

FINAL REPORT: IIU concludes investigation into Criminal Code allegations against Brandon police

On July 5, 2017, the Independent Investigation Unit of Manitoba (IIU) was notified by the Brandon Police Service (BPS) of a complaint by an individual (Affected Person – AP) that intimate images of her had been distributed without her consent, and that a BPS officer had received and viewed, these images. AP complained that the BPS did not notify her that intimate images were distributed by a member of the public without AP’s consent, and that these images were used to disqualify her from a job with the BPS. AP further alleged that the BPS officer destroyed the images despite knowing she was in the process of making a formal complaint to BPS.

As this notification involved allegations of a breach of a prescribed offence under IIU Regulation 99/2015, specifically obstruction of justice (section 139, *Criminal Code (Canada)*) (specifically the destruction of the images), IIU assumed responsibility for this investigation in accordance with section 66(4) of the *Police Services Act (PSA)*.

The IIU civilian director designated the BPS member who received, viewed and destroyed the images as the subject officer (SO). An additional eight members of BPS were designated as witness officers (WO1 - 8) and were interviewed. In addition to AP, IIU investigators identified and interviewed three civilian witnesses (CW1 - 3). CW4, the individual who allegedly possessed and originally distributed the intimate images, did not, despite all attempts and requests by IIU investigators, attend or participate in any interviews.

As outlined under the PSA, a subject officer cannot be compelled to provide his notes to IIU investigators or to attend an interview with them. In this matter, SO provided IIU investigators with a copy of his notes and met with IIU investigators to answer their questions at an interview.

IIU investigators also received and reviewed:

- a file package from BPS containing notes, narratives and reports;
- a copy of notes, reports and complaint by AP to the Law Enforcement Review Agency (LERA);
- SO’s notes.

The following facts and circumstances have been ascertained:

In 2016, AP had applied for a police officer position for the BPS and, by early 2017, was in the final stages of the application process.

On February 21, 2017, CW4, an ex-employee with the BPS administration department, wanted to provide information to a BPS recruitment committee, as she had photo images of AP that she believed would be relevant to assessing AP's suitability as a police officer.

On February 22, SO met with CW4 at her residence. According to SO, CW4 transferred approximately 20 images from her computer directly onto a BPS USB thumb drive. (In fact, there were 26 images transferred from CW4 to the thumb drive.) SO reviewed the images on the thumb drive and determined some images depicted AP in various stages of undress.

On February 24, SO, a member of the BPS executive committee (the Executive), met with co-members WO1 and WO2, to discuss these images and their potential impact. It was agreed that SO should be the sole person to view and maintain control over the images to prevent all unnecessary access and protect AP's privacy.

On March 13, SO had a conversation with fellow police recruitment committee members (WO3, a senior member of BPS, and CW1, a City of Brandon human resources representative) regarding the images and impact on AP's application. It was agreed that a review of information from and concerning AP would be undertaken. It was further agreed that hiring advice would be sought from an outside professional advisor.

On March 29, during a follow-up interview with WO3, of the police recruitment committee, AP advised that, in the summer of 2015, she had sent intimate images to another BPS officer, WO4, who was in a relationship with CW4. WO3 advised AP that BPS had received and viewed those images. WO3 explained that due to further background checks and the consideration of additional information obtained, AP was no longer being considered for employment.

AP expressed concern as to whether CW4 had committed a criminal offence by possessing and distributing the intimate images of AP without consent. When offered an opportunity to make a formal complaint into this matter, AP asked for more time to think about it.

On the morning of April 21, WO5, a BPS supervisor, met with SO to relate concerns brought up by AP and WO6 (who was then in a relationship with AP) that CW4 may be distributing the intimate images in the community. SO met with WO7, another BPS supervisor, to ensure someone from BPS contacted AP to follow up on her concerns. WO7 arranged for WO8 to contact AP and interview her if required.

The Executive met to discuss retention and subsequent destruction of the images. The Executive unanimous agreed that all of these images possessed by BPS be destroyed. Both SO and WO2 were tasked with destroying the images. Members of the Executive did not believe that CW4 had committed an offence when she provided the images to BPS and, further, neither BPS nor its officers committed an offence when they received the images. The Executive concluded that BPS received the images as part of the police constable hiring process. AP was removed from the competition and they did not want any of the images viewed by anyone thereafter. Also, there was no requirement to retain the images. The Executive also considered AP's concern that BPS had images of her, that they affected their hiring decision, and that they may possibly be viewed by other persons.

On April 25, WO7 telephoned AP to discuss the status of her complaint. During this conversation, AP advised that she wanted to move forward with her complaint. AP was advised that WO8 would be the assigned investigator.

On April 26, SO made detailed notes about the images and then destroyed the USB thumb drive with a hammer. The broken pieces were discarded in separate garbage cans within BPS offices. SO also permanently deleted the images and all e-mails containing the images from his computer. SO was the only BPS member who had viewed these images and he had maintained possession of the USB drive at all times.

On April 28, AP attended BPS and participated in a video recorded interview with WO8.

On May 1, the Executive decided it would be best if another police agency investigate AP's complaint due to sensitivity and complexities of the investigation, including the involvement of active BPS officers and an ex-employee. SO updated WO1 on the investigation and agreed to enquire about the availability of an outside police agency to investigate AP's complaint.

AP wished to discuss her removal from the police constable job application process and on May 5, met with WO3 and CW1. They discussed the reasons for removing AP from the application process. WO3 advised AP that only SO had viewed the images and that BPS had destroyed the images as they were considered part of a hiring process and no longer relevant.

On May 17, WO2 spoke with CW2, an information technologist (IT) who agreed to search the BPS computer system to attempt to recover any e-mails and intimate images sent to SO by CW4. Later that day, CW2 advised WO2 that a search had recovered 12 e-mails sent by CW4 to SO from an e-mail address outside of BPS computer system and it appeared images were attached to the e-mails. The e-mails were saved on a USB thumb drive and encrypted.

On June 14, WO8 met with a member of RCMP and was advised that RCMP would assume the investigation into AP's complaint and required the investigative file.

On June 15, the encrypted thumb drive containing the recovered e-mails and images was provided to the RCMP. However, there were issues accessing the data on the encrypted thumb drive. CW3, another IT member of BPS, retrieved that same data and copied it to a new encrypted thumb drive.

AP was contacted by the RCMP investigator who advised that the RCMP had taken over the investigation of her complaint. AP was also advised that emails with the images had been recovered from the BPS computer system and she was requested to meet with the investigator to review them. Up until that time, AP believed the images had been destroyed.

On June 22, AP met with the RCMP investigator, was interviewed and reviewed the images.

On June 30, in response to an application by AP pursuant to *The Freedom of Information and Protection of Privacy Act* (FIPPA), the Executive requested another encrypted USB thumb drive

be prepared containing the recovered e-mails and images. SO received this newest encrypted thumb drive and confirmed they were accurate and complete.

As of January 26, 2018, the RCMP investigation into AP's complaint against CW4 for possession and distribution of intimate images was still ongoing. This is separate and distinct from the IIU investigation, which concerned itself only with the conduct of BPS officers—not CW4.

Following a review of this full and complete investigation by the IIU, I am satisfied that SO believed the images were relevant to determining the suitability of an applicant as a BPS police officer. I am satisfied that SO's receipt, viewings and maintenance of the images fell within the exceptions outlined in both the *Criminal Code (Canada)* and *Intimate Image Protection Act (Manitoba)* in that a non-consensual distribution of intimate images is authorized if "...the conduct that forms the subject matter...serves the public good and does not extend beyond what serves the public good."¹ The hiring process for a police officer, including determining the suitability of such a public servant to be held to very high standards, fits within the definition of "public good." It was the decision of the Executive that SO should secure the images and ensure their integrity during the hiring process.

I am further satisfied there was no attempt by SO to obstruct justice by destroying the first set of images. The Executive were in agreement to destroy the images as they were received solely for consideration in the BPS police officer application process. Once AP's application was removed from this process, the images were no longer relevant. Destruction of otherwise sensitive and private material was a reasonable decision in these circumstances. The images were not received as part of a criminal investigation and accordingly were not treated as evidence of any possible crime. I am satisfied that in acting as he did, nothing was done by SO to obstruct, pervert or defeat the course of justice. The RCMP investigation into AP's complaint respecting CW4's actions and involvement proceeded without issue.

On careful review of the available evidence and material facts obtained in this investigation, together with consideration of the applicable law, I am not satisfied that there are reasonable and probable grounds to believe SO's conduct warrants charges under the Criminal Code or any other federal or provincial statute. Accordingly, no charges will be laid against SO.

At the time of writing this report, I am keenly aware that other proceedings are still ongoing. The RCMP investigation continues into the complaint by AP respecting the conduct of CW4. I am also aware that AP has filed a complaint with the Law Enforcement Review Agency, and that agency's investigation was on hold pending the completion of the IIU investigation. Additionally, there may be labour-related proceedings that may be pursued by AP.

¹ Section 162.1(3), Criminal Code (Canada). A similar but slightly different worded provision is found in section 13 of Manitoba's *Intimate Image Protection Act*. That provision states: *It is a defence to an action for the non-consensual distribution of an intimate image if the distribution of the intimate image is in the public interest and does not extend beyond what is in the public interest.* "Public interest" replaces "public good". There is no difference, in practical terms, between the two phrases.

IIU has completed its investigation and this matter is now closed.

Final report prepared by:

| Zane Tessler, civilian director
Independent Investigation Unit
January 26, 2018

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