Sault Ste. Marie Police Service – Hearing

In the Matter of

Ontario Regulation 123/98

Made Under the Police Services Act, RSO, 1990c. P.15, as amended

And

Sault Ste. Marie Police Service

And

Constable C. Johnson

Re: Abuse of Process Motion Ruling

Before:

(Ret.) Superintendent Robert F. Gould M.O.M.

Waterloo Regional Police Service

Counsel:

Counsel for the Officer: Ms. P. Machado

Counsel for the Prosecution: Mr. J. Dubois

Motion Date November 25, 2021

Decision Date: January 3, 2022 (electronic release)

PART 1 - OVERVIEW

Background

The subject Officer of this Tribunal, Constable C. Johnson [*JOHNSON*], a sworn police officer with Sault Ste. Marie Police Service [*SERVICE*], has filed a Motion for an order of stay, resulting from an abuse of process by the *Respondent*. The Motion was heard verbally on November 25, 2021, on its merits.

JOHNSON is alleged to have committed ten (10) counts of misconduct contrary to the Police Services Act of Ontario [*PSA*].

JOHNSON stands accused of misconduct *Corrupt Practice on or about July 7, 2020, you improperly used your character and position as a member of the Sault Ste. Marie Police Service for private advantage in relation to the public complainant and/or members of her family, constituting an offence against discipline, Corrupt Practice, as prescribed in section 2 (1) (f) (v) of the code of conduct Regulation 268/10 as amended.*

JOHNSON stands accused of misconduct*, Discreditable Conduct on or about July 7, 2020, and in relation to the public complainant and/or other members of her family you acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Sault Ste. Marie Police Service constituting an offence against discipline, Discreditable Conduct, as prescribed in section 2 (1) (a) (xi) of the Code of Conduct, Ontario Regulation 268/10, as amended.*

JOHNSON stands accused of misconduct*, Discreditable Conduct on or about July 7, 2020, you acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Sault Ste. Marie Police Service, namely using MTO/ISS site to gain information on the public complainant, constituting an offence against discipline, Discreditable Conduct, as prescribed in section 2 (1) (a) (xi) of the Code of Conduct, Ontario Regulation 268/10, as amended.*

JOHNSON stands accused of misconduct, Discreditable Conduct *on or about July 7, 2020, you acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Sault Ste. Marie Police Service, namely using the MTO/ISS site to gain information on the public complainant's son (Zachary), constituting an offence against discipline, Discreditable Conduct, as prescribed in section 2 (1) (a) (xi) of the Code of Conduct, Ontario Regulation 268/10, as amended.*

JOHNSON stands accused of misconduct, Discreditable Conduct *on or about July 7, 2020, you acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Sault Ste. Marie Police Service, namely using OPTIC NICH/RMS to gain information on the public complainant and/or other members of her family, constituting an offence against discipline, Discreditable Conduct, as prescribed in section 2 (1) (a) (xi) of the Code of Conduct, Ontario Regulation 268/10, as amended.*

JOHNSON stands accused of misconduct, Deceit in that on or about July 7, 2020, you willfully or negligently made a false, misleading or inaccurate statement pertaining to official duties, namely relating to the creation of incident SM20015764, constituting an offence against discipline, Deceit, as prescribed in section 2 (1) (d) (ii) of the Code of Conduct, Regulation 268/10 as amended.

JOHNSON stands accused of misconduct, Deceit in that on or about July 7, 2020, you willfully or negligently made a false, misleading or inaccurate statement pertaining to official duties, namely relating to your duty note entries relating to incident SM20015764, constituting an offence against discipline, Deceit, as prescribed in section 2 (1) (d) (ii) of the Code of Conduct, Regulation 268/10 as amended.

JOHNSON stands accused of misconduct, Deceit in that on or about July 7, 2020, you willfully or negligently made a false, misleading or inaccurate statement pertaining to official duties, namely relating to a communication sent to the Alternate Response Unit relating to incident SM20015764, constituting an offence against discipline, Deceit, as prescribed in section 2 (1) (d) (ii) of the Code of Conduct, Regulation 268/10 as amended.

JOHNSON stands accused of misconduct, Deceit in that on or about November 20, 2020, you willfully or negligently made a false, misleading or inaccurate statement pertaining to official duties, namely relating to your compelled written duty report in relation to OIPRD Complaint # E-202008262121129119, constituting an offence against discipline, Deceit, as prescribed in section 2 (1) (d) (ii) of the Code of Conduct, Regulation 268/10 as amended.

JOHNSON stands accused of misconduct, Deceit in that on or about January 6, 2021, you willfully or negligently made a false, misleading or inaccurate statement pertaining to official duties, namely relating to your compelled interview in relation to OIPRD Complaint # E-202008262121129119,

constituting an offence against discipline, Deceit, as prescribed in section 2 (1) (d) (ii) of the Code of Conduct, Regulation 268/10 as amended.

This Motion asks for relief that an order of stay be awarded to *JOHNSON* resulting from an abuse of process (excerpt from Applicant's Notice of Motion);

- An order that the proceedings against the *Applicant* be stayed, based on an Abuse of Process by the *Respondent*.
- In the alternative, an order that Count 1, Count 6, Count 7, Count 8, Count 9, and Count 10 be withdrawn, proceeding only on Count 2, Count 3, Count 4, and Count 5, based on an Abuse of Process by the *Respondent*.

Parties to this Motion include *JOHNSON [Applicant],* and his Counsel, Ms. Machado, and Mr. Dubois, Prosecutor, the *Respondent* representing the *SERVICE*.

The *APPLICANT* alleges that the right to make full answer in defence was infringed as a result of the lack of full and timely disclosure caused by the *Respondent*.

In the record of Motion provided by the *Applicant,* one hundred and nine (109) grounds are explained. The documentary evidence attached to the Motion Record has approximately forty-seven (47) tabs of documents and case books indicate that thirty-four (34) cases are to be relied upon.

In reply to the Abuse of Process Motion and stay request by the *Applicant,* the *Respondent* submits;

- That the *Applicant* has not indicated that any prejudice has occurred or would occur, and a stay is without merit. A stay is warranted only in the clearest of cases where the conscience of the community would be shocked by the abuse of process. This is not a case for this conclusion.
- Any technicality does not reach the high level required to trigger a stay.
- The argument by the *Applicant* is better suited after the Hearing proper, when an argument can be made to the weight of the evidence presented.

The *Respondent* has provided a factum in reply, along with two (2) volumes of affidavits containing forty-seven (47) documents, a book of Prosecutor documents containing twenty-six (26) tabs, a Motion record containing thirty-four documents, and three (3) volumes of authorities totaling forty (40) cases.

Items received by the Tribunal from the parties include;

Applicant

1. Factum
2. Motion Record
3. Brief of Authorities Tab 1-5
4. Book of Authorities 1 Tab 1-13
5. Book of Authorities 2 Tab 14-19
6. Book of Authorities 3 Tab 20-34

Respondent

1. Factum in Reply
2. Motion Records Book 1 tab A 1-6, B1-28
3. Book of Authorities Book 1 Tab 1-14
4. Book of Authorities Book 2 Tab 15-25
5. Book of Authorities Book 3 Tab 26-40
6. Prosecutor's Documents Tab 1-26
7. Affidavit Book 1 Tab 1-28
8. Affidavit Book 2 Tab 29-47

The parties have provided supporting case materials/written arguments and made oral submissions in support of their respective positions on this Motion on November 25, 2021. I have considered all of the presented information and took time reflecting on the issues.

I find that this Motion can be parsed into a number of themes. The *Applicant* believes that an abuse of process is evident based on:

1. The lack of timely production of documents.
2. The lack of a proper investigation into the alleged misconducts.
3. The lack of providing radio transmission data.
4. The loss of the ability to recover radio transmission data as a result of a third-party ransomware attack on the computer files at the *SERVICE*.

The *Applicant* contends that the breach of obligation by the *Respondent* and *SERVICE* supports an abuse of process and that this breach is to a degree such that the *Applicant* was not/will not be afforded procedural fairness and a stay is the only conclusion.

Finding

I do not find in favour of the *Applicant.* An abuse of process has not been proven and therefore a stay of proceedings is not supported. Fairness to the *Applicant* has not been found to have been compromised. This proceeding can and should continue as the *Applicant's* argument has not swayed me that I can support their request as outlined in the Motion record.

The Motion for me to stay the proceeding is dismissed with the acknowledgement that I reserve my decision particular to the prejudice to the *Applicant* from lost radio transmissions until the Hearing proper when I can weigh this evidence against the entirety of evidence.

Part II: THE MOTION

Witness Evidence

There was none.

Party Positions

The following are not complete summaries but are intended to focus on the pertinent arguments by the parties considered by the Tribunal in deciding on the Motion. The summaries that follow are taken from the verbal arguments on November 25, 2021, and the written materials provided by the parties.

Applicant Position

Ms. Machado commenced the *Applicant's* verbal argument by stating that the Motion can be parsed into themes and is asking for a stay direction from the Tribunal under the Statutory Powers Procedure Act [*SPPA*] section 23. (1) for an Abuse of Process.

> *"A tribunal may make such orders or give direction in proceedings before it as it considers proper to prevent abuse of processes".*

The main themes identified by the *Applicant,* as outlined in the Motion record;

- Full disclosure of incoming calls to the *SERVICE* was not provided when requested on July 7, 2020.

- Radio dispatch recordings were not reviewed or provided when requested on July 7, 2020.
- A full and fair investigation into the misconduct was not done by the *SERVICE*.
- Disclosure has come in late at times (just prior to the commencement of a Hearing date) and at other times in piecemeal.

The only remedy is to stay or dismiss the proceeding to satisfy the need for Natural Justice and Procedural Fairness. The *Applicant* has been irreparably harmed by the abuse of process and cannot make full answer in defence to the allegations of misconduct. Any continuation of this proceeding would constitute an ongoing abuse of process.

This matter is a very serious one, as the allegations include Deceit, Discreditable Conduct, and Corrupt Practice. Additionally, *JOHNSON* was charged criminally in respect to the same facts as we have here in this matter. The *RESPONDENT* has advised that the *SERVICE* is seeking dismissal of the *Applicant* from the *SERVICE*.

The *Applicant,* in their Motion record and documents, has provided the Tribunal with four (4) affidavits, which include;

- Susan Board – Law Clerk for Machado Law Professional Corporation.
- Brad Baber – Vice President of the Sault Ste. Marie Police Association.
- Josh Teresinski – President of the Sault Ste. Marie Police Association.
- Constable Craig Johnson – Sault Ste. Marie Police Service

These affidavits outlined the information that the *Applicant* relies on and have been produced to support the request for a stay. The affidavit information is outlined below (in summary accent added).

The Susan Board affidavit outlines all correspondence between the *Applicant's* Counsel and the *Respondent*. These documents and photocopies of emails are enclosed in the Motion Record and encompass forty-five (45) tabs A-UU.

The Brad Baber affidavit includes statements about policy 3.02 at the *SERVICE* and, in paragraph 14, the affiant confirms that dispatch radio calls that are recorded may pick-up background calls answered at the Duty Desk.

The Josh Teresinski affidavit includes the same information as outlined by Brad Baber with the exception of paragraphs, 1, 2, and 16.

The Craig Johnson affidavit includes 35 paragraphs of information which detail work history, medical information, and the impact of this misconduct proceedings on his person.

In the *Applicant's* factum, the following are identified as the "overview" reasons for the Motion and are best stated to assist the reader in understanding the request for a dismissal of the Hearing or a stay; (in summary)

1. The *Respondent* failed to disclose all recordings of incoming calls to the police station on July 7, 2020.
2. The *Respondent* has consistently failed to provide disclosure in a timely fashion.
3. The *Respondent* has abdicated its duty to conduct a full and fair investigation.
4. The *Respondent* has failed to produce evidence that is relevant.

The *Applicant* outlined for the Tribunal the law respecting an abuse of process and made reference to the following cases in support of the argument to stay the *JOHNSON* proceeding.

In *R v. Regan,* the two (2) criteria for a stay were identified as: the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome, and no other remedy is reasonably capable of removing that prejudice.

In *Forestall and Toronto Police Service,* a decision of the Hearings Officer spoke to the loss of evidence as one of the impacting reasons in allowing a stay.

In *R v. Jewitt* it spoke about how the fundamental principles of justice, a community's sense of fair play, must prevent an abuse of oppressive or vexatious proceedings.

Peel Regional Police Service and Crane references the *Blencoe* case which outlines that an unacceptable delay may amount to abuse of process and even when no unfairness has impacted the proceedings. Additionally, the law is clear that the Hearings Officer must consider whether an abuse of process has taken place before a matter can proceed.

In considering *R v. Young,* the *Applicant* suggested that the Tribunal is to exercise its discretion necessary to stay the proceedings if the fundamental principles are violated.

In *Ramos and Toronto Police Service,* it was noted that where there would be significant damage to the public interest that outweighs any harm to the public in halting the proceedings, then the proceeding should be halted.

The *Applicant* took the Tribunal to the concerns about the *Respondent's* lack of production and outlined the "Professional Conduct" expected of Counsel.

In *Gatemen and London Police Service*, it was pointed out that the *Ontario Civilian Police Commission* [*OCPC*] outlined the need to deal with employment concerns in a fair and consistent manner.

In *Horton and Ontario Provincial Police* [*OPP*], the *Applicant* identified that in a case in which dismissal is identified as a potential outcome, a high standard of justice is required.

In *Powers and London Police Service*, it was outlined that *OCPC* stated that in administrative law an abuse of process is about protecting people from unfair treatment.

The *Applicant* argued that the misconduct of deceit requires the clearest of cases. The *Respondent* must prove that a false, misleading, or inaccurate statement was willfully or neglectfully made pertaining to their official duties, as explained in the *Perry and York Regional Police* and *Cate and Peel Regional Police Service* cases.

The *Applicant* explained that in *R v. Stinchcombe* the basic principles outlined in this case of disclosure requirements should be relied upon in administrative matters. The *Respondent* did not include the radio dispatch recordings in production, nor did they review them. The *Applicant* questions how they can be deemed irrelevant if they were not reviewed. It is reasonably possible that these records could be useful to the *Applican*t. The assessment of these records is no longer possible as they have been lost. The ability of the *Applicant* to make full answer in defence is impaired.

The *Applicant* highlighted their concern that Sgt. Miron's notes were held by the *Respondent* and only disclosed on October 19, 2021. It was argued that Sgt. Miron does not have client privilege because he was working on tasks assigned by the Prosecutor. The *Applicant* points out that it's a moot point now as the Sergeant`s notes were disclosed by the *Respondent*.

The *Applicant* points out that the lack of production and timing of other production, including the last-minute attempts at accounting for incomplete production, only served to prejudice the *Applicant*'s ability to make full answer in defence. The prejudice is of such a degree that the public's sense of decency and fairness has been impacted.

The rules of natural justice and procedural fairness were explained to the Tribunal by the *Applicant* on pages 35-36 of the factum, in which the *PSA* and *SPPA* were also exemplified.

In *Durham Regional Police Association and Durham Regional Police Senior Officers Association and Durham Regional Police Service*, the *Applicant* drew the Tribunal to the four (4) test criteria involving production on page 38 of the factum.

The *Applicant* suggested that all the recordings, including the radio transmissions, should have been produced, or at the very least reviewed. The *Applicant* went on to identify that the non-production of the material sought, or not reviewed by the *SERVICE*, establishes a clear case that an abuse of process is evident. Now that the radio transmissions are lost and cannot be produced, an egregious breach of the duty of fairness has occurred. Only a stay can remedy as the Tribunal must make a finding on clear and convincing, weighty and reliable evidence in deciding a matter, as indicated in the *Carmichael and OPP* case. The *Applicant* drew the Tribunal`s attention to the decision by Hearing Officer Walton in the *Crane and Peel Regional Police Service* as a case similar to *JOHNSON*.

The *Applicant* concluded by outlining for the Tribunal case law that assisted in supporting the request for stay.

Respondent's Position

The *Respondent* began their argument by identifying the misconducts that *JOHNSON* is alleged to have violated and noted that the central issue surrounds the fabrication of an anonymous traffic complaint by *JOHNSON*. *JOHNSON* describes that he received a phone call while working at the duty desk on July 7, 2020, from an anonymous caller reporting a traffic issue involving a motorcycle. A traffic warning notice was sent to the public complainant as a result of the creation of a *SERVICE* occurrence by *JOHNSON* in respect to the anonymous caller's complaint.

The *Respondent,* in their Motion reply record and documents, has provided the Tribunal with two (2) affidavits, which include;

- Sandra MacKinnon – Information clerk at the *SERVICE*.
- Anne Gillis – Legal Assistant with Perley–Robertson, Hill & McDougall LLP.

The *Respondent* described in great detail how the "Commlog" systems work at the *SERVICE*. In brief, it was explained that any phone calls being received at the *SERVICE*'s dispatch center, Central Emergency Reporting Bureau [*CERB*], are recorded by this system which assigns a log number to each incoming call. This includes certain *SERVICE* telephones that are part of the Komutel system of recording incoming

data. It is noted that the duty desk phone is one such location in which the phone is recorded. Additionally, the internal *SERVICE* paging system is also recorded under the same program. All of these recordings, Commlogs, were reviewed and produced to the *Applicant*. The *Respondent* acknowledged that police radio transmissions, although also recorded, were not part of the review and therefore not produced. These assertions by the *Respondent* are confirmed in the affidavits of Sandra McKinnon and Anne Gillis.

The *Respondent* confirms that the systems data (Commlogs) was reviewed by Sandra McKinnon, Staff Sergeant Bolduc, and Sergeant Miron and no anonymous incoming call alleged to have been received by *JOHNSON* was recorded during the date and time range searched.

The *Respondent* contends that the majority of the production was delivered to the *Applicant* on April 23, 2021. There were several follow-up requests from the *Applicant* for additional production. The DVD containing a recording of 311 incoming calls (Commlogs) to the *SERVICE* was sent to the *Applicant* on May 10, 2021, along with an explanation of what was contained on the DVD (incoming calls, internal pages, and internal calls to dispatch). The *Respondent* asserts that these were phone calls and not radio transmissions.

The large number of missing phone calls which are alleged by the *Applicant* do not exist as there are no missing calls from the production provided. The numbers associated to these recordings are not phone calls but rather radio transmissions. The *Respondent* identified that there were some back and forth emails between the parties over the DVD audio files and that the request by the *Applicant* was to discuss incoming calls from trunk lines and telephone numbers that called the station. The initial request did not particularize radio transmissions.

The Tribunal was made aware of a ransomware event that occurred at the *SERVICE* on August 26, 2021. This attack caused the loss of recordings of the *SERVICE`S* radio transmissions and other data (Commlogs), including those of July 7, 2020, which are subsequently deemed no longer retrievable.

The *Respondent* identified that the *Applicant* did not request the Commlogs of radio transmissions until October 18, 2021 and further suggested *it`s because they are not relevant to this matter*. A reply was provided to the *Applicant* within 24 hours of this request and outlined the *Respondent's* position on radio transmissions as being irrelevant to the misconduct.

The *Respondent* clarified that the last duty note of Sergeant Miron was made on October 19, 2021 and all notes were made available to the *Respondent* at that time. Those notes were subsequently provided to the *Applicant* on the same day. The emails between the parties will clearly indicate that the parties were working collectively to provide production and explain details in said production. The *Respondent* asserts that there is no missing production, with the exception of the radio transmissions from July 7, 2020, which were asked for on October 18, 2021 and are lost as a result of the ransomware attack in August.

The *Respondent* moved to identifying the law for the Tribunal and outlined that administrative law is not criminal law. *PSA* matters are labour relations issues and Prosecutors in administrative Tribunals are not Crown Attorneys. The Tribunal was directed to the below cases.

Burnham v. Metropolitan Toronto Police SCC announced that *PSA* matters are not penal proceedings within the purview of Section 11 of the Charter, nor are they criminal in nature.

In *Godfrey v. OPP*, a judicial review identified that discipline matters are essentially a matter of labour relations within the police force.

In *Williams and OPP*, the Commission identified that discipline hearings under the *PSA* are administrative proceedings directed at employment concerns. The Prosecutor does not speak for the Crown but is rather a representative of the employer.

The *Respondent* expressed concern that the *Applicant* characterized a *PSA* hearing as a professional regulatory hearing. The Tribunal should be aware that a *PSA* matter is about the discipline of an employee and not about the removal of a license as considered by a Regulatory Hearing.

In *Figueriras v. York Regional Police Service*, the *Respondent* identified that the public complaint system is to ensure transparency and enhance public confidence in the process. The Public Complainant is entitled to procedural fairness in consideration of whether a process is to be dismissed prior to a Hearing on its merit.

In *Krull and OPP, 2021, OCPC*, the *Respondent* pointed out, in paragraphs 23-27, the test for production. In paragraphs 28-29 some insight into privilege was exposed. The *Respondent* has identified that Sgt. Miron`s notes are privileged.

The *Respondent* then explained that a stay for an abuse of process is an exceptional remedy and outlined the case of *Brazeau v. Morrell*, which outlined the concept of prejudice.

A number of cases were outlined for the Tribunal on pages 20-23 in the *Respondent's* factum in reply which provided considerations for the Tribunal with respect to a stay of proceedings. These included: that a stay is considered in the clearest of cases; it must have caused an actual prejudice; must have an air of reality; and, must violate the public's sense of fairness.

The *Respondent* asserted that no prejudice has been identified by the *Applicant*. The matter is an administrative matter, the Charter does not apply, and the legislation that impacts on this matter is the *PSA* and *SPPA*.

A party cannot request production as a "fishing expedition" to see if they can discover a case but must particularize a request and connect the request to the matter (relevant). The *Respondent* identified the cases of *AFG Industries and A.B.G.W.I.U Loc 295* and *Cardi and Peel Regional Police Service* as outlining these concepts.

The *Respondent* commented that the *Applicant`s* suggestion that there was some possibility that the radio transmission recordings may have captured some part of the anonymous caller in question is speculative at best. The *Respondent* argued that it`s inconceivable, when we consider where *JOHNSON* received the anonymous phone call (duty desk) that the radio transmission recording would pick-up that conversation.

Additionally, the *Applicant* has identified late disclosure as a reason for the Motion. The *Respondent* took the Tribunal to a number of cases identified on pages 26-28 in the factum in reply and expressed that late disclosure does not warrant a stay of proceedings. In the *Cieslik* case cited by the *Applicant,* the delay was over years and 26 appearances and is not similar to what we have here in *JOHNSON*.

The loss of the radio transmission data has been explained and was in no way caused by the *SERVICE* or Prosecutor. The law is clear that only in the clearest of cases for lost evidence a stay is an exceptional remedy. The *Respondent* argues that, in the case of lost evidence, the trier of fact should make a determination on the lost evidence at the Hearing proper, when all the evidence is known, and not based on a preliminary Motion with minimal evidence. Only then can the circumstances surrounding the loss of evidence be analyzed appropriately.

In conclusion, the *Respondent* suggests that the *Applicant* is relying on speculative relevance that the radio transmission recording would be of assistance. No prejudice has been exposed that would inform a stay. The *Respondent* has met his obligation for production and the Motion for an abuse of process must be dismissed.

Part III: ANALYSIS & FINDING

First and foremost, I would like to address my understanding of what an Administrative Hearing involving the *PSA* is about, as there was some discourse about Criminal principles between the parties' verbal arguments for this Motion. The issues to be decided in a *PSA* matter are administrative and do not contain penal consequence as in Criminal matters. They are employer and employee relationship matters. I acknowledge that the loss of one's position as a Police Officer can be difficult for a member and the case before the Tribunal has been identified by the *Respondent* as seeking dismissal. This fact does not elevate the matter to that of Criminal stature.

I note that many cases and arguments of the parties were centered on Criminal cases that enunciated principles for consideration in Criminal processes. A *PSA* matter is not a Criminal process and I want to be clear that, as such, Criminal principles are not binding on an Administrative Tribunal as the tests for a finding are separate and distinct considerations in a *PSA* matter from that of a Criminal case. The test in administrative proceedings is clear convincing evidence, as established by *PSA* jurisprudence.

I will not go into a lengthy discussion on this issue as I believe prior attempts at factoring in Criminal principles in other *PSA* cases have been appropriately enunciated already in the jurisprudence. Having said this, I acknowledge that at times, and in specific circumstances, I can gain some assistance and insight in reviewing a Criminal case and its directions.

Issue of stay

To address any question of a stay, the Tribunal must first determine whether the abuse of process as indicated by the *Applicant* is substantiated and then whether this irregularity can be mitigated appropriately without a stay. As this is a *PSA* matter and therefore a labour relations issue, the Tribunal purports that the best way to deal with an abuse of process matter is to examine if there are irregularities that inform an abuse of process. If there are irregularities, the next step is to look at making order(s) that would satisfy the irregularity identified (if proven).

The last stage should consider a balance of the public demands, integrity of the process, and the need to hold an Officer accountable for their conduct vs procedural fairness and natural justice. If an abuse is supported and no means are available to appropriately mitigate the abuse, then the Tribunal must consider if the abuse of process reaches the high level that a stay of proceeding is reasonable given the balance described above.

The *SPPA* gives credence to this understanding in section 23(1) in which it states that a Tribunal (excerpt in brief);

> *"May make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of processes"*[1].

I shall now move on to the matter at hand in consideration of the request by the *Applicant* for a stay.

The timelines associated to the proceedings are important to acknowledge.

- The incident date that has led to the misconducts occurred on July 7, 2020.
- An anonymous driving complaint was entered into the *SERVICE*'s data and a request for an alternate response was initiated on July 7, 2020.
- A "Warning Letter" was issued by the *SERVICE* to the Public Complainant on July 13, 2020.
- The Public Complainant made a complaint to the Office of the Independent Police Director [*OIPRD*] on August 26, 2020.
- The *OIPRD* complaint was sent to the *SERVICE* on October 7, 2020.
- The matter was remitted to the *SERVICE* to investigate, and an internal correspondence was sent to the *Applicant* on November 18, 2020, outlining the *OIPRD* complaint and compelling information (duty notes and a duty report).
- A compelled interview was conducted on January 6, 2021.
- The final investigative report was completed by the *SERVICE* on February 21, 2021.
- On April 6, 2021, a Notice of Hearing and a Statement of Particulars was provided to the *Applicant*.

[1] Ontario Police Service Act, Ceyssens and Childs 2017, Earlscourt, SPPA section 23 (1), p. 610.

- The *Applicant* was ordered to appear (electronically) before a *PSA* Hearing Tribunal on April 19, 2021. Adjourned (jointly requested) to May 25, 2021, for further production.
- The *Applicant* appeared electronically on May 25, 2021, and requested an adjournment to review the large amount of production provided.
- Counsel for the *Applicant* appeared electronically on June 21, 2021 and requested an adjournment to speak with their client and further review of production.
- The *Applicant* appeared on July 13, 2021, to set dates of October 25-27 and November 25-26, 2021. A check in date of October 4, 2021, was also scheduled.
- The parties appeared electronically on October 4, 2021, to confirm their readiness to attend to the Hearing. An additional three (3) days were scheduled for January 24-26, 2022. The Hearing was to take place electronically over the Zoom portal.
- The *Applicant* requested a conference call via email on October 19, 2021. A date was set for October 21, 2021.
- The *Applicant* requested that a Motion of abuse of process be considered by the Tribunal. Written materials were to be forwarded by the parties and a date of November 25, 2021, was set aside to hear verbal arguments in support of the written materials provided by the parties. The *Respondent* suggested that viva voce evidence may be presented.
- On November 25, 2021, verbal arguments were made by the parties pertaining to the requested Motion by the *Applicant*.

Production commenced between the *Respondent* and *Applicant* on April 12, 2021, with the production of Delegations, the Notice of Hearing, the Statements of Particulars and the Investigative Report. On April 23, 2021, fifty six (56) files were produced to the *Applicant*. On May 10, 2021, a CD was produced to the *Applicant* which contained all incoming calls to dispatch on July 7, 2020. The *Applicant* outlines the back and forth of email communication and phone calls in which the parties engaged over the next five (5) months. These are captured and referenced in the factum, pages 4-18, and in the affidavit of Susan Board. The *Respondent* has done the same, as outlined in the affidavit of Anne Gillis, volume 1 B tabs 1-28.

I find it clear what was asked for by the *Applicant* and what was produced by the *Respondent* after analyzing the emails and reading the reference materials and considering the verbal arguments of Counsel. The voluminous materials provided by both parties, once studied, became easy to follow and understand. I laud both parties on providing well thought arguments on this Motion.

I considered the *PSA* and *SPPA* requirements of production as outlined in:

> *"PSA Section 83 (5) Before the hearing, the police officer and the complainant, if any, shall each be given an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence, 2007,c.5,s. 10."*
>
> *"SPPA Section 8 Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto."*

I reduced the complexity of the arguments to a more contextual understanding. While I do not wish to offend the parties, it's for the ease of understanding my decision that I reduce the material to the following series of questions. I note that the analysis in response to the questions is overlapping as they are intertwined at their core and not entirely independent.

> The first question to contemplate is did the *Respondent* fail to provide full production of all recordings of incoming calls to the *SERVICE* on July 7, 2020?

I find that the *Respondent* did in fact provide all recordings of incoming calls to the *Applicant* involving phone calls into *CERB*, recorded calls into desk phone (ext. 210) and internal pages on July 7, 2020. These incoming call recordings were produced to the *Applicant* on a CD on May 10, 2021. The *Applicant* acknowledged reception in a letter dated June 23, 2021.

I acknowledge that the parties differ in their opinion of what recordings were requested. On this I find it difficult to side with the *Applicant* as it was very clear in my mind what was asked for by the *Applicant* (*incoming calls to the SERVICE on July 7, 2020)*. If I consider my 37 years of police experience I find that the essential factor of the misconduct quite reasonably involved an anonymous incoming phone call to the *SERVICE*.

I cannot confirm in reviewing the email correspondence between the parties that anything was asked for other than incoming calls until the October 18, 2021, email exchange, when radio transmissions were specifically requested by the *Applicant*. In my mind, a request for incoming calls only makes sense given the understanding that I have about the allegations. The *Respondent's* numerous emails clearly outline that the production provided involved incoming phone calls to *CERB*, the duty desk and internal pages. I'm not able to reach the same conclusion that the *Applicant* has that those requests prior to October

18, 2021, included radio transmissions. In my mind, radio transmissions are not incoming calls. The possibility that these radio transmissions would be of any value to either party is below any reasonably possible consideration at this juncture, when viewed objectively with what recordings were considered in the investigation and produced to the *Applicant*.

The *Respondent* has suggested that he responded to the particularized requests and at no time prior to October 18, 2021 had the *Applicant* asked for radio transmissions. It is not the Prosecution's job to read into what the *Applicant* wants. The Commission has outlined this understanding in a Commission Motion[2].

> "The commission is only obligated to disclose evidence available to it. The Commission is not obligated to provide: analysis, theory of their case, legal arguments, strategy or any legal research. Each party has counsel, and it is the work of counsel to do this research for their client."
>
> "The Duty imposed on the Crown in criminal cases as per McNeil, *supra*, is not the same in proceedings before the Commission. Specifically, Commission counsel are not required to do further research as requested by defence counsel, nor are they required to make inquiries of other agencies or government department."

It is apparent when I review, not only what was requested by the *Applicant,* but also what was produced by the *Respondent,* that the materials involved incoming calls to the station and not radio transmissions.

> The next question to contemplate is did the *Respondent* fail to provide timely production to the *Applicant*?

I find that the *Respondent* has been receptive and responsive to the many requests made by the *Applicant* for materials and explanations. The timelines established in no way informs me that this irregularity, as stated, is indicative of undue delay and falls well short of a clear case that could warrant a stay. I agree with the *Applicant* that some answers and production were provided just prior to a scheduled Hearing date of October 25, 2021, however, these were the direct result of inquiries by the *Applicant*. When I compare the timelines in this case with the prior cases outlined by the parties as instructional to the question of unreasonable timelines, I find that there is not a case for a finding here

[2] Ontario Civilian Police Commission, 2015, motion, Chief John Gauthier, para, 35, 36.

of undue delay. This case has progressed appropriately and in no way can be compared to the prior cases outlined for the Tribunal by the *Applicant* in their assertion that undue delay in *JOHNSON* reaches an abuse of process and the requisite of a stay. I find that that the case here does not reach anywhere near the timelines associated in those cases, as outlined by the *Applicant*, where a breach was found, and a stay announced.

The production commenced on April 12, 2021 and continued until October 18 - 19, 2021. There were summer vacations involved in this timeline, as well as a ransomware attack that was impactful. I find that, in considering my experience in these matters, this timeline of five (5) months is not unusual or unexpected in a fully contested Hearing in which a dismissal is a consideration. In my experience, this matter has been moving forward with expediency that I have seldom experienced in other similar cases. There was a considerable amount of data that had to be downloaded and then reviewed prior to the production. The *Applicant* had requested adjournments to review materials and this impacted the process, as expected (excerpts from my conference call notes):

> May 25, 2021 – production was received but more time requested to review by the Officer.
>
> June 21, 2021 – Prosecution is ready, but Defence needed to get instructions from the Officer and review audio files.
>
> July 13, 2021- Dates were scheduled and a few follow-ups on production required.
>
> Oct 4, 2021 – Check in date prior to the start of the Hearing proper, additional dates added.
>
> Oct 21, 2021 – Motion request outlined by the Officer.

I find that the *Respondent* was responsive and find that the production was what was asked for up until the request for radio transmissions on October 18, 2021.

The *Applicant* had not advised the Tribunal that there were any specific concerns about production until an October 21, 2021, conference call. The Parties had acknowledged a few weeks prior that they were ready to go to Hearing, during an October 4, 2021, conference call.

A simple delay does not warrant a stay unless the delay informs a prejudice and that prejudice reaches the high level of community unfairness to outweigh the need to hold the Officer accountable for his

actions. I do not see the delays and piecemeal production explained by the *Applicant* as indicative of an abuse of process.

> The next question to contemplate is did the *Respondent* abdicate their responsibility to conduct a full investigation and review of the evidence?

I find that the *Respondent* did consider the relevant evidence and did review the evidence available. I understand that it's alleged by the *Applicant* that the *SERVICE* investigator did not review the Commlogs data from the recordings of incoming calls to the *SERVICE* on July 7, 2020, but this issue was put to rest with the acknowledgement that this was done by three individuals on more than one occasion (Sandra MacKinnon, Staff Sergeant Bolduc and Sergeant Miron). The *Applicant* can also review the data and see for themselves if the anonymous call in question is evident in the recordings. I find that the *Respondent* and *SERVICE* have collected and reviewed the data from the incoming calls to the *SERVICE* that are integral to the misconducts in this case.

The *Applicant* was concerned that the seven-digit Commlog numbers for the alleged missing calls indicated that recorded incoming calls were missing. The *Respondent* has addressed this issue of missing recordings as it was explained that these numbers in question are associated to radio transmissions and not incoming calls. The Commlog system assigns a sequential number to all incoming calls, pages, and radio transmission recordings using the same sequence of numbers. The affidavit of Ms. MacKinnon highlights the Komutel Commlogs can be searched by type, date, and time. Radio transmissions are a different type than incoming phone calls and paging. The search requested by the *SERVICE* investigator was for the latter and not radio transmissions. When the recordings of incoming calls were reviewed by the *Applicant* without this understanding it became obvious that there were gaps and sequentially numbered recordings were not contained in the production. I can understand the *Applicant's* concern for missing recordings as the sequential numbers of both radio transmissions and incoming calls are inclusive. I find that this question has been sufficiently answered by the *Respondent* and there are no missing recordings of "incoming calls".

> The last question to contemplate is specific to the radio transmissions and lack of collecting these recordings before a ransomware attack that has rendered these recordings lost. Has this loss prevented potentially decisive evidence from being made available to the *Applicant*?

I find that this issue of the missing radio transmission recordings is premature and should not inform an abuse of process Motion at this time. I have little evidence before me that would inform me that this investigative step of the collection and review of these radio transmissions was required in the first place. The need to collect radio transmission data for this investigation has not been shown as fundamental to the investigation when we have the requisite phone call recordings. I can't uncover the evidentiary need for these transmissions to be required when the allegation and supporting information all indicate a phone call as the essential factor in the misconduct. The *Applicant* himself supports this:

> "Uh, so basically received a phone call of an anonymous complaint over the phone."
>
> "I got a phone call, anonymous complaint."[3]
>
> "I got this traffic complaint on the desk on night shift".[4]
>
> "The caller did not wish to provide their name, information or a call back number for me to label as the complainant."[5]

Nor has any reasonable proof been established that a call being answered at the "duty desk" could be overheard and recorded in the *CERB* room by the system that records radio transmissions. When I consider the diagram of the *SERVICE's* lobby and *CERB* room in the *Respondent's* Motion record volume 1 at tab six (6), it's clear the contention that the reception of any conversation occurring at the duty desk phone could possibly be recorded is not a credible assertion given the superficial argument put forth by the *Applicant*.

The *Applicant* argues it is "possible" that the radio transmission recording system could record a phone call conversation occurring at the duty desk. I find that there is no precision in this argument, and, even when I consider the suggestion as "reasonably possible", it's just too imprecise to be of probative value given the circumstance we have in this matter. The phone that is assigned to *JOHNSON* is at the duty desk, ext. 210. This phone is recorded, and those recordings were reviewed and produced. *JOHNSON* himself has indicated repeatedly that he received a phone call. Why is there a need by the investigator to look further to the radio transmission recording in hopes that these recordings could have picked up this anonymous caller conversation with *JOHNSON* when the phone recording did not?

[3] Compelled interview – Johnson, January 6, 2021, pg., 3 and 17.
[4] Email Johnson to Hohmeyer, July, 7, 2020.
[5] Duty report of Johnson, pg.,1.

JOHNSON's own notes, duty report, and compelled interview all speak to an incoming phone call at the duty desk. When confronted during his compelled interview with the fact that ext. 210 recordings did not indicate that an anonymous call was received by *JOHNSON,* it was then suggested by the *Applicant* that he may have been paged while in the lunchroom by dispatch and took the call there. The paging system was also recorded, reviewed and produced to the *Applicant*.

The *Applicant* has argued that without these recordings the *Applicant* can't make full answer in defence. The support provided for this argument that it's possible that the radio transmission recording could have picked up and recorded the anonymous caller at the duty desk is shallow and, quite frankly, without sufficient substance currently that this argument could inform me to find in favour of an abuse of process to the high degree required to warrant a stay. The Tribunal was directed to a pair of affidavits in the *Applicant'*s Motion Record, tab three (3) and tab four (4), the affidavits of the *SERVICE*'s Association President Teresinski and Vice President Barber, at paragraph fourteen (14). These paragraphs both make the same statement:

> *"I can confirm that dispatch radio calls that are recorded may pick up background calls being answered by the Duty Desk Officer, and/or Dispatch".*

I find in the absence of additional information to understand how this claim can be made by these two Association members that it is impossible for me to give much reliability to these statements. I concur with the *Respondent`s* comments on this issue that I would need to hear evidence from these witnesses at the Hearing proper in order that I could put the testimony into context with the case as a whole. To agree to a request that I stay a case at a preliminary junction, supported by this claim, would be simply improper.

I may have been swayed to consider the request of the *Applicant* for the production and review of the radio transmissions for July 7, 2020, in consideration of an overabundance of caution for fairness, but as they are no longer available, I cannot. I understand the *Applicant'*s position that now that this data is lost *we cannot know whether it helps proves the Respondent's case, or whether it does not*. What I'm left to ponder is how this prejudices the *Applicant* when the nexus to the misconduct has not been demonstrated. I cannot see how it's reasonably possible that the radio transmission recordings are relevant when the other recordings are available.

I find that the *SERVICE* was not neglectful in their investigation based on the materials presented at this Motion. I see no need for the collection and review of the radio transmission when the recordings of the incoming phone calls to *CERB*, duty desk phone and pages were secured.

I acknowledge that the loss of the radio transmission data was a result of a third-party ransomware attack on the *SERVICE,* as explained by the *Respondent*. There is no fault identified in this. The *Applicant* did not ask for these recordings until after the attack had rendered the data lost. It is clear to me that the *Applicant* asked for incoming calls/phone calls in their correspondence with the *Respondent*. I find at no time, until October 18, 2021, did the *Applicant* request the production of radio transmissions. I was aided in reviewing the *Ontario Court of Appeal* decision in *Regina v. Sheng*, 2010, ONCA 296, at paragraphs, 32, 44, 59, 63, and 72.

I have reviewed the entirety of the back-and-forth emails provided by the parties and it is clear that what was produced were recordings of incoming calls, phone calls, and paging recordings. The duty report of *JOHNSON* and his compelled interview clearly state that a phone call was received. For all intent and purposes, I can clearly see that the misconduct purportedly involved an incoming anonymous phone call. I find, at this point, that the investigational steps outlined by the *Respondent* are reasonable.

I'm left to question, if the Commlog recordings of all incoming calls to *CERB,* paging, and all calls to extension 210 were recorded and produced with no anonymous caller being identified in the recordings, why would the radio transmission Commlogs capture this anonymous call? It makes no sense to me at this point, and with the materials presented, that this is a plausible concern for procedural fairness to the *Applicant*.

If the *Applicant* wishes to present witnesses and evidence to aid in the position argued, I suggest that the Hearing proper is the place to do this when I can weigh the reliability, relevance, and, if needed, the credibility of such evidence against the case for the Prosecution.

The *Applicant* outlined *Durham Regional Police Association and Durham Regional Police Service, 2014 ONCP 1161 at par., 6,* which outlined the test of production documents. This is found in paragraph 199 of the *Applicant's* factum. Additionally in *Krull and OPP, 2021, OCPC* this four (4) part test is announced.

1. The information being requested must be "arguably relevant".
2. The information must be particularized so it is clear what is being requested.

3. The Panel must be satisfied that the information is not being requested as a "fishing expedition".
4. There must be a clear nexus between the information being requested and the issues in dispute at the hearing.

I found this helpful in my decision as it clearly articulates what the factors are for consideration related to production. I'm at a loss to establish that this material of the radio transmissions is arguably relevant when I consider the full production of the recorded phone data from the duty desk phone, the incoming calls to *CERB*, and the paging system. The *Applicant* suggests that it is clear that this data would be arguably relevant. I disagree and cannot support this proposition based on the contents of the Motion. The *Respondent* suggested this data request was speculative at best, and I'm inclined to agree.

I agree with the *Respondent* when it was pointed out that any request for information (production) made by the *Applicant* should be particularized so it is known what is being asked for. When considering the *Durham & Krull* case, it's clear that a particularized request is part of the test so outlined. I reviewed the email exchanges and it is not clear that the radio transmissions were being requested. Rather, I find what was clear is that incoming calls to the *SERVICE* were being asked for. It is not the responsibility of the *Respondent* to read between the lines and/or interpret that the *Applicant* wanted radio transmissions.

The *Respondent* argued that the request for radio transmissions was akin to a "fishing expedition". I cannot reasonably agree with the *Respondent's* position as minimal information has been provided to the Tribunal to establish sufficient evidence of "fishing" in the Motion reply. However, I do not see the significance of these radio transmissions such that I could consider them relevant given what has been argued. It is clear what the *Respondent* has produced and it did not include radio transmissions, nor was there any question that the production was anything but incoming phone calls to *CERB*, the duty desk, and pages. The *Respondent* was quite clear in his communication.

In support for the above, the Commission wrote in *Cardi and Peel Regional Police*:[6]

[6] Cardi and Peel Regional Police, 2013, OCPC 13-10, par., 81, 82.

"The Commission has previously held that rules governing Criminal Code offences do not apply to hearings under the Act which are administrative disciplinary hearings concerning conduct in the workplace as between employer and employee: see Turbucz, supra".

"A party to an administrative hearing such as the one decided by the Hearing Officer is not entitled to use a request for disclosure to rummage around the files of the adverse party to see if a case can be made. Such a party must be able to articulate why the requested material is relevant and is not entitled to base a disclosure application or argument on suspicion or speculation alone: see AFG Industries Ltd., supra."

In order for me to find that there is a nexus between the information being sought and the allegations made against the *Applicant*, I would need to have much more fulsome evidence to connect the radio transmissions recordings to the misconduct(s). As I have alluded to prior, my suggestion is that I would need to hear the evidence at the Hearing proper to establish any such connection in the context of all the evidence.

In considering the *Applicant*'s own argument and the supporting case of *Durham Regional Police Association and Durham Regional Police Senior Officers Association and Durham Regional Police Services Board,* outlined on page 36, paragraphs 199-201 of the factum, I cannot agree with the hypothesis as outlined in the Motion.

I turn my mind to the other cases that were identified by the parties.

The case of *Forestall and Toronto Police Service,* a decision on stay by Hearings Officer De Caire, was outlined by the *Applicant*. I find that the stay in this case surrounded an abuse of process for the length of the hearing of 22 months. A minor issue in the case surrounded the loss of evidence and, as explained, the Prosecutor did not address the lost evidence issue, nor was there any explanation why the evidence was lost. The Hearings Officer reasoned that it would be reasonable for the investigators to have secured the evidence and then concluded at page 27 line 16, "this evidence would have likely confirmed or denied that the very offence that is alleged took place".

This case is different than *JOHNSON* as the Prosecutor here has addressed the loss and explained satisfactorily the reason. I have not been swayed by the *Applicant's* argument that the evidence in question (radio transmissions) is of any relevance to the allegations, nor should the recordings have been secured prior to the ransomware attack.

The case of *Crane and Peel Regional Police Service* was outlined by the *Applicant* as a case entirely relevant to this proceeding (page 38 paragraph 213, book of authorities 1 tab 13). I agree, to a point, that the *Crane* case does examine the law as it relates to authorizing a stay. What I disagree with, however, is that the case here in *JOHNSON* contains the same facts that led to the stay in *Crane*. This case was stayed as a result of a conclusion that the *OIPRD* did not have "reasonable ground" to order the Chief of Police to hold a Hearing. This is not the case here.

The case of *Nassar and Vogelzang v. OPP* was outlined by the *Applicant* as a case in which a stay was ordered and the aggrieving facts were far less than in *JOHNSON*. I find that the written arguments pertaining to the law and ability for a Tribunal to announce a stay were well explained by the Hearings Officer. I find that this case was decided not on any delay caused to the actual hearing process but on the manner in which the case was processed by the *OIPRD*. This was a case that over a four (4) year period bounced around within the *OIPRD,* first not screening it in 2012, to again screening it out in 2014, to 2016 when it was screened in and investigated by the *OPP,* who unsubstantiated the majority of the complaint. The public complainant appealed and the *OIPRD* took over the case. On November 29, 2018, the *OIPRD* provided a notice and directed a Hearing take place on issues of note taking and failing to follow policy - not normally misconducts adjudicated at a *PSA* hearing. The case here in *JOHNSON* is substantially different and has none of the process at issue announced by Hearings Officer Taylor. Additionally, there was no prejudice identified in *JOHNSON* that amounted to a clear case in support of a stay.

The case of *Horton and OPP* was outlined by the *Applicant.* I find that this case took four years (4) and was facing a potential third Hearing when the Motion was heard. The misconduct was minor in nature and not at the level of misconduct as we have here in *JOHNSON*. I feel the below passage is important to highlight (accent added);

> *"I take the view that there is no compelling societal interest in having a final decision on the merits because of the gravity of the misconduct alleged here. Were PC Horton facing charges of an egregious nature, then a different finding may be appropriate..."*[7]

In *Yerxa v. Canada* it is suggested that natural justice be met by production within a reasonable time before the Hearing of evidence so as the Officer is not surprised. Clearly here, with the delay resulting

[7] Abuse of process motion, Horton v. OPP, Superintendent Perkins, 2016, pg., 50. Tab 26 book of authorities III.

from the Motion, along with a finding on the merits of the Motion, I have no concerns for the *JOHNSON* Hearing going forward. The next Hearing dates are scheduled for January 24-26, 2022. There is enough time for the *Applicant* to be prepared and to know the case to be met. It may be appropriate to state that in *JOHNSON* five (5) months had elapsed and there was a back and forth of information and requests for information by the parties during this time. All of this is expected, and I can say from my experience that for a potentially fully contested dismissal Hearing a time frame of five (5) months from Notice to Hearing may have been a bit aggressive and, in my mind, a contributing reason for the parties finding themselves at this Motion. There were unresolved matters to contend with prior to the commencement of the Hearing proper, again not unexpected, and it's reasonable that the parties iron out these issues. My hope is that this has been done and we can now hear what the *Respondent* relies on that will prove the allegations on clear and convincing evidence and what in reply the *Applicant* wishes to say in defence.

What this Motion has done is solidify those areas wherein the *Applicant* had a need for answers to questions as outlined previously in this document and/or positions on other requests. They have now been provided. The Hearing proper can proceed forward in consideration of procedural fairness and natural justice.

In the case of *Cieslik and Toronto Police Service*, a Motion ruling by the Hearings Officer Federico, a stay was ordered. I find that this case is considerably different than *JOHNSON*. In *Cieslik* the aggravating issues surrounded the orders for production from the Hearings Officer remained unfulfilled and caused an unreasonable and unnecessary delay. Discussions/evidence were reviewed between the Investigators and the Crown Attorney in a related criminal matter not involving *Cieslik* before these materials were released to the Prosecutor. The Hearings Officer felt this was not the role of the Crown and/or Investigators but that of the Prosecutor to decide production for a *PSA* matter. The length of four (4) years and 26 appearances all played a part in the decision to stay. I find that none of the issues outlined in this case can be applied to *JOHNSON*.

I find that both parties have described the case of *Blencoe* as the seminal case in addressing an abuse of process. This *Supreme Court of Canada* decision was helpful in establishing the factors that may lead to an abuse of process.

> *"In order to find an abuse of process, the court must establish that, "the damage to the public interest in the fairness of the administrative process should the proceedings go ahead would*

exceed the harm to the public interest in the enforcement of legislation if the proceedings were halted".

"The clearest of cases."

"Administrative law abuse of process doctrine is fundamentally about the treatment by administrative agencies…when we ask whether there has been an administrative law abuse of process, we ask the fundamental question: has an administrative agency treated people inordinately badly?"

"I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised..."

"Cases of this Nature are extremely rare."[8]

In the case of *Williams and Ontario Provincial Police*, the Commission wrote, as outlined by the *Respondent*:

"*Disciplinary hearings under the Police Services Act are administrative proceedings directed at employment concerns. They are not criminal prosecutions. Unlike a Crown Attorney under such matters Inspector Christopherson does not speak for the Crown. Rather his role is that of an employer representative for the Ontario Provincial Police. Accordingly, none of the obligations which would attach, for example to a Crown Attorney addressing a criminal jury, would apply".*

The *Respondent* cited other cases that support *Williams*: *Burnham and Metro Toronto Police Chief, 1987 Can II 42 (SCC); Godfrey and Ontario Police Commission, 1991 CanLII 7115 (ON SC);* and, *Armstrong and Peel, 2003 CanLII 37924 (ON SCDC)*.

I agree that a Prosecutor in a *PSA* matter is not a Crown Attorney as outlined by the *Respondent*.

Further, the *Respondent* properly identified that the Public Complainant in this matter is entitled to fairness and must be a consideration in any decision on procedural fairness as outlined in *Timms-Fryer and Amherstburg Police Service*. The *PSA* section 83 (3) provides for full rights as a party to a public complainant.

[8] Blencoe v. British Columbia (Human Rights Commission), 2000, SCC 44, 2SCR 307,para 120, 144, 307.

"The parties to the hearing are the Prosecutor, the police officer who is the subject of the hearing and, if the complaint was made by a member of the public, the complainant".

This is an important factor for me to consider, supported by the case of *Figueriras and York Regional Police, 213 ONSC 7419.* The *JOHNSON* case is an *OIPRD* complaint and, as such, the Public Complainant is a party to the proceedings.

When I consider the cases of *Sutton and City of Calgary Police Force* and *Vogelzang and Calgary Police*, it becomes apparent that even with an irregularity found, those irregularities may not invalidate a proceeding nor give rise to a breach of Natural Justice. The equation that informs a breach such that a stay is warranted is a much more complicated calculation and the burden of proof belongs to the *Applicant*.

The proof must indicate that the Officer has suffered an actual prejudice to a level that the public's sense of decency and fairness is affected. The *Groat* case is indicative of this understanding as the Commission states:

> "It has been established that in "the clearest of Cases" this can include a stay of proceedings."
>
> "To exercise such exceptional authority, a tribunal must be satisfied that the conduct in question is so wrong that it would violate the conscience of the community, fundamental justice and fair play; prejudices an accused officer or the integrity of justice and no other remedy is reasonably capable of removing the prejudice. The onus is on the subject officer."[9]

I find no such concerns in the case of *JOHNSON* that this case reaches "the clearest of cases" threshold for the reasons already stated previously in this document.

I found the *Ontario Court of Appeal* decision in a criminal case helpful in understanding when it's appropriate to stay a proceeding on the grounds of lost evidence. It was apparent in reading this case that the court felt that a Motion about lost evidence occurring before trial was incorrect and that a Motion of this nature should be reserved until after evidence could be properly heard and evaluated to support the Motion or not.

[9] Groat and Quinte West Police Service, November 26, 2001 (OCCPC).

> "The Trial judge should not have ruled on the motion at the outset of the trial. This Court has repeatedly indicated that except where the appropriateness of a stay is manifested at the outset of proceedings, a trial judge should reserve on motions such as the motion brought in this case until after the evidence has been heard. The trial judge can more effectively assess issues such as the degree of prejudice caused to an accused by the destruction of evidence at the end of the trial…"[10]

At this time, I cannot find an air of reality to the assertion that the *Applicant* is unable to make full answer in defence because of the lost radio transmissions. I have already indicated that I do not see how the radio transmissions would in fact be of assistance to the *Applicant*. The ***Natkunarajah*** case expressed that in ***Brantford***;

> "The fact a piece of evidence is missing that might or might not affect the defence will not be sufficient to establish that irreparable harm has occurred to the right to make full answer in defence…"[11]

It is apparent in reviewing the materials provided by the parties, and specifically a review of the ***Blencoe*** case, that an abuse of process must identify a prejudice suffered and that prejudice must meet a lofty height of clearest of cases. A balancing of the competing interests is another component to an abuse of process. I note that this misconduct Hearing does involve a Public Complainant who has an interest in the outcome. The balance between the community's sense of fair play and the need to enforce legislation is a complex one, and, in cases in which there is a public complainant and not singularly predicated on the issue of discipline within the Police Service, it is an important aspect to consider. The *Applicant* has not shown that *JOHNSON* has been prejudiced and that prejudice reaches the heights that the community sense of fair play would supersede the need to hold an Officer accountable.

The *PSA* serves a clear purpose:

> *"The legislation serves a clear public purpose: it is to shield the public against wrongful acts by members of the police force, and to provide a process by which allegations of wrongdoing may be resolved without the enormous trouble and expense of a trial in the law courts"[12].*

[10] R v. Bero, 2000,137, O.A.C. 336, par., 18.
[11] R v. Nalkunarajah, 2020 ONCJ 247 CanLII at par., 41.
[12] Ramsay v. Toronto Commissioners of Police, 1988, Ontario High Court of Justice 66 O.R. (2d) 99.

In reviewing the plethora of cases provided by both parties, I have gained good insight into the jurisprudence surrounding an abuse of process in relation to production, lost evidence, and stay. I find that I agree with the *Respondent* that the case here in *JOHNSON* is not a case for a finding of abuse of process to warrant a stay. The cases cited that support a finding of a stay are not similar to what we have here, and what we have here does not speak to a finding of an abuse of process, let alone reach the plateau required in order for me to stay the proceedings.

The Motion has been explained and has rectified some of the issues identified by the *Applicant*. This Motion has flushed out the missing calls, reviewed data, and gaps pertaining to the production concerns, with only the radio transmission data remaining unresolved. The loss of this data has been explained and I have indicated my position on this information at this point in the process. Should the *Applicant* wish to bring viva voce or documentary evidence before the Tribunal proper when that evidence can be adduced with the case as a whole, I would consider that argument at that time.

Conclusion

I find that the production meets the standard required of the *Respondent*. No unfairness is evident to *JOHNSON* at this preliminary point. There has been no prejudice uncovered by the *Applicant*. No abuse of process is found, therefore no remedy is necessary particular to the factual grounds identified by the *Applicant* pertaining to;

1. The *Respondent*, in failing to provide full disclosure of all recordings of incoming calls to the police station on July 7, 2020, has caused irreparable harm to the *Applicant's* ability to make full answer in defence, as that evidence has now been destroyed and/or is unavailable, and cannot be produced.
2. The *Respondent* has consistently failed to provide disclosure in a timely fashion, as requested, by the *Applicant* on several occasions; in some instances, failing to provide the information requested, and in other instances, providing disclosure days before the Hearing was scheduled to commence.
3. The *Respondent* has abdicated its duty to conduct a full and fair investigation, by failing to request, collect, and subsequently review relevant evidence, prior to serving the *Applicant* with Notice of Hearing, for which it seeks dismissal, and recommending criminal charges be laid against the *Applicant*.

What is left for me to consider at an appropriate time in the Hearing proper is whether the *Respondent* failed to produce evidence that is relevant, as it bears upon decisive, or at the very least, potentially decisive, issues in the Hearing as outlined by the *Applicant*. This has to do with the radio transmission data not collected and now lost because of a ransomware attack on the records of the *SERVICE*.

What I found helpful was to review section 8 SPPA, *PSA* section 83 (5), prior cases, and any findings by the appellant body provided by the Parties. They have all informed me what the requirements are of a fair Hearing.

> *"Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto*[13]*.*

I find that continuing with this misconduct Hearing will not violate the good conscience of the community, nor will it negatively impact the fundamentals of natural justice and procedural fairness. I would be suggesting that it was impossible to proceed with this case, if I were to find the case for a stay and clearly it is not.

The integrity of this proceeding is intact. Any unfairness perceived by the *Applicant* because of the lost radio transmission recordings has not, at this point in the proceedings, been demonstrated as indicative of a prejudice that reaches the clearest of cases test.

These misconducts have been properly placed before this Tribunal and *JOHNSON* has been provided with the information pertaining to the alleged misconduct such that he can make full answer in Defence.

It is time to hear the case for the *SERVICE* and hear what the *Applicant* wishes to say in reply.

[13] Statutory Powers Procedure Act, [RSO 1990] s. 22 as amended, section 8.

Part IV - DECISION

For the reasons cited above, this abuse of process Motion requesting a stay of proceedings at this preliminary junction and in the alternative the withdrawal of counts 1, 6, 7, 8, 9, 10 is denied. I reserve judgment on the merits of the "lost radio transmissions" for the Hearing proper.

Robert Gould *January 3, 2022*

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Superintendent (Ret) Robert Gould, Adjudicator Date