

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3260

Appeal PA12-539

Ministry of Community Safety and Correctional Services

October 2, 2013

Summary: The appellant, a media outlet, sought access to certain probation records dating back to 2005 and relating to an individual who is awaiting trial on serious, though unrelated, charges in Quebec. The ministry argued that the records are excluded from the operation of *Act* as a result of section 65(5.2) which applies to "prosecution material". The ministry tendered into evidence a letter from a Crown Prosecutor indicating that the Crown did not intend to rely on the information contained in the records, though it could be introduced by the defence. The adjudicator finds that section 65(5.2) has no application in this case as the records do not relate to a prosecution.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(5.2).

Orders and Investigation Reports Considered: PO-2703.

Case Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (CanLII), March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

OVERVIEW:

[1] 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:

A copy of progress reports, assessments and closing summaries connected to the conditional sentence and probation orders given to [a named individual] on [a specific date in 2005] for a guilty plea to fraud charges in [a named court case in Ontario].

[2] The appellant subsequently clarified her request in a telephone call with the ministry, indicating that she was seeking the probation case records with respect to the named individual (the affected person).

[3] The Ministry of Community Safety and Correctional Services issued a decision denying access to the requested information, on the basis that it is excluded from the *Act* under section 65(5.2) of the *Act*. In its decision, the ministry stated:

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 you may be aware, a criminal prosecution involving the named individual is currently in progress in Quebec. As a result, the records you have requested fall outside the scope of the Act.

[4] The ministry further indicated that the appellant may submit a new request, once all proceedings in relation to the prosecution have been completed.

[5] The appellant filed an appeal with this office, asserting that section 65(5.2) is not applicable. In her appeal documentation, the appellant noted that the affected person faces serious criminal charges in Quebec on a completely separate matter from the charges which resulted in a probation order against him in 2005. She also indicated that the Ontario prosecution has long been completed and the affected person is not being retried in Ontario.

[6] Further mediation of this appeal was not possible and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[7] I sought and received the representations of the ministry, initially. A complete copy of the ministry's representations, with the exception of a letter received from a Crown Prosecutor in the province of Quebec, was provided to the appellant, who also submitted representations in support of her position favouring disclosure. The ministry was invited to and provided further representations by way of reply.

[8] In this order, I do not uphold the ministry's decision to deny access to the records at issue on the basis that they are excluded from the operation of the *Act* because they fall within the ambit of section 65(5.2) and I order it to issue a decision respecting access to the information.

RECORDS:

[9] The records at issue are documents contained in the affected person's probation file.

DISCUSSION:

[10] The sole issue for determination in this appeal is whether the records are excluded from the *Act* as a result of the operation of section 65(5.2), which 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.

General principles and representations of the parties

[11] The purposes of section 65(5.2) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution. [*Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*¹ cited above]

[12] 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. [Order PO-2703]

[13] The words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution." [*Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*.²]

[14] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case. [Order PO-2703]

¹ 2010 ONSC 991 (CanLII), March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

² 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

[15] The ministry relies on the decision of the Divisional Court in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above. The ministry provided me with a letter received from the Crown Prosecutor in Quebec who is responsible for the conduct of the trial against the affected person on the serious charges he faces there. In his letter, the Crown Prosecutor advises that the records at issue in this appeal are unrelated to the criminal proceedings initiated by the Crown against the affected party in the Quebec prosecution. However, the Crown Prosecutor goes on to indicate that the documents may be relevant to and may be relied upon by the affected party as part of his defense on those charges.

[16] The ministry goes on to submit that because the records at issue "may be used during the trial" of the affected person, the requisite link between the records and the prosecution has been created and that "the records are clearly 'in respect of' the prosecution." The ministry also points out that the Quebec prosecution has only recently completed the preliminary inquiry stage and that the trial of the affected party is not expected to begin until 2014.

[17] The appellant argues that the prosecution of the offence to which the records relate was completed in 2005. While the affected person may be standing trial in Quebec, those charges are completely unrelated to those which resulted in the creation of the probation records which are at issue in this appeal.

[18] The appellant also refers to a decision of the Ontario Court of Justice in *The Queen v. Canadian Broadcasting Corporation, Canadian Press Enterprises Inc., the Globe and Mail and Shaw Television Limited Partnership*³. In his decision, Mr. Justice Fergus O'Donnell ruled on an application brought by various media outlets for access to a letter written by a doctor who had been treating the affected party at the time of his sentencing in 2005. The letter was relied upon by the judge in making his sentencing decision and it was ordered to be attached to both the resulting conditional sentence order and the probation order. A copy of this letter remains in the court file pertaining to the charges, conviction and sentencing of the affected party in 2005.

[19] In his decision, Justice O'Donnell applied the open courts principle expressed by the Supreme Court of Canada in *A.G. Nova Scotia v. MacIntyre*⁴ and *CBC v. New Brunswick (A.G.)*⁵ and the limitations placed on it in *R. V. Mentuk*.⁶ He concluded that because the letter being sought by the applicants had been placed before the sentencing judge and relied upon by him, and its inclusion in the court file was not disputed by the affected party's counsel, it ought to be disclosed to the applicants as any risk to a fair trial of the affected person is minimal. The appellant argues that, by

³ April 2, 2013, Toronto Doc. 05/40045174 (Ontario Court of Justice).

⁴ [1982] 1 S.C.R. 175.

⁵ [1996] 3 S.C.R. 480.

⁶ [2001] 3 S.C.R. 442.

analogy, similar principles ought to apply to the appeal before me as the probation records being sought are similar in nature to the letter which was the subject of the application before Justice O'Donnell.

[20] The ministry responds to these arguments by submitting that regardless of the outcome of the application before Justice O'Donnell, this office has no jurisdiction over the records as a result of the operation of section 65(5.2).

Analysis and findings

[21] Based on my reading of the section, the exclusion in section 65(5.2) is satisfied when all three elements contained within it have been met. The party relying on its application must establish that:

- There is a prosecution.
- There is some connection between the record and a prosecution.
- All of the proceedings with respect to the prosecution have not been completed.

[22] In the present appeal, it is clear that there is an ongoing prosecution of the affected person in the province of Quebec respecting serious criminal charges. The preliminary hearing of this matter has taken place and the trial of the affected person is to begin in 2014. As a result, I find that the ministry has established the necessary elements of parts one and three of the test under section 65(5.2) as there is a prosecution of the affected person which has not been completed.

[23] The contentious issue in this appeal is whether there exists "some connection" between the records at issue and that prosecution.

[24] The Divisional Court addressed this part of the section 65(5.2) exclusion in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above [the *Toronto Star* decision.] Its analysis included an examination of the purposes of the exclusion in section 65(5.2), which it described as follows:

We agree with the Ministry's submissions that there are additional important purposes underlying section 65(5.2), including the following:

- 1) to ensure that the accused, the Crown and the public's right to a fair trial is not jeopardized by the premature production of prosecution materials to third parties; and
- 2) to ensure that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials.

The purposes of s. 65(5.2) are far broader than the purpose suggested by the Adjudicator and include maintaining the integrity of criminal justice system and ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution . . .

[25] In the present case, the Quebec Crown Prosecutor has clearly indicated that the records at issue in this appeal, which relate to the affected person's probation following a conviction in 2005, will not be relied upon as part of the Crown's case in the upcoming criminal proceeding. He does indicate, however, that these records may form part of the evidence relied upon by the affected person as part of his defence on the criminal charge he is facing. Although it may anticipate what evidence the defence may or may not decide to tender in the proceeding, the Crown cannot speak for the defence and is only speculating about what may form part of its case.

[26] In my view, the records at issue in this appeal are not "prosecution materials" as contemplated by the court in *Toronto Star*. The Crown Prosecutor has made it clear that the Crown will not be relying on these records as part of its case against the affected person. Even if the exclusion could protect a broader range of materials than those relevant to the prosecutor's case or conduct of the proceeding, the evidence before me does not establish the requisite relationship between the record and the prosecution proceedings. I find that they do not fall within the ambit of the section 65(5.2) exclusion as they are not "records relating to a prosecution". In my view, the ministry has not provided sufficient evidence to establish "some connection" between the records at issue and the existing prosecution of the affected person in Quebec.

[27] Because the records are not excluded from the operation of the *Act*, I will require the ministry to issue a decision respecting access to them. Again, it is important to note that the records at issue will not be disclosed to the appellant as a result of this decision. Rather, it only has the effect of bringing the records under the ambit of the *Act* and, as the Divisional Court noted at paragraph 31 of its decision in *Toronto Star*:

Similarly, subsection 65(5.2) is an exclusion limiting the IPC's jurisdiction, rather than an exemption. The statutory exclusion operates independently from the statutory exemptions set out in sections 12 to 19 of the Act. Thus, subsection 65(5.2) excludes the jurisdiction of the IPC for records relating to an ongoing prosecution. The IPC first acquires jurisdiction over a record relating to a prosecution once all proceedings in respect of the prosecution have been completed. When the IPC acquires jurisdiction over a record relating to a prosecution after a prosecution has been completed, a head of an institution may refuse to disclose classes of records based on one or more of the exemptions set out in ss. 12 to 19.

Accordingly, a record of a prosecution may subsequently become exempt under one of the listed exemptions.

ORDER:

1. I order the ministry to provide the appellant with a decision respecting access to the requested records, as contemplated by section 26 of the *Act*, treating the date of this order as the date of the request.
2. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the decision letter referred to in Order Provision 1.

Original signed by: _____
Donald Hale
Adjudicator

_____ October 2, 2013