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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

KRISTIN ANNABLE,	)	Jennifer Sokal
	)	for the applicant
applicant,	)	
- and -	)	
	)	
CHIEF ADMINISTRATIVE OFFICER OF THE CITY OF WINNIPEG,	)	Shannon Hanlin
	)	for the respondent
	)	
respondent.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	November 23, 2022

Application under ***The Freedom of Information and Protection of Privacy Act***, CCSM, c. F175, section 67 and King's Bench Rule 14

MARTIN J.

INTRODUCTION

[1] Kristin Annable is a journalist and producer employed by the Canadian Broadcasting Corporation (referred to herein interchangeably as Ms. Annable or the CBC). The Chief Administrative Officer of the City of Winnipeg (Winnipeg) is responsible for processing applications under ***The Freedom of Information and Protection of***

Privacy Act, C.C.S.M. c. F175 (the ***Act***) for the City of Winnipeg, including the Winnipeg Police Service.

[2] On July 14, 2020, in the course of her work, Ms. Annable submitted two requests to Winnipeg for access to records for specific information. Part of the request was for records of breaches (referred to as defaults) and penalties imposed on Winnipeg Police Officers for breaches of the Police Service Regulations (the Service Regulations), from 2015 to the date of the application. The CBC is not seeking the identification of the police officers who received disciplinary action or penalties.

[3] Winnipeg provided copies of the records, referred to as Routine Orders, in which the penalty imposed for a specific default or breach was redacted. Winnipeg says it cannot disclose the unredacted record, with the penalty information, because the record is "personal information", as defined in the ***Act***, that could reasonably be expected to identify an individual officer and would be an unreasonable invasion of the officer's privacy, contrary to s. 17(1) and certain deemed invasion of privacy situations listed in s. 17(2) of the ***Act***.

[4] CBC disagreed and appealed to the Ombudsman, who agreed with Winnipeg. The Ombudsman's decision is not at issue or relevant to an appeal (s. 53 of the ***Act***).

[5] The CBC now appeals to this court pursuant to s. 67 of the ***Act***.

THE *ACT*

[6] In ***Fletcher v. Bradbury***, 2022 MBQB 25, at paras. 9 – 13, I restated critical touchstones underpinning all access requests:

> [8] First, in the opening paragraph ***Merck Frosst Canada Ltd. v. Canada (Health)***, [2012] SCC 3, Cromwell J. wrote for the Supreme Court of Canada

> that "[B]road rights of access to government information ... help to ensure accountability and ultimately, it is hoped, to strengthen democracy. "Sunlight", as Louis Brandeis put it so well, "is said to be the best of disinfectants" [citation omitted].
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> [9] At, para 22, the Court explained the overarching purpose of access to information legislation is to facilitate democracy:
>
>> [22] ... the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, [citation omitted]. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, ...
>
> These aspirational words apply as well to the Manitoba *Act*, and should be borne in mind by any civil servant handling an access request.
>
> [10] Bottom line: put another way, quoting Judge Damon Keith, of the U.S. Court of Appeals for the 6th Circuit, "democracy dies behind closed doors".
>
> [11] Second, any access request decision must reflect the purpose of the *Act* (s. 2), which ensures a *right of access*, to any person, to public body records, *subject to limited and specific exceptions* set out in the *Act*. In this way, the *Act* balances the sometimes competing purposes of disclosure, while protecting other valid interests.
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> [12] Third, however, importantly, the analytical approach to either objecting to disclosure or deciding whether an exemption applies that supports nondisclosure, starts from the premise that "[D]isclosure is the rule rather than the exception ..." (***Kattenburg v. Manitoba***, [1999] M.J. No. 498, at para 5).
>
> [13] These purposes and principles should frame every decision made by a public body in assessing whether a citizen's right of access to their government's records should be denied or restricted. I now turn to this appeal.

[7] Moving from that general admonition, to the specifics of this situation, while there are several issues at play, critically they revolve around concepts of whether the undisclosed records constitute a third party's (a police officer's), "personal information" and whether disclosure of that information would be an invasion of such police officer's reasonable expectation of privacy.

[8] The ***Act*** defines personal information as "recorded information about an *identifiable* individual" (emphasis added) including a list of 14 specified circumstances.

[9] The concept of personal information is foundational to the provisions of the ***Act*** Winnipeg relies upon in denying the penalty information. Notably:

- s. 17(1) mandates that a public body (i.e. Winnipeg) shall "refuse to disclose personal information … if the disclosure would be an unreasonable invasion of a third party's privacy." As noted, in this instance, the third party would be an identifiable police officer;
- s. 17(2) deems disclosure of certain personal information detailed in ss. (a) – (i), as an unreasonable invasion of the third party's privacy, including, s. 17(2)(e): if the "personal information relates to the third party's employment, occupational … history";
- s. 17(3) is a non-exclusive list of factors to be considered by a public body in determining whether disclosing personal information would unreasonably invade a third party's privacy, for matters other than those listed in s. 17(2);
- s. 17(4) sets out circumstances where, despite s. 17(2), "disclosure of personal information is not an unreasonable invasion of a third party's privacy if … (i) the record requested … is publically available."

[10] Finally, this appeal is a "new matter", a *de novo* hearing (s. 69).

BACKGROUND

[11] I will be succinct.

[12] At issue is the CBC's access request of records detailing penalties or consequences imposed on police officers for violations of the Service Regulations. On this appeal, the CBC is not seeking disclosure of records respecting:

- information identifying the officer;
- the date or circumstances of the defaults;
- the investigation file underpinning the default and penalty; or
- the internal discipline process followed in a particular situation.

The Service Regulations are publically available in the Winnipeg Police Service Regulation By-Law No. 7610/2000.

[13] The requested information is contained in a record published by the Chief of Police called a Routine Order, which is issued four times a year, in other words, quarterly. As part of the appeal, I ordered the unredacted Routine Orders, and other information, to be provided by Winnipeg in a sealed affidavit so that I could clearly understand the withheld information (s. 71 of the ***Act***).

[14] Winnipeg's counsel confirmed Routine Orders are published such that all civilian and police service members, about 2,000 people, have access to them. Routine Orders are not labelled "Confidential", nor do they carry any other privacy warning or ban on publication. As I understand it, there is nothing in the Service Regulations governing Routine Orders to show they are confidential internal documents only.

[15] A Routine Order sets out information of interest to police service members including such diverse and routine matters as driver license assessments, court closures, promotions, retirements, leaves granted to civilian and police members for various

reasons, such as funerals or training, and discipline matters. Only two pieces of information are given respecting discipline matters: one, a list of defaults, which is the section number of the Service Regulation that was breached; and two, the default penalty.

[16] The Service Regulation defines a default as a minor service default or a service default. Minor service defaults are prescribed in s. 18 and include, for example, discourteous or uncivil conduct to a member of the public, insubordination to a superior officer, some forms of neglect of duty and improper maintenance of a firearm. Service defaults are prescribed in s. 20. Generally, they are more serious defaults and include such things as discreditable conduct, improper use of a firearm, corrupt practice, abuse of authority, and unlawful conduct.

[17] Winnipeg provided the CBC with 26 pages of redacted Routine Orders for the time period of January 2015 – April 2020. Winnipeg redacted all information from the Routine Orders except the itemized list of defaults by section number of the Service Regulations in the specified quarter. Thus, of the information the CBC sought, the penalty imposed for a specific default was redacted. An example of defaults and penalties set out in a Routine Order would be enlightening.

[18] A single Routine Order was issued for the third and fourth quarters of 2015. Under the heading of Discipline Matters it simply showed two defaults in the third quarter as:

- s. 20.04(a) – [penalty]
- s. 20.04(e) – [penalty]

and two defaults in the fourth quarter as:

- s. 20.04(a) – [penalty]
- s. 20.09(a) – [penalty]

By referencing the Service Regulations, one can see that: s. 20.04(a) is a default where a police officer "without lawful excuse, neglects or omits to promptly and diligently perform his or her duties"; s. 20.04(e) is a default where a police officer "prevaricates or withholds pertinent information before any Court, Inquiry, or Winnipeg Police Service investigation", and: s. 20.09(a) is a default where a police officer "does anything not specifically provided for in Sections 18 or 20 in contravention of any Regulation, order or instruction of the Chief of Police". I will not detail the penalties corresponding to these defaults in this Routine Order because they were redacted. However, from the sealed affidavit containing the unredacted Routine Orders, I note generally penalties were mostly a mix of simply stating, "Admonition", "Written Reprimand" or "Loss of [x] Days of Leave". In one instance, the penalty was "Dismissed".

[19] Evidence adduced by Winnipeg on the appeal also explained that default penalties for Service Regulation breaches are considered by a judge imposing a penalty for a disciplinary default under ***The Law Enforcement Review Act***, C.C.S.M. c. L75 (a LERA hearing). In other words, the default would likely become public knowledge. In addition, where applicable, defaults and penalties are disclosed to the Crown, and then to defence counsel as part of a so-called ***McNeil*** process in a criminal proceeding (***R. v. McNeil,*** 2009 SCC 3). Further, if counsel judged it relevant, the officer would be publically questioned about his service record and defaults at an accused's trial. Finally, it was also

confirmed that if the discipline process for a default went so far as a labour arbitration, the arbitration and its result may be public.

[20] On reviewing the sealed affidavit, I excerpted and made available to the CBC's counsel, and on the court file, basic explanations provided by Winnipeg why s. 17(1) and s. 17(2)(e) of the ***Act*** precluded disclosure of the penalties. This nonspecific affidavit evidence dovetails with Winnipeg's position on the appeal. The affiant opined;

> [6] … I am aware that there is often public and media attention directed at the conduct of members of the WPS which is contrary to the Winnipeg Police Service Regulations. In some instances, the identity of the member is known to the media or public.
>
> [7] Some of the penalties in the Routine Orders are unique and significant and might be apparent to family and close friends of the member who received the penalty. If a member received a penalty of loss of days, family or close friends of the member could be aware of a change of routine because the member has reduced pay or less leave. Family or close friends who saw the penalty in combination with the timeframe on the Routine Order in which the penalty was registered might make the connection and realize that their friend or relative was investigated by their employer and what the particular charge was.

and,

> [9] Some of the charges in the Routine Orders are specific and could result in public identification of the member by that fact alone. For example, witnesses, and complainants could be aware of the circumstances that resulted in the Regulatory charge and if they saw the charge and the Routine Orders in combination with the timeframe on the Routine Order in which the penalty was registered, could then become aware of the penalty imposed.

[21] Corresponding to the Routine Orders at issue, the sealed affidavit also offered specific examples of how these explanations may play out in an actual situation.

THE PARTIES' POSITIONS

[22] In essence, Winnipeg asserts that it is prohibited by the ***Act*** from disclosing the penalty set out in Routine Orders for defaults of Service Regulations by police officers

because, close friends, family, neighbors of the officer, or perhaps others, might be able to discern the identify the officer by knowing the calendar quarter in which the penalty was imposed, the specific default and the penalty. As such Winnipeg says, this is personal information of an identified third party that is deemed an unreasonable invasion of privacy of the police officer of their employment histories.

[23] The CBC submits that in the context of the Routine Orders, the penalties corresponding to the defaults of the Service Regulations are not personal information as defined in the ***Act***, in that they are not about an identifiable individual, regardless of whether the information is about an individual's employment or occupational history. The CBC says the redacted information that they seek is anonymized in the Routine Order in a way that makes it impossible to identify the individual police officer who committed the default. They say that Winnipeg has not discharged its onus to prove on the appeal, on a balance of probabilities, that an individual police officer could reasonably be identified through the disclosure of the redacted information.

[24] Alternately, they say disclosure of the redacted information is not an unreasonable invasion of privacy of the third party, in that s. 17(2) is a rebuttable deeming provision which, under all the circumstances, should not be relied upon to deny the requested information. In effect, given the importance of transparency and public accountability to policing functions in a free and democratic society, the public's right to know defaults or breaches of the Service Regulations that unidentified officers have committed, and the related penalty, trumps an officer's privacy rights.

ISSUE

[25] In framing the issues, the burden of proof set out in s. 70 must be taken into account and harmonized with the specific issues arising in this situation. The standard of proof is the civil balance of probabilities test.

[26] The analysis in this situation revolves around s. 17(1). It comprises two key components: (i) personal information; and (ii) unreasonable invasion of a third party's privacy.

[27] The CBC asserts there is an onus upon Winnipeg to demonstrate the contentious information is personal information. If they discharge the onus, then the onus switches to the CBC to demonstrate that disclosure is not an unreasonable invasion of privacy of the police officer. Winnipeg agrees.

[28] As such, the real issues are:

i. has Winnipeg demonstrated on a balance of probabilities that records disclosing a penalty imposed upon an unidentified police officer, for a specific default of the Service Regulations, in a particular three-month quarter, is personal information respecting the officer's employment or occupation? A more specific articulation of this issue will follow shortly; if so,

ii. has the CBC shown that disclosure of such records would not be an unreasonable invasion of an officer's privacy?

ANALYSIS

[29] For the reasons that follow, I find Winnipeg has failed to demonstrate that disclosure of specific penalties, in conjunction with the default or breach information, and

other information, could reasonably lead to the identification of the involved police officer. Winnipeg's position, and evidence, is not cogent. As such, it has not been shown that the requested record is personal information as defined by the ***Act***.

[30] Both parties agree the civil balance of probabilities standard applies to Winnipeg's onus. This standard was set out by the Supreme Court of Canada in ***F.H. v. McDougall***, 2008 SCC 53, [2008] 3 S.C.R. 41, where the headnote explains:

> One legal rule applies in all cases and that is that the evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test.
>
> (underlining added)

[31] As to the specific test whether a record is personal information, the first question is whether the information sought is about an identifiable third party. This may invoke two considerations.

[32] One, whether the information is about, or speaks to, an identifiable individual. Here it does, as the information is uniquely related to a certain individual (***Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)***, 2011 ABCA 94 at para. 49).

[33] Two, whether the information can reveal or identify the individual. This is the important consideration here. The analytical framework is described by Barbara von Tigerstrom, ***Information and Privacy Law in Canada,*** (Toronto, Irwin Law Inc., 2020, at 210):

> In order for information to qualify as personal information, it must be possible to identify the individual subject or subjects of the information. … The test that has long been used in Ontario is whether there is a "reasonable expectation that the individual can be identified" from the information that is disclosed. This must be

> demonstrated on a balance of probabilities, and the evidence may vary from case to case.

Both parties concur this is the test to be applied. I agree. Otherwise, I also note that some jurisprudence, notably from the Federal Court, formulates the test as to whether there is a "serious possibility" that the individual could be identified, yet recognizes the two standards are effectively the same. Finally, the reasonable expectation of identifying an individual must be considered *vis-à-vis* all of the information that is disclosed, or otherwise publically available, not simply that portion which has been withheld.

[34] In sum, at this point in the analysis, the question is whether Winnipeg has demonstrated on a balance of probabilities that the disclosure of the default penalties, produced quarterly in the Routine Orders, in conjunction with other available information, could reasonably be expected to identify the police officer who received the default penalty.

[35] The meaning of the "reasonable expectation" standard gains context from the Supreme Court of Canada's interpretation of the similar phrase "could reasonably be expected" (albeit, respecting the harm test applicable to other privacy legislation exemptions), as explained in ***Merck Frosst Canada Ltd. v. Canada (Health)***, 2012 SCC 3, [2012] 1 SCR 23, . The Court stated at para. 204:

> [204] … A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason: see *Air Atonabee*, at p. 277, quoting *Actors' Equity Assn. of Australia v. Australian Broadcasting Tribunal (No. 2)* (1985), 7 A.L.D. 584 (Australia Admin. Appeals Trib.), at p. 590. The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively": *Watt v. Forests NSW* [(August 29, 2007), Doc. 063292 (Australia Admin. Appeals Trib.)], [2007]

> NSWADT 197, at para. 120. On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof.
>
> (underlining added)

The Canadian Abridgment Words & Phrases, W&P 8865, summarizes a "reasonable expectation" as something that is at least foreseen and perhaps likely to occur, but not necessarily probable.

[36] All in, a reasonable expectation standard means something considerably higher than a mere possibility, but lower than a probability, of an outcome occurring (such as identifying an individual). The evidence must be based on reason, on real and substantial grounds when looked at objectively, not matters that are fanciful, imaginary, contrived, or speculative.

[37] Considering the whole of the information, comprising of the Routine Orders and other information that may be available to a member of the public, such as a friend, neighbor, family member or the CBC, on the surface, there is nothing obvious to support disclosure of the default penalty as increasing the likelihood of identifying a particular officer. Digging deeper, there is nothing that can be gleaned to reveal the circumstances or particulars of the default incident, including when or how it arose, or the discipline proceeding process, including when and how it was conducted, that might even be a clue in identifying the officer. In addition, the reference to the section number of the Service Regulation default in the Routine Orders is entirely generic, as is the penalty. Moreover, this is not a "small cell" situation: to the contrary, there are over 1,300 officers in the pool of possible individuals, a number so large it makes Winnipeg's arguments that

disclosure could identify a specific officer far less plausible, even in a dismissal situation. To say that someone such as a friend or family member could reasonably identify an officer by learning that in a certain quarter, a default was registered with a penalty such as "Written Reprimand" or "Loss of [x] Days Weekly Leave", is speculative. It relies on guesswork and conjecture.

[38] In an attempt to display some objective reality to its rationale, Winnipeg also provided eight specific real examples in the sealed affidavit. Internal Winnipeg Police Service documents, attached as exhibits, dealing with a discipline proceeding respecting a specific default and penalty, are irrelevant to the consideration, as those documents are not publically available. Otherwise, somewhat ironically, in seven of the examples, Winnipeg attempts to bolster their argument of a reasonable expectation of identifying an officer because the event leading to the discipline was publically known (i.e., such as when an officer is criminally prosecuted), often through valid media reporting which included naming the officer. In the other example, the officer disclosed the possibility of discipline to the person who Winnipeg says then could reasonably be expected to piece together the discipline. I need not go further than to say that while these examples are more concrete, they still do not rise to the bar. For the most part, my findings apply to each example situation. In almost every quarter, there are multiple defaults which Winnipeg acknowledges must be disclosed; the addition of disclosing penalty information has no meaningful effect or consequence in identifying an officer.

[39] In the generic explanations I have reproduced from Winnipeg's affidavit, and the specific examples under seal I have not reproduced, I recognize it is theoretically possible

that someone could identify an officer in some specific situation, but that falls short of the bar of a reasonable expectation the officer could be identified. Mere possibility is not the test. The principle argument, and evidence, that someone might realize, or might make connections, is too remote to be cogent and amounts to a conclusory opinion which is not objectively reasonable. It is fanciful. It is speculation, requiring supposition on supposition.

[40] In the end, I do not find disclosing information of the default, and default penalty, in a given quarter, from the Routine Orders, could reasonably be expected to identify an individual officer, even in the context of other public information; therefore it is not personal information.

[41] Having reached this conclusion, I need not deal with other arguments arising from s. 17 of the ***Act*** that would flow from finding the information was personal information as defined in the ***Act***.

[42] Two last comments. I have not considered the three situations where a default and penalty could already be public; a LERA hearing, during examination of a police officer testifying at a criminal trial and at a discipline arbitration hearing. These are all situations where by legislation, jurisprudence or a labour relations and collective bargaining process an officer may be identified. These points speak more to whether disclosure would be an unreasonable invasion of an officer's privacy under s. 17.

[43] Nor have I factored in the effect of 2,000 members of the police service routinely receiving the information Winnipeg says is personal information. Arguably these are the people that would have the best and most insight to identify a specific recipient of

discipline. Disclosing the information to such a large pool of people, regardless of their status as members, while asserting the public cannot have access to the information because it is personal information, may, in reality, be irreconcilable positions. However, I leave those arguments for another case that more directly considers s. 17(4): whether it is an unreasonable invasion of privacy if the records are available to a large group in this way -- is that information not already publically available?

[44] Part of my point in raising these issues is that I am concerned that those charged with facilitating access to records applications approach their task mindful of the touchstones I set out earlier, with a healthy dose of common sense, given the context of the situation. There is often an inherent tension between keeping records of one's organization private and being true to the ***Act***'s premise that disclosure is the rule not the exception. Privacy rights are important, but the evidence and arguments to keep records private, concealed, should not be stretched to attempt to fit an exemption; objectivity is critical.

CONCLUSION

[45] The CBC's appeal is granted. Winnipeg shall produce within 21 days the Routine Orders without redaction of the default penalty. The CBC is entitled to tariff costs.

Martin J.