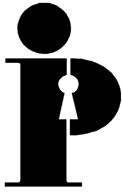

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2708

Appeal PA08-32

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information gathered by the Ontario Provincial Police (OPP). The OPP is part of the Ministry. The requester sought a copy of a specific incident report, a named police officer's report and any other reports filed by five other named police officers involved in the specified incident.

The Ministry located the responsive records and denied access to them pursuant to section 65(5.2) of the *Act*. In its decision, the Ministry stated the following:

> Section 65(5.2) states that the *Act* does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.
>
> The Ministry is of the opinion that section 65(5.2) is applicable in the circumstances of your request. As a result, the records you have requested are not accessible under the *Act* at this time. You may wish to reapply once all proceedings in relation to the prosecution have been completed.

The requester, now the appellant, appealed the Ministry's decision.

As mediation was not successful in resolving this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, seeking its representations. I received representations from the Ministry, a complete copy of which was sent to the appellant, along with a Notice of Inquiry, seeking the appellant's representations. I received representations from the appellant. I then sought and received reply representations from the Ministry.

RECORDS:

The records at issue in this appeal consist of a combination of occurrence reports, witness statements and police officer handwritten notes.

DISCUSSION:

PROSECUTION

The Ministry relies on section 65(5.2) to exclude the records from the *Act*. Section 65(5.2) states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

If section 65(5.2) applies to the records, the records are excluded from the scope of the *Act*.

The Ministry submits that the records relate to a prosecution concerning an incident on a specified date to which the police responded and four charges were laid against the appellant and other identifiable individuals. It states that:

> The requested records were prepared as a result of this incident for prosecution purposes. All of the records are relevant to each of the prosecutions as all of the charges arose out of the same event. Police records, notes, etc are instrumental in forming the basis for a prosecution because they function as the record of an event…
>
> [A]ll proceedings in respect of the prosecution have not been completed… There are still three outstanding charges… A trial date of [date] has been set for these matters.

The appellant admits that she was fined for an offence and elected to appear in court to challenge the evidence of the officer who issued the fine against her. She submits that she is entitled to:

> …full disclosure of the [the records], to defend herself before the courts. [She] is not in a position to present a fair defence without the relevant records. She was present at the incident and fined at the incident, therefore, she is entitled to full disclosure in the same capacity as the Officer in question.
>
> It is certain that the Officer and prosecutor will have full disclosure when they prosecute this fine; [the appellant] is equally entitled to the same disclosure. If a lawyer were handling this case, they would not be denied full disclosure, regardless of ongoing proceedings related to the incident. [The appellant] is entitled to the same disclosure as a lawyer would receive in preparation for the court date.

In reply, the Ministry submits that:

> It is a well-established principle of Canadian law that in a criminal or quasi-criminal proceeding, counsel for the Crown has a duty to disclose all relevant information [*R v. Stinchcombe,* [1991] 3 S.C.R. 326, (S.C.C.)] .
>
> Accordingly, the appellant is accurate in stating that she is "...entitled to full disclosure..." in order to defend herself. However, the forum in which to obtain this disclosure is the trial process. The case of *Toronto (City) v. Canada Land Corp.*, [2006] O.J. No. 4489, involved a prosecution for a provincial offence under the *Fire Protection and Prevention Act, 1997*. The court stated that:
>
>> In order to make full answer and defence the accused or defendant must be provided with the evidence that the Crown or prosecution is intending to use against the person to prove the charge in

> question. This obligation on the Crown or prosecution to disclose the evidence is obligatory.

> The appellant has a right to disclosure in order to make full answer and defence and the prosecutor has an obligation to provide such disclosure. The Ontario Provincial Police (OPP) has advised that records have not yet been disclosed to the appellant. Therefore, the appellant should avail herself of this clearly established process and request disclosure from the provincial prosecutor. This will ensure that she is provided with all information relevant to her defence…
>
> [A]ll of these charges arose out of the same… incident and all records created detail all of the facts and circumstances relating to the entire incident. The investigating officers did not create separate notebook entries or witness statements for each charge. The lead investigating OPP officer is responsible for identifying relevant records for inclusion in the Crown brief. This officer has confirmed that he intends to include all of the responsive parts of the requested records (including the records relating to the resolved assault charge) in the Crown brief that will be prepared at a later date.
>
> Therefore, it is the position of the Ministry that all of the records at issue are relevant to each of the prosecutions. Accordingly, as 3 of the prosecutions remain outstanding, all of the records continue to be excluded in accordance with s. 65(5.2) of the [*Act*].

Analysis/Findings

The applicability of the exclusionary provision in section 65(5.2) of the *Act* has recently been interpreted by Senior Adjudicator John Higgins in Order PO-2703. In that order, Senior Adjudicator Higgins stated that:

> In my view, section 65(5.2) is aimed at protecting prosecutors from having to address access-to-information requests for records that are part of their prosecution file where the matter is ongoing. The apparent rationale for doing this would be avoidance of the distractions that would be caused to Crown prosecutors, who are well known to have heavy caseloads, if they were required to address access-to-information requests, including which exemptions to claim, while proceedings are ongoing. Similar considerations apply to provincial offences officers, who prosecute provincial offences... The fact that materials of this kind can be voluminous, to say the least, provides further reinforcement for this rationale...
>
> [Section 65(5.2)] raises a number of interpretive and other questions in the context of this appeal. These are:

> (1) What constitutes a "prosecution"? Do charges under the [named Act] qualify as a "prosecution"?
>
> (2) What is required to find that a record is "relating to" a prosecution?
>
> (3) Where records are not part of a court brief or Crown brief, what criteria apply to determine whether a record may be described as "relating to" a prosecution?
>
> (4) What considerations must be taken into account in determining whether all proceedings in respect of a prosecution have been completed?

I adopt this interpretation of section 65(5.2) of Senior Adjudicator Higgins and I will address these questions in turn.

(1) What constitutes a "prosecution"? Do charges under the *Liquor Licence Act* and an assault charge under the *Criminal Code* qualify as a "prosecution"?

The appellant was charged along with other individuals as having committed offences under the *Liquor Licence Act*. These charges arose out of the same incident. In addition, the records relate to an assault charge under the *Criminal Code*, which charge has been resolved.

In Order PO-2703, Senior Adjudicator Higgins found that a "prosecution" in the context of section 65(5.2) the *Act* means "the prosecution of an offence under an enactment of Ontario or Canada." In considering what would qualify as an "offence" under that section, he relied upon section 11 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), which sets out rights accruing to persons charged with "an offence", as well as the case *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. In that case, the Supreme Court of Canada discussed the criteria for deciding that something constitutes an "offence" within the meaning of section 11 of the *Charter*. In making this assessment, Wilson J., for the majority, discusses the distinction between regulatory proceedings and offences of a penal nature. She states:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity. … Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are

> automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply. [para. 23]
>
> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. … If an individual is to be subject to penal consequences such as imprisonment -- the most severe deprivation of liberty known to our law -- then he or she, in my opinion, should be entitled to the highest procedural protection known to our law. [para. 24]

In Order PO-2703, Senior Adjudicator Higgins determined that:

> [The] term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine…
>
> [T]he provisions of the statute governing the proceedings and stipulating the penalty to be applied must be considered.

I will therefore consider the relevant portions of the *Liquor Licence Act*, an enactment of the Ontario Legislature. These provisions state as follows:

> 31(2) No person shall have or consume liquor in any place other than,
>
> (a) a residence;
>
> (b) premises in respect of which a licence or permit is issued; or
>
> (c) a private place as defined in the regulations.
>
> 31(4) No person shall be in an intoxicated condition,
>
> (a) in a place to which the general public is invited or permitted access;

Penalties

> 61(3) Upon conviction for an offence under this Act, other than a contravention of subsection 30 (1), (2), (3), (4) or (4.1),
>
> (b) an individual is liable to a fine of not more than $100,000 or to imprisonment for a term of not more than one year or both.

Exception

> 61(3.1) An individual who is convicted of an offence under subsection 31(2) or (4) is not liable to imprisonment.

These statutory provisions concern matters of a public nature, intended to promote public order and welfare within a public sphere of activity. Section 61(3) refers to a "conviction" and the penalty imposed may entail a significant fine. Charges under these provisions of the *Liquor Licence Act* may lead to true penal consequences and I find that they constitute "offences". Therefore, I find that proceedings in respect of charges under sections 31 of the *Liquor Licence Act* constitute a "prosecution" within the meaning of section 65(5.2).

It is also clear from the wording of section 65(5.2) of the *Act* that an assault charge under the *Criminal Code of Canada* does constitute a "prosecution" within the meaning of that section. Upon conviction for assault, a person is liable to be imprisoned.

(2) What is required to find that a record is "relating to" a prosecution?

In Order PO-2703, Senior Adjudicator Higgins stated that:

> …the following principles should be followed in the interpretation and application of section 65(5.2):
>
> - "relating to" should be interpreted in the same manner as "in relation to", that is it means "for the purpose of, as the result of, or substantially connected to";
> - there must be a substantial connection between the records and the prosecution, and the connection must not be merely superficial; and
> - the purpose of the provision must be taken into account in deciding whether the connection is sufficient to justify the application of this exclusion.

The records in this appeal consist of occurrence reports, witness statements and police officer handwritten notes. As stated above, the Ministry intends to include all of the responsive parts of the requested records (including the records relating to the resolved assault charge) in the Crown brief that will be prepared at a later date.

Upon my review of the records I agree with the Ministry that they are related to the prosecution of the three outstanding charges referred to above and would be included in the Crown brief.

The Crown brief consists of the Crown prosecutor's copies of the investigation materials prepared by the OPP in contemplation of or for use in the criminal prosecution [Order MO-1968-R]. In Order PO-2364, a Crown brief was described as containing:

> …statements of proposed witnesses, photographs taken, the results of sample analysis and expert opinion, as appropriate. The brief also contains a synopsis which is the investigator's narrative of how the proposed evidence is related to the alleged violation.

I have carefully reviewed the records and am satisfied that they were either prepared for the Crown's use in the prosecution, or are copies of other records that have been expressly made and will be included in the Crown brief for that same purpose. Therefore, I find that the records have the necessary substantial connection to the outstanding prosecutions and I find that they are records "relating to" the prosecutions of the individuals that have been charged.

(3) Where records are not part of a court brief or Crown brief, what criteria apply to determine whether a record may be described as "relating to" a prosecution?

I have found above that the records will be part of a Crown brief. Therefore, the records will be used in the prosecution of the outstanding charges that are the subject matter of the records. The intent to prosecute had already crystallized when the records were created and the records clearly "relate to" the prosecution for the purposes of section 65(5.2) [Order PO-2703].

The only outstanding question is whether all proceedings in relation to the prosecutions have been completed.

(4) What considerations must be taken into account in determining whether all proceedings in respect of a prosecution have been completed?

As the trial has not yet taken place and charges remain in place, all proceedings have not been completed. Even after a trial has been completed, the question of a possible appeal arises. Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed [Order PO-2703].

In the present appeal, the trials of the appellant and the other accused individuals have not concluded. Therefore, I find that not all proceedings in respect have been completed, and this requirement in section 65(5.2) is satisfied.

In conclusion, I find that all of the responsive records form part of the prosecution materials assembled by the Ministry and are records relating to the prosecutions of accused individuals. All proceedings in relation to the prosecutions have not been completed. Therefore, the records are excluded from the application of the *Act* under section 65(5.2).

ORDER:

I uphold the Ministry's decision that the records it has identified as responsive are excluded from the scope of the *Act* under section 65(5.2).

Original signed by: August 12, 2008
Diane Smith
Adjudicator