

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3397

Appeal PA13-395

Ministry of Community Safety and Correctional Services

September 18, 2014

**Summary:** The ministry received a request for records which refer to the appellant, who is a lawyer, in connection with one of his clients. The ministry denied access to the responsive records, claiming the application of the exclusionary provision governing records pertaining to a prosecution in section 65(5.2). The adjudicator finds that any responsive records are, because of the manner in which the request is framed, records relating to a prosecution and, therefore, excluded from the operation of the *Act* under section 65(5.2).

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

**Cases Considered:** *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, 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 every record in which I am named in connection with [a named individual] that is in the possession of any branch of the Ontario Provincial Police ("OPP)". The appellant is a lawyer representing the named individual in certain continuing criminal proceedings. In his request letter, the appellant provided some

background information which included the names of many OPP officers who might have a connection with the requested records.

[2] The ministry issued a decision advising that access to the requested information is denied pursuant to the exclusionary provision which governs records relating to a prosecution in section 65(5.2) of the *Act*. In its decision, the ministry stated that:

...

Section 65(5.2) of 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.

...

[3] The appellant appealed the ministry's decision.

[4] During mediation, the appellant argued that the exclusionary provision in section 65(5.2) of the *Act* does not apply to the requested records as he is seeking access only to records pertaining to himself, despite the fact that they may be in connection with the person being prosecuted. The ministry took the position that all the records responsive to the wording of the request relate to the prosecution of the named individual and therefore, are excluded from the scope of the *Act*.

[5] No further mediation was possible and the mediator assigned to the file provided the parties with a Mediator's Report setting out the positions of the parties at the conclusion of mediation. The appellant disputed the manner in which his position was characterized in the Mediator's Report and re-stated it in the following way:

The appellant takes the position that the records he seeks relate to an investigation that was completed long ago. At the end of that investigation, criminal proceedings were commenced. Those criminal proceedings do not relate to the appellant. More important, those criminal proceedings do not relate **to the records the appellant is seeking**. In other words, **the records do not form part of the proceedings against the person being prosecuted**.

[6] I sought and received representations from the appellant and the ministry, a complete copy of which were shared in accordance with *Practice Direction 7* and section 7 of the IPC's *Code of Procedure*. The ministry provided additional representations by way of reply, to which the appellant responded in sur-reply submissions.

[7] In this order, I uphold the ministry's decision that the records are excluded from the operation of the *Act* by virtue of section 65(5.2) as they relate directly to an on-going prosecution of the appellant's client.

## **RECORDS:**

[8] The records that are responsive to the request have not been provided to this office by the ministry. It takes the position that they are excluded from the scope of the *Act* under section 65(5.2), because they relate to the prosecution of the appellant's client.

## **DISCUSSION:**

### **Are the records excluded under section 65(5.2) of the *Act*?**

[9] The sole issue to be determined in this appeal is whether the responsive records are excluded from the operation of the *Act* by virtue of the application of the exclusionary provision for records relating to a prosecution in section 65(5.2) of the *Act*, 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.

[10] 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<sup>1</sup>.

### **Meaning of "Prosecution"**

[11] 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]

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<sup>1</sup> *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

## **“Relating to” and “in respect of”**

[12] 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<sup>2</sup>.”

## **Representations of the parties**

[13] The request as originally framed sought access to “a copy of every record in which I am named in connection with [an identified individual, the appellant’s client] and that is in the possession of any branch of the Ontario Provincial Police.” The request then went on to describe the appellant’s client and the circumstances surrounding his involvement with the OPP, including the fact that there are ongoing criminal proceedings against this individual. Finally, the request identified some 80 individual OPP officers who “have participated, to varying degrees, in the investigation of [the appellant’s client]” and who “might have some connection to” any “files pertaining to me in connection with [the appellant’s client].”

[14] In its initial representations, the ministry relied upon the decision in *Toronto Star* where, at paragraph 51, “the Court gave the exclusion in section 65(5.2) a broad and non-exhaustive interpretation:”

The purposes of s.65(5.2) . . . include maintaining the integrity of the 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.

[15] The ministry goes on to add that the court in *Toronto Star* relied upon the Supreme Court of Canada’s decision in *Markewich v. Canada*<sup>3</sup> which held that the words “in respect of” ought to be interpreted “to be words of the broadest scope that convey some link between two subject matters.”

[16] The ministry also submits that because of the solicitor-client relationship that exists between the appellant and the named individual who is the subject of the OPP investigation and prosecution, there exists the requisite connection between the appellant and any records which are responsive to the request, owing to the nature of their relationship. According to the ministry, “it would be impossible to disclose the appellant’s records without disclosing those related to the named individual.”

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<sup>2</sup> *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

<sup>3</sup> 2003 SCC 9.

[17] In his initial representations, the appellant seeks to modify his request to include only "a copy of every OPP record in which I am named in connection with [the appellant's client] and that is not related to his prosecution (and was not, therefore, among the items disclosed by the Crown)." In this way, he seeks to obtain only those records which are maintained by the OPP that do not relate to the investigation or prosecution of his client.

[18] The appellant seeks to distinguish the facts in *Toronto Star* from those extant in the present appeal. He argues that unlike the situation in *Toronto Star* where the requester sought access to records about a particular prosecution, he is only seeking records that pertain to himself which "are not being used in, or are in any way connected to, the prosecution of [his client]." In addition, the appellant argues that the ministry has failed to provide evidence to support a finding that disclosure of the information sought "might jeopardize fair trial interests" or result in the disclosure of solicitor-client privileged documents.

[19] In its reply submissions, the ministry points out that the appellant is seeking to amend his request in order to avoid the application of section 65(5.2). It argues that from the outset, the appellant has sought records that pertain directly to the investigation and prosecution of his client, particularly since he provided a lengthy list of OPP officers who may have been involved in this matter as part of the investigation into the allegations made against his client.

[20] In his surreply representations, the appellant argues that he provided the list of OPP officers in order to assist the ministry in locating records responsive to his request for information about himself, rather than records relating to the prosecution of his client. The appellant also relies on the wording of his appeal letter to this office in which he wrote that:

. . . I requested records in the possession of the OPP pertaining to me in connection with [the client], not in connection with me and prosecution of [the client]. I used [the client's name] the person, not the [client's name] prosecution, as the reference point for my request. And while [the client] is being prosecuted, I am not being prosecuted.

. . . The records I seek relate indirectly to a person who is being prosecuted [the client], but the records I seek do not relate to the prosecution of [the client]. As one of [the client's] defence lawyers, I know firsthand that one of the records I seek, assuming they exist, relate to the prosecution of [the client] because none of those records has been disclosed by the authorities in [the client's] prosecution. In other words, assuming records pertaining to me and [the client] exist, the authorities by their non-disclosure of such records have implicitly deemed them irrelevant (i.e. they do not relate) to the proceedings against [the client].

## **Analysis and findings**

[21] In beginning my consideration of the sole issue to be determined in this appeal, it is imperative that a crucial fact be stressed. The appellant's involvement with the OPP, at least with respect to this particular client, arose because of his representation of the client, who is the subject of an OPP investigation and prosecution. The appellant reiterates that he is only seeking records that relate to himself "in connection with" his client.

[22] The ministry argues, and I agree, that any records which refer to the appellant "in connection with" his client must, by definition, relate to the prosecution of the client. I have not been provided with any evidence which would demonstrate that the appellant's dealings with the OPP "in connection with" his client relate in any way to any subject other than the OPP investigation and the subsequent prosecution.

[23] In my view the request, by the very manner in which it was originally framed, seeks access to records that are "relating to a prosecution" and that any responsive records would, accordingly, be "reasonably related" to the prosecution. The appellant is involved in the prosecution because he represents the accused individual, and for no other reason. Records which mention him "in connection with his client", as he stipulated in his request would, therefore, be related to a prosecution, that of his client. The decision in *Toronto Star* clearly states that there needs to be only a connection between the subject matter of the records and a prosecution.

[24] In my view, the ministry has established that there exists a connection between any records that might mention the appellant in the context of his representation of his client and the prosecution because this is the foundation and only point of contact between the appellant and the ministry, at least as it relates to this particular client. The appellant has not provided evidence that would lead me to find a reasonable basis for concluding that there may be responsive records in the ministry's possession that pertain to the appellant and his client *which do not relate to the prosecution*. In my view, any responsive records that may exist would, by the very definition of the request as originally framed and as modified by the appellant, relate directly to the prosecution of his client. I find no evidence to support or give rise to some other context whereby records that are responsive could reasonably exist.

[25] As a result, I find that the records identified by the ministry as responsive to the appellant's request "relate to a prosecution" and are, accordingly, excluded from the operation of the *Act* by virtue of section 65(5.2).

**ORDER:**

I dismiss the appeal.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ September 18, 2014