainant, the Complainant provided the additional information:

- The officer knocked on her window aggressively before opening the door.
- She said that she did not acknowledge the officer's knock because she did not want to interact with any male.
- She said she knew she had not broken any law and there was no need to speak with the officer.
- The parking spot that was the subject of the incident was not a designated spot.
- The lot was full that day.
- She did not answer any of the officer's questions because she did nothing wrong.
- She believed the officer knew the lady she fought for the parking spot because she was speaking to someone on the phone.
- She admitted she did not hear the conversation the lady was having but said she was having a casual conversation like one would with a family member.
- She agreed that she did not have permission to record any conversation the officer was having with persons other than her.
- She said she recorded the conversations for her safety. The investigator told her this was illegal.
- She said the officer pushed her off the road (parking spot) where she was standing. She was not injured and she could not identify any witnesses.
- She felt that for an investigation to occur, the lady who made the complaint should have been present.

The Respondent's narrative report

[60] The Respondent in the incident complained of was identified. His narrative report, prepared on December 13, 2022 at 4:13 p.m., was reviewed by the LERA investigator and provides:

- Police received a report of a disturbance incident at 1560 Regent Avenue on December 12, 2022 at 10:38
- A female had reported that another person (the Complainant) had parked behind her vehicle while it was parked and the Complainant refused to leave.
- The Complainant advised the female parking in the spot that she was parking in “her” parking spot.
- The spot was in a public lot with no assigned parking.
- It was reported that the Complainant made derogatory slurs at the woman parking regarding the 2SLGBTQA+ community.
- The Complainant moved her vehicle when she became aware police had been called.
- The make, model, license plates and registered owners of both vehicles were noted.
- Constable W. (surname provided) arrived on scene and saw the Complainant's vehicle.
- He noted there was a person inside.
- He approached and stood beside the driver's side door.
- He confirmed the person inside matched the description given by the person who had called police.
- He stood by the driver's door for several seconds, expecting she would lower her window, but she continued to stare forward.

- He felt she might have been suffering from a medical event and tried to open the unlocked car door.
- She then began yelling at the officer that she would not be answering questions. While doing this she was holding up her phone to record the interaction.
- She tried to slam the door shut.
- The officer did not permit this. He found her “quick and angry” behaviour shocking and asked what was happening and if she was okay.
- She swore at the officer and said she was a “citizen” and did not have to listen to the police.
- Her behaviour appeared consistent with that of the Sovereign Citizen Freeman of the Land Movement and the officer felt she was trying to bait him into an argument for social media purposes.
- The officer said he tried to explain the reason for the interaction and that he was investigating the incident between her and the woman who reported the incident to police. The Complainant continued to be hostile and refused to provide any identification or verbal indication of her identity.
- She got out of her vehicle and told the officer she was leaving.
- The officer told her she was being detained until he could contact the other woman.
- She continued a tirade about police brutality and said she did not need to follow police laws.
- She requested a street supervisor attend and the officer responded he was the street supervisor.
- The officer did queries on the Complainant’s licence plate.
- An unknown male approached the officer to ask about a traffic matter.

- During this conversation, the Complainant got out of her vehicle, approached the police cruiser, and began to yell at the officer.
- The officer told her she may be arrested for causing a disturbance.
- She returned to her vehicle but accused the officer of being racist. The officer said the interaction was not due to skin colour but due to her uncooperative behavior.
- Another police unit arrived on scene, and advised that the Complainant had called 911 accusing the officer of harassment.
- During this time, the officer was trying to call the complainant (who had called 911) but his calls went to voicemail.
- The Complainant was advised she was free to leave as the incident was determined not to be of a criminal nature. She continued to swear and berate the officer and then walked to the nearby gym.

Interview of the Respondent by the LERA investigator

[61] On March 2, 2023, the Respondent was interviewed by a LERA investigator. He provided some additional information during the interview as follows:

- He heard a message about a disturbance at a parking lot of Regent and dispatched himself because he was in the area.
- The information in the call history sounded like it was a road rage incident.
- The complainant in that incident provided a physical description of the Complainant.
- While on route he received an update from dispatch that the complainant in the incident was leaving and wanted a unit to call her.
- The officer attended the parking lot and looked at licence plates. He located the Complainant's car and observed her inside.

- Due to her lack of reaction, he was concerned about a medical or mental health issue.
- The Complainant appeared ready for him to open her door and had the camera ready and recording.
- The officer adopted the video evidence for accuracy.
- He was concerned about her when he opened the door.
- He denies yelling.
- He admitted he was stern but was adamant he did not swear or yell.
- He was shocked at her attitude.
- He put his arms out to guide her back to her car at one point but did not touch her.
- He denies he was ‘extremely biased’ and acting on behalf of a female friend or relative . He did not know the complainant. He says she did bring up race, but that was not a factor.
- He says he did not use his position to harass or intimidate.
- He was there to find out what happened.
- He said her claim is vexatious.
- She was detained to determine if any threats, assaults, or damage had occurred.
- The entire interaction was 7 minutes long.
- The male who approached him to ask a question had a right to privacy, and she approached and recorded the conversation. There was a possibility the male could have been providing confidential information. Her recording was inappropriate and she violated the male’s right to privacy.

The Commissioner's Decision

[62] In the decision letter addressed to the Complainant, dated April 21, 2023, the Commissioner states that it is not his role to make any final and binding decisions about what events did or did not occur. If judgments of that kind were needed, that would be done by a provincial judge.

[63] The Commissioner states that his role is to determine whether section 13(1) of the *Act* applies to the Complaint and the information uncovered during the investigation.

[64] He sets out s.13(1) of the *Act* which says:

Where the Commissioner is satisfied:

- (a) That the subject matter of a complaint is frivolous or vexatious or does not fall within the scope of s.29;
- (b) That the complaint has been abandoned; or
- (c) That there is insufficient evidence supporting the complaint to justify a public hearing;

the Commissioner shall decline to take further action on the complaint and shall in writing inform the complainant, the respondent, and the respondent's Chief of Police of his or her reasons for declining to take further action.

[65] The Commissioner noted that the Complaint alleged a disciplinary default within the scope of the *Act*, being a violation of section 29(a)(iv) of the *Act*, namely abuse of authority by being discourteous or uncivil.

[66] The Commissioner noted that he is permitted to make his decision based on a limited assessment of credibility and disputed evidence but without making any definite finding of fact or law. He says he must consider the information available to him, and he is permitted, in a limited way, to determine if there is evidence of an abuse of authority and if the evidence is sufficient to justify taking further action.

[67] After a review of the investigation, the Commissioner wrote:

Following a close review of all information available, I am satisfied that the evidence required to justify the referral of this complaint to a public hearing is insufficient. As such,

pursuant to section 13(1)(c) of the Law Enforcement Review Act, I must decline to take further action, and this file is closed.

The Relief Sought in the Complainant's Notice of Application

[68] Before turning to an analysis of the Commissioner's decision and his reasons therefor, I need to determine whether the relief sought by the Complainant in her Notice of Application, or any of it, should be granted.

[69] The Complainant's Notice of Application seeks the following:

1. That the WPS provide a digital copy, and a typed transcript, of the recording of the 911 call made on December 12, 2022 which resulted in the dispatch of the officer to 1560 Regent Avenue;
2. That those items be adduced as fresh evidence at the judicial review hearing;
3. That the affidavit of the Complainant affirmed May 18, 2024 ("the Affidavit") be adduced as fresh evidence at the review hearing; and
4. That the video recording made by the Complainant of her interaction with the officer on December 12, 2022, be adduced as fresh evidence at the review hearing.

[70] A couple of points need to be noted:

- The video recording referenced as point #4 was part of the LERA Record and considered by the Commissioner, so it does not need to be considered as "new evidence".
- Counsel for the Complainant agreed that WPS has no obligation to provide a typed transcript of a 911 call recording, so is no longer seeking disclosure of that item.

[71] The issues to be addressed on the Complainant's application are:

(i) whether the 911 call recording must be disclosed by WPS, and if so, whether it is to be admitted as fresh evidence; and

(ii) whether the Affidavit is to be admitted as fresh evidence.

[72] It was agreed by counsel that if the 911 recording is ordered to be disclosed, and/or if new evidence is to be permitted, the required process is not for such evidence to be considered on the review hearing, but rather that the matter be sent back to the Commissioner for such evidence to be considered and for the Commissioner to re-assess the Complaint in light of that disclosure.

[73] The Complainant argues that the Commissioner's decision not to proceed with a hearing on the merits cannot be a reasonable one because it did not include consideration of the 911 call recording and the information contained in the Affidavit.

[74] The Complainant also says that a failure to obtain the 911 call and to consider it, and to not permit consideration of the Affidavit, amount to breaches of fundamental justice and of procedural fairness, which must necessarily, make the Commissioner's decision, reached without consideration of those items, unreasonable.

The 911 call recording

[75] The Complainant seeks disclosure by WPS of the 911 call recording and says that the failure of the Commissioner to obtain it amounts to a failure to properly investigate the Complaint and amounts to a breach of fundamental justice.

[76] Counsel for the WPS filed a Brief in the Application, noting WPS is not a party to the LERA proceedings and that as a non-party, has no disclosure obligations to either party. A court order would be required to compel disclosure.

[77] The Affidavit of Corwin Francis, Divisional Commander of the Professional Standards Unit (PSU) of the WPS, affirmed August 14, 2024, was filed in the Application.

[78] That affidavit sets out the process for dealing with disclosure requests by the Commissioner and as to 911 calls. A 911 recording is disclosed only if it is part of the investigative file (as part of a criminal investigation), or if specifically requested by the Commissioner.

[79] In this case, the 911 recording was not provided to the Commissioner. The Commissioner's letter to WPS did not request it. There is no evidence that it would be part of an investigative file.

[80] The affidavit of Corwin Francis also indicates that WPS does not have a transcript of the 911 call.

[81] Section 12(2) of the *Act* sets out the disclosure obligation of a police service as follows:

At the request of the Commissioner, a Chief of Police involved in the complaint shall forthwith forward to the Commissioner copies of all documents, statements, and other materials relevant to the complaint which are in the possession, or under the control, of the police service, including any notes or reports prepared or compiled by members of the police service.

[82] There was no obligation on WPS to disclose the 911 recording to the Commissioner since he did not request it.

[83] The question now is whether the Court should order its disclosure.

[84] The Complainant argues that the Commissioner's decision was not a reasonable one because he made the decision without obtaining all the relevant material, which includes the 911 call recording. The Complainant says the 911 recording is relevant because it would show why the Respondent officer was on the scene.

[85] The Commissioner has discretion as to how he conducts his investigation. This extends to his determining what information is relevant to an assessment and determination of the Complaint. In this case, the Commissioner obviously did not consider the 911 call to be relevant as he did not request it from WPS.

[86] The Respondent was not a party to the 911 call. He only heard the information about that call from WPS dispatch. His actions cannot fairly be judged relative to a call he was not privy to.

[87] The dispatch records are part of the LERA Record that was before the Commissioner.

[88] The 911 recording could not reasonably be expected to have any bearing on the Respondent's interactions with the Complainant. It follows that there is no reason the Commissioner would request the 911 recording for the purposes of investigating the Complaint and there is no basis for the Court to now order it be disclosed.

[89] The Complainant alleges that failing to secure the 911 recording was a breach of fundamental justice. As the call is not relevant to the Respondent's interaction with the Complainant, the fact the Commissioner did not pursue obtaining it, for consideration in his investigation into the Complaint, is not a breach of fundamental justice.

[90] I decline to make any order as to the 911 call recording.

The Complainant's Affidavit affirmed May 18, 2024

[91] The Affidavit was not part of the LERA Record before the Commissioner.

[92] "New" evidence means evidence that was not before the Commissioner at the time he made his decision.

[93] The admissibility of evidence on a judicial review that was not before the original decision maker was addressed by the Manitoba Court of Appeal in *Pimicikamak v. Manitoba*, 2018 MBCA 49. Cameron J.A. said at para 71:

To be admissible, evidence must be relevant and not otherwise excluded on any ground of law or policy. The applicants agree that the reviewing judge properly set out the rule against the admission of extrinsic evidence on judicial review save for limited circumstances. The reason for the rule is to ensure that the review is conducted on the evidence that was before the decision -maker. The review should not expand into a hearing de novo; there must be finality in litigation. See *AOV Adults Only Video Ltd v Labour Board (Man) et al*, 20003 MBCA 81 at para 34; *Town of Grand Bay-Westfield v The Canadian Union of Public Employees, Local 2404*, 2006MBCA 115 at para 4; *Sowemimo v. College of Physicians & Surgeons of Manitoba*, 2013 MBQB 42 at paras 53-55; *Albu v The University of British Columbia*, 2015 MCCA 41 at para 36.

[94] Evidence that was not before the decision maker (in this case, the Commissioner) will only be permitted on review in limited and exceptional circumstances. Exceptions would include where the record is incomplete or has gaps, or evidence is filed in support of allegations of procedural unfairness, jurisdictional errors, or bad faith (*Ladco Co. V. Winnipeg (City)*, 2020 MBQB 101 at paras 97-98). Any such evidence must of course be relevant to the matter at issue.

[95] If extrinsic evidence not before the Commissioner when he made his decision, is permitted to be added to the Record on a judicial review of the Commissioner's decision, the review hearing will extend beyond the scope permitted of a review under the *Act*, and will become a de novo hearing. That is not what the *Act* contemplates or permits (*Pimichlkamak; AOV Adults Only Video Lts. V. Manitoba (Labour Board)*, 2003 MBCA 81).

[96] In this case, the Complainant has not suggested any jurisdictional error. There is no assertion that there were no facts about the interaction at issue between the Complainant and the Respondent upon which the Commissioner could base a decision under s.13(1)(c) of the *Act*.

[97] There have been a number of decisions of this Court specifically addressing the proposed introduction of new evidence on LERA review hearings (In *P.P. and P. Sgt. E.S. and Cst. B.S. and R.R.* LERA Complaint # 2017 105 (Heinrichs J – September 6, 2018; *N.K. and Cst. F.D. and A.Z.* LERA Complaint #2019 (Killeen J. – July 31, 2020) and *D.B. and Cst. D.V., Cst. A.M. and Inspector K.D.* LERA Complaint 2023 – 12 (Cellitti, J. - May 13, 2024). In all of those cases, the reviewing judges confirmed that it was proper to limit their decision on a review to the information and evidence that was before the Commissioner and not to consider any “new” evidence.

[98] The Complainant argues that exceptional circumstances exist in this case. Though there are no allegations of jurisdictional errors, the Complainant says the record is incomplete and that her affidavit is required to support allegations of procedural unfairness by the Commissioner and by the LERA investigator, and to permit consideration of the Complainant’s assertions of denial of fundamental justice.

[99] These areas of incompleteness, procedural unfairness, and denials of fundamental justice that the Complainant says the Affidavit can address and which are required to be considered can be itemized as follows:

- (i) The conduct of the LERA investigator toward the Complainant;
- (ii) Alleged bias of the LERA investigator and of the Commissioner;
- (iii) Failing to consider the inconsistencies in the evidence as to the opening of the Complainant’s car door by the Respondent;
- (iv) Failing to allow the Complainant to rebut the Respondent’s suggestion that she was part of the “Sovereign Citizen/ Freeman of the Land Movement”;
- (v) Failing to obtain documentary evidence to substantiate a claim by the Respondent that the Complainant was a “police hater”;

- (vi) Failing to consider two emails sent by the Complainant to LERA after the interview of her by the investigator; and
- (vii) Failing to retain the actual recording of the Complainant's interview to be part of the LERA Record, and relying only on a transcript summary of the interview.

[100] A review of the Affidavit shows that there is in fact very little, if any, "new evidence" contained therein. Most of the Affidavit contains the Complainant's opinion or argument as to alleged mistakes made by the Commissioner or the LERA investigator (stating "It is my position" or "I take the position"). This is the case in paragraphs 15, 17, 19, 20, 21, 22, 23, 24, 25, 27, 28 , 29, 31, 32, 35, 37 and 38. Other paragraphs contain information already included in the LERA Record such that it was considered by the Commissioner. This is the case as to paragraphs 13,14,16 and 36.

[101] The Affidavit describes in paragraph 18, emails from the Complainant , one to "LERA Supervisor" dated March 9, 2023 and one to the Commissioner, dated March 30,2023, and they are attached as exhibits to the Affidavit. Both of these express complaints about being updated on the status of her file and make complaints about the conduct of the LERA investigator when he interviewed her. These emails were not included in the LERA Record. Counsel for the Commissioner indicates that these emails were however considered by the Commissioner, who ultimately found these allegations were vexatious and had no merit (as stated in the Commissioner's written decision). The emails are neither fresh evidence, nor are they relevant to the adjudication of the Complaint, and so they are not relevant on the review hearing. The Complaint is concerned only with the conduct of the Respondent in his interaction with the Complainant. The emails are referenced in paragraphs 18 and 19 of the Affidavit, and the substance of complaints about the investigator's conduct are contained in paragraphs 4, 5, 6, 7, 8, 9, 10, 11and 12.

[102] Paragraphs 1,2, 3 and 39 of the Affidavit are introductory and conclusory and provide no new evidence.

[103] There are several paragraphs (numbered 26, 30, 33, 34 and 35) that object to the fact that a document contained in the LERA Record (the Respondent's narrative) noted the Complainant was "on file as a Police Hater" and that the Complainant, during her interaction with the Respondent was determined to be "showing the signs of belonging to the "Sovereign Citizen/Freemen of the Land Movement", but that, during her interview with the LERA investigator she was not told about these notations in the Respondent's narrative and was not given a chance to respond to them. The Complainant says her evidence responding to these assertions needs to be considered because the investigator and Commissioner may have been biased by such assertions.

[104] The notations in the Respondent's narrative referencing "police hater" and "sovereign citizen/freemen of the land movement" were made by the Respondent after the interaction. There was no mention of either of these things during the interaction between the Respondent officer and the Complainant, which is apparent from the Video.

[105] I note that as to matters of bias, administrative decision makers (including the Commissioner) are presumed to have acted fairly and impartially. There is a high onus on the Complainant to show the Commissioner was biased in his investigation and decision making (*Rainy River First Nations v Bombay*, 2022 FC 1434 at paras 63-64). There is no reference in his decision that the Commissioner put any weight on these notations at all. The onus is not met.

[106] Further, there has to be some finality to the investigation. The process for investigating and deciding complaints under the *Act* does not require a complainant to be able to rebut or respond to factors that may be relied considered by the Commissioner in coming to a decision (*S.B. and Cst. M.S.*, LERA Complaint #2023-2015 (May 24,

2004). The Commissioner may seek clarification if he wishes. He is not required to keep going back and forth between the parties to get responses and further information.

[107] In sum, the entirety of the Affidavit is either not relevant to the review (or to the adjudication of the Complaint), is already before me as part of the LERA Record, is argument rather than evidence, or, in the case of the emails, are not in the Record but were considered by the Commissioner.

[108] Accordingly, the Affidavit is not admitted on the review hearing. Nor am I prepared to order that the Affidavit be provided to the Commissioner and that the Complaint be re-assessed.

The Complainant's arguments as to procedural unfairness or as to alleged breaches of fundamental justice

[109] The Complainant raises arguments about procedural unfairness and/or as to breaches of fundamental justice that she alleges the Commissioner made in reaching his decision. Most of those allegations relate to what was contained in the Affidavit that I have already dealt with. The assertions are:

- Failing to obtain the 911 recording (I have addressed this already).
- Failing to review the video provided by the Complainant (I note that the Video was included in the LERA file and did form part of the investigation).
- Failing to keep the recording of the investigator's interview with the Complainant. The Brief of the Commissioner explains that a summary of the recording is done and then the recording is destroyed and the summary is what goes to the Commissioner. This transcript is part of the LERA Record and was before the Commissioner when he made his decision.

- Various aspects of the conduct of the LERA investigator. As indicated, this is not relevant to consideration of the Complaint or on the review. Further, I do not have jurisdiction under the *Act* to review the conduct of the investigator.
- Overall, allegations of bias of the investigator. The Commissioner found these allegations, as indicated in his decision to the Complainant, to be “vexatious” and “without merit”.
- By allegedly failing to consider inconsistencies in the Respondent’s evidence, showing bias. The *Act* permits the Commissioner was entitled to conduct a limited weighing of the evidence and come to a conclusion.
- By adopting the Respondent’s evidence without giving the Complainant an opportunity to rebut it, and failing to obtain evidence to substantiate the note in the Respondent’s narrative that the Complainant was on file as a police hater, and failing to permit rebutting of the suggestion she was part of the sovereign citizen movement. As indicated, the Commissioner is not required to go back and forth to permit responses to everything the other party says. Also, as indicated, the evidence the Complainant objects to is information reflected in the Respondent’s notes and narrative, and is not something that was said during the interaction that is the subject of the Complaint.

[110] As to procedural fairness, I note consideration of the doctrine of procedural fairness in the context of a s. 13(2) LERA review in *S.B. v. Cst. M.S. LERA Complaint #2023-15* (Frederickson, J., May 24, 2024), at paras 53-69. Judge Frederickson held that the *Act* provides the Commissioner with wide investigative and interpretive powers. The *Act* does not set out steps the Commissioner must take in conducting an investigation. The only requirement of the *Act* is that the Commissioner must provide a

copy of the complaint to the respondent officer and to their Chief of Police. Beyond that, the Commissioner has wide discretion as to how he determines an investigation into a complaint is to be conducted.

[111] I am not persuaded that the Commissioner's decision disregarded procedural fairness or the principles of fundamental justice.

The Complainant's Allegations of Abuse of Authority

[112] The Complainant's allegations of disciplinary default were summarized by the Commissioner in his letter to the Chief of Police as falling under s. 29(a)(ii), namely using oppressive or abusive conduct or language, and s. 29(a)(iv), being discourteous or uncivil.

[113] In the decision letter to the Complainant, the Commissioner says the disciplinary default alleged was one set out in s. 29(a)(iv) of the *Act* as "abuse of authority by being discourteous or uncivil".

[114] Despite that specificity, the Commissioner in his decision letter, addresses all of the Complainant's allegations as to how she says the Respondent abused his authority.

[115] The various allegations of abuse of authority can be summarized as follows:

- (i) The Respondent opening the Complainant's car door
- (ii) The Respondent's treatment of the Complainant by raising his voice and yelling at her.
- (iii) The Respondent's treatment of the Complainant when she was outside his vehicle.
- (iv) The Respondent's direction to the Complainant to remain her vehicle, which she says was a wrongful detention.

[116] I note that even though an officer may use oppressive conduct or language as referenced in s. 29(a)(iii), it will only be a disciplinary default if such conduct

or language is an “abuse of authority”. Judge Joyal (as he then was) set out what is required to make oppressive conduct or language an “abuse of authority” in *A.C. v. Cst. G.S. LERA Complaint #6100* February 20, 2007:

It is only the cases where a police officer’s behaviour or conduct can be concluded to be abusive of his authority that are sanctionable pursuant to section 29(a). Default is not to be found for absolutely any and all manifestations of the impugnable behaviour set out in section 29(a)(i) – (vii)l Each case will depend upon its own facts.” Para 51.

...Police conduct which can be properly found as an “abuse of authority” is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer’s good faith intention to lawfully perform his duties and uphold the public trust...” para 52.

[117] Accordingly, even if the Commissioner were of the view that an officer was discourteous or uncivil, that is not necessarily a disciplinary default. It will only be a disciplinary default if it was an abuse of authority.

Analysis of the Commissioner’s Decision

[118] The Commissioner sets out reasons in the decision letter for his finding that the evidence supporting the Complaint that there was abuse of authority by the Respondent was insufficient to justify referring the matter to a public hearing.

[119] The Commissioner reviewed all of the evidence gathered in the investigation.

[120] The Commissioner stated that the Complaint was reviewed and appeared to contain a different interpretation of events when compared to both the Video she provided and the version of events provided in the Respondent’s narrative report and in the Respondent’s interview.

[121] The Commissioner noted ways in which what was apparent on the Video differed from what the Complainant had stated and was consistent with what the Respondent had said. These observations made by the Commissioner in his decision address the ways the Complainant alleges the Respondent abused his authority. Specifically:

- The Complainant alleged the Respondent opened her door, forcibly, without knocking on her window first. The Respondent said he opened the door when she failed to respond to his knocking on her window, as he was concerned she may be experiencing a mental health or medical issue and he denies opening the door “forcibly”. The Commissioner noted in his decision letter that in her interview, the Complainant said “I think he knocked on my car window aggressively” and then agreed she did not acknowledge him when he knocked because “I don’t have to...” The Respondent officer said the Complainant was already recording as soon as he opened the door. The Video confirms the Respondent officer’s version of events.
- The Complainant alleged the Respondent officer “yelled” while asking her questions. The Respondent officer denied yelling. The Video confirms he did not yell, and confirms that his conduct was consistent with the version of events he provided in his interview.
- The Complainant alleged the Respondent’s treatment of her when she was outside his vehicle was an abuse of his authority. The Respondent said he directed her to return to her vehicle because he was having a private conversation with someone who had approached him to ask a question, and the Complainant was recording it which the Respondent was concerned could be a breach of the other person’s privacy. The Video does not disclose any yelling or abusive language when the Respondent directed the Complainant to her vehicle.
- The Complainant alleged that the Respondent’s direction to her to remain in her vehicle, was a wrongful detention. The Respondent said that he attended to investigate the dispatched call of a possible road rage incident involving the Complainant using derogatory comments toward the complainant in the road rage incident as to 2SLGBTQA+ persons and a dispute over a parking

spot. The Respondent located the vehicle based on the license plate given by the complainant in the parking lot incident. The Commissioner notes the Respondent detained the Complainant as part of an investigation into possible threats, assault or property damage relating to the road rage incident.

[122] The Commissioner noted several specific allegations made by the Complainant that the Respondent disputed, in addition to the ones above namely:

- The Complainant claimed the Respondent was “extremely biased” and “acting on behalf of a female friend or relative”. The Complainant said she based this on the tone of the phone conversation the person in the parking lot was having before she left (presumably when she made the 911 call). The Respondent said the allegation is baseless and false. He said he does not know the complainant in the alleged road rage incident, nor was she a relative of his. The Respondent was not the person who spoke to that complainant on the phone- that would have been dispatch personnel. The Respondent told the Complainant he could not reach the complainant in the incident, although he tried. That is on the Video.
- The Complainant said that the Respondent officer used his position of power to harass and intimidate her. The Video does not support that assertion.
- The Complainant says the officer engaged in a conversation with a “civilian acquaintance”. The Commissioner in his decision letter states the Respondent said that such person was not a person known to him, and that the person approached him to ask about a traffic control matter. The Respondent said in his interview that he knew the father of that person.

- The Respondent agreed he guided the Complainant back to her vehicle. He denied any physical contact with her. The Video does not show this but there is nothing on the Video that is audible suggesting any physical contact.

[123] I note that the Commissioner's decision letter also indicates the Complainant accused the LERA investigator of bias during the investigation, and the Commissioner says the recording of the interview by the investigator with her confirms that claim is vexatious and without merit.

[124] Based on all the information available, the Commissioner exercised his jurisdiction to find that there was not sufficient evidence to substantiate an "abuse of authority" in this case, so as to justify referring the Complaint to a public hearing, and to close the file pursuant to s. 13(1)(c) of the *Act*.

[125] The Complainant is asking me to come to a different conclusion that the Commissioner did. That is not the function of this court on a LERA review. My function is to decide if the Commissioner came to one of the reasonable or rational conclusions that reasonably could be drawn on the evidence.

[126] The Complainant did not provide any basis upon which I could conclude that the decision reached by the Commissioner was one that could not reasonably be drawn on the facts of this case. She simply argued for a different decision, in essence asking me to accept her version of the facts where there were differences in the evidence between hers and the Respondent's. In this case, the Commissioner had the benefit of having the Video, which in a number of areas where the Complainant and the Respondent disagreed, corroborated the Respondent's version.

[127] It is important for the Complainant to understand that I am not making any findings of fact on this review. I am not saying that I do not believe what she said in her

Complaint and/or what she told the investigator. I am finding however that the Commissioner's decision, based on all the information provided by the Complainant, including the Video, and the information provided by the Respondent, that there was insufficient evidence of abuse of authority to justify a referral of the Complaint to a public hearing, was a rational decision. It does not mean it is necessarily the same decision I would have come to. My task on a LERA review is to determine if the Commissioner's decision is one that could reasonably have been drawn from the facts.

[128] In this case, the Commissioner relied at least in part on the fact that the Video corroborated the Respondent's version of some of the events and was contrary to the Complainant's evidence on those points. The Commissioner was entitled to make that assessment.

[129] Because the Video is part of the Record the Commissioner had, I was able to review the video myself. Indeed, having reviewed the video, I have to say that the Commissioner's conclusion is a reasonable one.

[130] The Commissioner complied with the required test of acting with "justification, transparency, and intelligibility by setting out his reasons in his eight page decision letter of April 1, 2023 to the Complainant.

[131] I am satisfied that the reasons of the Commissioner permit this reviewing court to understand why he made the decision he did and permit me to determine if the decision is within the range of acceptable outcomes, and as such the reasonableness requirement is met.

[132] I am satisfied in this case that the Commissioner's reasons show he reviewed all the evidence of the investigation and conducted a limited weighing of the evidence, in coming to his decision.

[133] The Commissioner's decision that evidence of an abuse of authority is insufficient to justify taking further action falls within a range of possible outcomes that could reasonably be drawn on the facts of the case.

[134] I find that the Commissioner's decision was reasonable.

CONCLUSION

[135] I have reviewed the LERA investigation file and the Commissioner's reasons for not proceeding to a hearing on the merits of the Complaint.

[136] I have concluded that the Commissioner assessed the evidence reasonably and drew a reasonable conclusion as to the Complaint. The Commissioner's reasons for decision were transparent, intelligent and justified.

[137] I am not prepared to interfere with the Commissioner's decision. I cannot find that the Commissioner erred in his decision.

[138] The Complainant's application, including seeking disclosure from WPS and seeking to have new evidence considered on the review, or sent back to the Commissioner for consideration, is dismissed.

[139] Pursuant to s. 13(4.1)(b) of the *Act*, the ban on publication of the Respondent's name shall remain in place.

Judge Carlson