Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3122

Appeal MA13-340

Durham Regional Police Services Board

November 14, 2014

Summary: The appellant sought access to the costs, including over-time hours and any expenses over and above daily expenses, incurred by the police as a result of a 27-hour standoff that began on a specified date. The police located two responsive records and denied access to them, advising that they fell outside of the scope of the *Act* as a result of the operation of the exclusion at section 52(2.1) (records relating to an ongoing prosecution). In this order, the adjudicator finds that the exclusion at section 52(2.1) does not apply and orders the police to issue an access decision to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(2.1).

Orders and Investigation Reports Considered: Order PO-3260.

Cases 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 Durham Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information of Protection of Privacy Act* (the *Act*) for the following information:

> 1) The cost to [the police] of the 27-hour standoff on [named street] in Whitby on Oct. 16 and 17 that led to the arrest of suspect [named individual]. This request is for a list of costs in excess of what [the police] would have spent on the day had the standoff not occurred.
>
> 2) The number of over-time hours incurred during the standoff.
>
> 3) A list of expenses incurred as a result of the standoff that would not have been spent on the day had the standoff not occurred.
>
> As a reporter for Oshawa This Week, I ask that any additional fees related to this request be waived given that the information is of public interest.

[2] The police issued a decision letter to the requester advising that, subject to a fee, it intended to grant full disclosure to the responsive information. The police subsequently issued a revised decision letter denying access to the records pursuant to the exclusion at section 52(2.1) (records relating to a prosecution) of the *Act*. If section 52(2.1) applies, the records are excluded from the scope of that *Act,* that is, the Act cannot apply. In their decision, the police stated that access was denied for the following reasons:

> [T]he case is currently before the courts. This institution takes the view that any premature disclosure of the records may interfere with the preparation of the matter for trial. Once the case has been through the court system and all appeal periods have expired, the records may then be subject to release. You may then reapply to our institution for access.

[3] The requester, now the appellant, appealed the police's decision to deny access to the records.

[4] During mediation, the police explained that the Crown Attorney assigned to the case believes that the disclosure of the requested information may prejudice a potential juror and has instructed the police to withhold the information until the conclusion of the case and all appeal periods have expired.

[5] The appellant does not agree that the information she has requested falls outside of the scope of the *Act* pursuant to section 52(2.1). The appellant also advised that she believes that there is a compelling public interest in the disclosure of the requested records, thereby raising the possible application of section 16 of the *Act* to the records. It should be noted that the public interest override provision at section 16 does not apply to the exclusions, including that listed at section 52(2.1) of the *Act.* Therefore, whether there is a public interest in the disclosure of this information is not at issue in this appeal at this time.

[6] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage where an adjudicator conducts an inquiry. I began my inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal to the police. They provided me with representations in response. The police indicated that they do not wish to provide this office with the responsive records as they relate to a matter that is currently before the courts. However, at my request, they provided me with a description of the two records that they claim are responsive to the request but are excluded under section 52(2.1) of the *Act*. The police's representations were shared with the appellant in accordance with this office's regular practice set out in *Practice Direction 7* and the appellant provided representations in response. As the appellant's representations raised issues to which I believed the police should have the opportunity to reply, I shared them with the police who provided representations in reply.

[7] The sole issue to be determined in this order is whether the exclusion at section 52(2.1) applies and the records fall outside of the scope of the *Act*. In this order, I find that the exclusion at section 52(2.1) does not apply to the requested records and order the police to issue an access decision with respect to the records at issue.

RECORDS:

[8] The records at issue have been withheld pursuant to the exclusion at section 52(2.1) of the *Act*. The police have described the two records that are responsive to this request as follows:

- 1-page email from Human Resources breaking down all overtime hours accumulated from the standoff.

- 1-page email from our Fleet/Property Unit breaking down all costs associated to vehicles, and fuel required for the standoff.

DISCUSSION:

Does section 52(2.1) apply to exclude the records at issue from the scope of the *Act*?

[9] Section 52(2.1) 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 52(2.1) 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.[1]

[11] The term "prosecution" in section 52(2.1) 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.[2]

[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."[3]

[13] 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.[4]

Representations

[14] The police submit that section 52(2.1) applies to exclude the records from the scope of the *Act*. They submit:

> The Durham Regional Police Service is a law enforcement agency mandated under the *Police Services Act* with the responsibility of investigating offences under the *Criminal Code of Canada.* These records clearly relate to [a] 27-hour standoff that resulted in criminal charges and said prosecution.
>
> There is "real and substantial" risk of interference with the right to a fair trial or impartial adjudication if these records were released prematurely and tainted potential jurors. The money and resources spent during this 27-hour standoff and substantial and essentially will be paid for by the Durham regional tax payers. These same Durham regional tax payers could potentially be selected to participate on the jury panel in this prosecution.

---

[1] *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.).
[2] Order PO-2703.
[3] *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.
[4] Order PO-2703.

> The results of the 27-hour standoff and subsequent criminal charges laid under the *Criminal Code of Canada* clearly fit within the meaning of "prosecution" within section 52(2.1) of the *Act*.
>
> The term "prosecution" in section 52(2.1) of the *Act* means proceedings in respect of a criminal charge laid under an enactment of Ontario of Canada and may include regulatory offences that carry consequences such as imprisonment or a significant fine.
>
> Keeping the purpose of section 52(2.1) in mind which includes maintain 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 in mind, it is clear that to prematurely release these records would pose a significant risk and potentially jeopardize the prosecution.

[15] The appellant indicates that she requested information about the costs to the police as a result of the standoff. She submits that she does not understand how this administrative information could taint a jury. She disputes the police's position that disclosure of the records "prematurely would taint a potential juror and interfere with [the accused's] right to a fair trial." Further, the appellant submits that she does not believe that the requested information would have been prepared or compiled as part of the prosecution file.

[16] The appellant also argues that the police do not state why knowledge of the cost of the standoff would be more prejudicial than other information about the case already in the public realm and that they have not cited any similar cases where such information was prejudicial. The appellant also submits that the fact that the standoff had a financial impact on the community is already common knowledge and points to an article published on October 18, 2012 on the website durhamregion.com.

[17] The appellant concludes that the request is for administrative and financial information related to the police and does not contain any information that would be used as evidence in the case against the accused. The appellant submits that the police have not explained how the costs of the standoff will be used in the criminal trial.

[18] In reply, the police submit that the appellant's submissions are based on her opinion and are not factually based. They submit that the 27-hour standoff resulted in criminal charges being laid under the *Criminal Code of Canada*. The police submit that the case "remains before the courts," that it is their opinion that the records relate to the ongoing prosecution, and that the records "clearly" fit within the meaning of "prosecution" within section 52(2.1) of the *Act*.

[19] The police conclude their reply representations with the submission that the Crown Attorney has advised that there is a "real and substantial" risk of interference with the right to a fair trial if these records were disclosed. They submit that section 52(2.1) applies but that when all appeal periods have expired they will be in a position to provide the appellant with the requested records in their entirety.

Analysis and finding

[20] In order for the exclusion at section 52(2.1) to apply, the police must establish that:

> (1) there is a prosecution;
>
> (2) there is some connection between the record and the prosecution; and
>
> (3) all of the proceedings with respect to the prosecution have not been completed.[5]

[21] The issue before me is whether there exists "some connection" between the records at issue which address the costs incurred by the police during a 27-hour standoff and the prosecution of an individual who was charged following that standoff. Based on the evidence before me, I do not accept that the police have established that there exists "some connection" between the records at issue and the prosecution.

[22] The Divisional Court addressed the provincial equivalent of the section 52(2.1) exclusion in the *Toronto Star* decision, cited above.[6] Its analysis included an examination of the purposes of the exclusion in section 52(2.1), which it described as follows:

> We agree with the Ministry's submissions that there are additional important purposes underlying [section 52(2.1)], 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 [section 52(2.1)] … include maintaining the integrity of the criminal justice system and ensuring that the accused and the Crown's

[5] Order PO-3260.
[6] *Supra,* note 3.

> 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….

[23] In this appeal, the request is clearly for records relating to the costs incurred by the police as a result of a 27-hour standoff. The records, as described by the police themselves, consist of a 1-page email from Human Resources breaking down all overtime hours accumulated during the standoff and a 1-page email from their Fleet/Property Unit breaking down all costs associated to vehicles, including fuel required for the duration of the standoff. The prosecution relating to the 27-hour standoff relates to a number of criminal charges laid against an individual under the *Criminal Code of Canada*.

[24] The records themselves, as described by the police, do not appear to have been prepared for the purposes of the prosecution; nor have I been provided with sufficient evidence to support a finding that they have been. Additionally, the records do not appear to form part of the prosecution file; although it was not addressed in their representations, this was confirmed by the police during the initial processing stages of the appeal.

[25] In my view, the records at issue in this appeal are not "prosecution materials" as contemplated by the court in *Toronto Star*. There is no evidence that the police will be relying on the records as part of their case in the ongoing prosecution of the individual involved in the standoff and the subject matter does not appear to relate to any of the criminal charges laid against him. The records are administrative records that relate to the costs incurred by the police. I do not accept, nor have I been provided with sufficient evidence to demonstrate, that this information is probative in the prosecution referred to by the police.

[26] I find that the records at issue in this appeal do not fall within the ambit of the section 52(2.1) exclusion as they are not "records relating to a prosecution." On my review of the representations, the description of records and the circumstances of this appeal, I find that the police have not provided sufficient evidence to establish that there is "some connection" between the records at issue and the prosecution of the individual charged as a result of the 27-hour standoff.

[27] Because the records are not excluded from the scope of the *Act* as a result of the operation of the exclusion at section 52(2.1), I will order the police to issue a decision respecting access to them.

ORDER:

1. I do not uphold the police's decision that section 52(2.1) applies to exclude the records from the scope of the *Act*.

2. I order the police to provide the appellant with a decision respecting access to the records, as contemplated by section 19 of the *Act*, treating the date of this order as the date of the request.

Original Signed By: November 14, 2014
Catherine Corban
Adjudicator