



Investigative Report

Complainant:	Dafonte Miller
Complaint Number:	E-201708151603116254
Police Service:	Toronto Police Service
Director:	Stephen Leach
Date Retained:	November 23, 2017
Date Released:	July 30, 2020

Summary of the Complaint

On December 28, 2016, the complainant, Mr. Dafonte Miller, and two friends were walking in a Whitby residential area when they were confronted and then chased by two males, later identified as off-duty Toronto Police Service (TPS) Constable Michael Theriault and his civilian brother, Christian Theriault.

Mr. Miller was pursued by the Theriault brothers to the side of a house between 113 and 115 Erickson Drive where the Theriault brothers assaulted him with their fists and a metal pipe. Durham Regional Police Service (DRPS) responded to the 911 call and attended the scene.

As a result of the assault, Mr. Miller suffered the loss of his left eye, partial vision loss in his right eye, a broken orbital bone, a broken nose, a fractured wrist, bruised ribs, and suffered severe psychological and emotional stress.

In his complaint, Mr. Miller raises numerous allegations against various TPS and DRPS officers. These will be addressed in subsequent separate investigative reports. This investigative report is about Mr. Miller's complaint against TPS Chief Mark Saunders. Specifically, Mr. Miller complains that Chief Saunders failed to notify the Special Investigations Unit (SIU) of the December 28, 2016 incident in order to conceal Constable Theriault's crime and to protect him from prosecution.

On April 27, 2017, Mr. Miller's legal counsel notified SIU of what occurred on December 28, 2016. SIU invoked their mandate on May 2, 2017, and the Theriault brothers were ultimately charged with aggravated assault and obstructing justice.

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The Theriault brothers were tried in the Superior Court Justice before Mr. Justice Joseph DiLuca. On June 26, 2020 Constable Michael Theriault was convicted of assault (a lesser and included offence of aggravated assault), while Christian Theriault was acquitted of all charges.

Code of Conduct Allegations

The allegations of misconduct pursuant to the *Code of Conduct Schedule* of Ontario Regulation 267/10 and 268/10 under the *Police Services Act* include.¹

Allegation 1

Neglect of Duty, s. 2(1)(c) (ii) – fails to comply with any provision of Ontario Regulation 267/10 (Conduct and duties of Police Officers Respecting Investigations by the Special Investigations Unit).

It is alleged that Chief Saunders failed to notify SIU.

Allegation 2

Discreditable Conduct, s. 2(1)(a)(xi) – acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force.

It is alleged that Chief Saunders failed to notify the SIU to protect Constable Michael Theriault from criminal charges.

¹ The complainant submitted that numerous misconducts had been committed by the Chief, including the two identified below. Given the factual investigative findings in this matter, it was not necessary to report on the balance of the misconducts alleged.

Summary of Statements – Witnesses (Civilian & Police)

1. On December 28, 2016, in the early morning hours, Mr. Miller and his two friends came into contact with the Theriault brothers at their family home. What occurred next is documented in great detail in Mr. Justice DiLuca’s reasons for judgment.² For the purposes of this report, it is sufficient to note that as a result of the interaction Mr. Miller suffered, *inter alia*, a horrific injury to his left eye, a broken orbital bone, reduced vision in his right eye and a broken right wrist. It is beyond dispute that all of these injuries met the threshold of “serious injury” as set out in the provisions of the *Police Services Act* respecting SIU notification.
2. Through a series of communications that will be detailed in a separate report, A/Inspector Nash of the DRPS (now retired) called the TPS Operations Centre to advise of Constable Theriault’s “off-duty” arrest of Mr. Miller. This call was received by the TPS duty officer, A/Inspector Keith Smith, who was directed by his supervisor, Superintendent Ferguson, to advise the on-call Chief’s SIU liaison designate.
3. The on-call Chief’s SIU designate the night of December 28, 2016 was Inspector Peter Moreira,³ who reported to the Chief’s SIU designate, Ed Boyd (since retired).
4. Accordingly, A/Inspector Smith contacted Inspector Moreira. Inspector Moreira, in turn, called A/Inspector Nash of the DRPS. Inspector Moreira reported that he learned from A/Inspector Nash that at no time did Constable Theriault identify himself as a police officer, produce a warrant card, or use any police-issued

² *R. v. Theriault*, 2020 ONSC 3317.

³ Although Inspector Moreira has since been promoted to the rank of Superintendent, he will be referred to in this report by his rank on December 28, 2016.

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equipment. Mr. Miller also had not indicated that he was aware Constable Theriault was a police officer.

5. Based on this information, Inspector Moreira formed the opinion that the SIU did not have to be notified since the arrest was a “citizen’s arrest”,⁴ and Constable Theriault had not put himself on duty. He also considered TPS Policy 13-16 – Special Investigations Unit and the information on the SIU website, namely the statement that:

“The SIU will not normally investigate incidents involving off duty police officers acting in the course of their private lives. If, however, an officer is off duty and police equipment or property is involved, or the officer identifies himself/herself as a police officer in the course of the occurrence, the SIU will investigate the incident if it involves serious injury, death or an allegation of sexual assault.”⁵

6. Inspector Moreira spoke with Inspector Boyd about his assessment of the information, and Inspector Boyd agreed with him that they did not need to notify SIU.
7. In light of their assessment, neither Inspector Moreira nor Inspector Boyd notified either the SIU or Chief Saunders of the incident. Inspector Boyd first notified Chief Saunders of the incident when he learned on May 2, 2017 that the SIU had invoked its mandate.

⁴ The authority to make a “citizen’s arrest” is found in subsection of 494(1)(a) of the *Criminal Code*: “Any one may arrest without warrant (a) a person whom he finds committing an indictable offence...” It is distinguished from the powers of arrest available to a police officer found in section 495 of the *Criminal Code*, which are predictably much broader.

⁵ “Off Duty Officers” - https://www.siu.on.ca/en/investigate_what.php

Summary of Statements – Respondent Officers

Respondent Officer 1 – Chief Mark Saunders (2585)

8. Chief Saunders was the Chief of the Toronto Police Service at the time of Mr. Miller’s arrest. He participated in a phone interview with OIPRD Investigators on June 17, 2020. The following is a summary of his interview.
9. On December 28, 2016, Chief Saunders was not notified or made aware of Mr. Miller’s arrest by off-duty Constable Michael Theriault.
10. Chief Saunders advised that he was first made aware of the incident was on May 2, 2017, when he received an email notification from Inspector Boyd that SIU had invoked their mandate.
11. Chief Saunders was not involved in Inspector Moreira’s decision not to notify SIU because, as the on-call Chief’s SIU designate, Inspector Moreira was empowered to make that decision based on his own assessment. He did so after consulting Inspector Boyd for guidance, who Chief Saunders described as “the most knowledgeable designate when it comes to SIU in the province.”
12. When Chief Saunders learned of the factors that Inspectors Moreira and Boyd had considered, he concurred with their assessment that since Constable Theriault was off-duty, and had effected a “citizen’s arrest”, the criteria to notify the SIU had not

been met. He was satisfied that they had complied with TPS Policy 13-16 – Special Investigations Unit.⁶

13. Chief Saunders also denied that he or his officers tried to protect Constable Michael Theriault, with whom he had never spoken.

Investigation

- Reviewed Mr. Miller’s OIPRD complaint form and attachments for his complaint statement;
- Reviewed relevant trial transcripts;
- Interviewed Chief Mark Saunders by telephone;
- Interviewed Inspector Moreira and Superintendent Ferguson by telephone;
- Attempted to interview Inspector Boyd, who declined to participate in an interview but answered questions via email;
- Reviewed *TPS Policy 13-16 Special Investigations Unit (SIU)* – reviewed the policy that was applicable on December 28, 2016;
- Reviewed the statements of the parties involved; and
- Reviewed the DRPS Occurrence Report.

⁶ Chief Saunders requested that the Waterloo Regional Police Service (WRPS) conduct the investigation that the TPS is required to conduct at the conclusion of the SIU investigation, pursuant to section 11 of Ontario Reg. 267/10. At the request of the Crown prosecuting the Theriault brothers, this investigation has been stood down pending the completion of the criminal proceedings.

Analysis

Allegation 1

Neglect of Duty, s. 2(1)(c) (ii) – fails to comply with any provision of Ontario Regulation 267/10 (Conduct and duties of Police Officers Respecting Investigations by the Special Investigations Unit).

14. It is alleged that Chief Saunders failed to notify SIU.

15. The duties of police officers respecting investigations by the Special Investigations Unit are laid out in O. Reg. 267/10. Specifically, section 3 of the regulation reads as follows:

A chief of police **shall** notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113(5) of the *Act* [emphasis added]

Subsection 113(5) of the PSA reads:

The (SIU) director **may**...cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers [emphasis added].

16. The SIU website says the following about off-duty conduct:

The SIU will not **normally** investigate incidents involving off duty police officers acting in the course of their private lives. If, however, an officer is off duty and police equipment or property is involved, or the officer identifies himself/herself as a police

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officer in the course of the occurrence, the SIU will investigate the incident if it involves serious injury, death or an allegation of sexual assault [emphasis added]

17. O. Reg. 267/10 creates a mandatory obligation on the chief of police to report to the SIU matters coming within their mandate; this statutory reporting obligation is not qualified by whether the conduct occurred while the officer was on or off-duty.
18. The discretion about whether the matter falls within the SIU mandate and warrants investigation lies not with a chief of police but solely with the SIU director. The information contained on the SIU website about on-duty/off-duty conduct in no way absolves a chief of police of his or her statutory obligations. It simply offers a public explanation about when the SIU director may choose to exercise *his or her* discretion to investigate a complaint in circumstances in which the officer is off-duty. Stated differently, chiefs of police have an absolute obligation to report all police conduct – whether on-duty or off-duty – where it meets the SIU threshold; it is then within the SIU director’s discretion to determine whether that conduct will be investigated.
19. Often, chiefs of police will delegate their SIU responsibility, as permitted by O.Reg. 267/10. In this instance, Chief Saunders had delegated his authority to Inspector Boyd and Inspector Moreira, the on-call SIU designate. They had the authority to make the final decision as to whether to notify SIU .
20. Inspector Moreira believed that the SIU did not need to be notified, a decision which could have been overridden by Inspector Boyd but was not. Having made the decision not to notify SIU, they were not required by policy to notify Chief Saunders of their decision, and they did not do so.

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21. Chief Saunders only became aware of Constable Theriault's involvement in Mr. Miller's arrest on May 2, 2017, when he received an email from Inspector Boyd advising him that the SIU had invoked its mandate. This was confirmed by the information provided by Inspectors Boyd and Moreira. Having learned about the incident, however, Chief Saunders concurred that the SIU did not need to be notified because Constable Theriault had effected a citizen's arrest while off-duty.
22. Chief Saunders misapprehends his statutory obligation. As stated earlier, the legislation requires a chief of police to notify the SIU in *all* cases where a police officer has been involved in an incident that results in serious injury; the legislation does not distinguish between on-duty and off-duty conduct. The discretion as to whether off-duty conduct ought to be investigated is within the exclusive purview of the SIU director.
23. However, given that Chief Saunders did not learn of Mr. Miller's arrest between December 2016 and May of 2017, his after-the-fact endorsement of the decision made by Inspectors Boyd and Moreira does not constitute grounds to believe that misconduct was committed.

Allegation 2

Discreditable Conduct, s. 2(1)(a)(xi) – acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force.

24. It is alleged that Chief Saunders was trying to protect Constable Michael Theriault from criminal charges by failing to notify SIU.

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25. As stated above, the evidence indicates that Chief Saunders had no part in his officers' decision not to notify SIU, and did not know about their decision until SIU invoked their mandate on May 2, 2017. Furthermore, Chief Saunders denied knowing Constable Theriault, or trying to protect him from criminal prosecution.

Conclusion

Allegation 1

Neglect of Duty, s. 2(1)(c) (ii) – fails to comply with any provision of Ontario Regulation 267/10 (Conduct and duties of Police Officers Respecting Investigations by the Special Investigations Unit).

26. Based on a review and analysis of the available evidence, the Director has determined that there is **insufficient evidence** to establish that misconduct occurred regarding this allegation. As a result, with respect to the allegation of Neglect of Duty, the allegation is found to be **unsubstantiated**.

Allegation 2

Discreditable Conduct, s. 2(1)(a)(xi) – acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force.

27. Based on a review and analysis of the available evidence, the Director has determined that there is **insufficient evidence** to establish that misconduct occurred regarding this allegation. As a result, with respect to the allegation of Discreditable Conduct, the allegation is found to be **unsubstantiated**.

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Referenced Information

- *Police Services Act*
- *TPS Policy 13-16 Special Investigations Unit (SIU)*

Investigators

Tom Andrew

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Supervisor/Manager

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