Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3110

Appeal MA13-629

City of Toronto

October 15, 2014

Summary: The appellant, a company involved in the food service industry, asked the city for access to records about a presentation called the "Healthy Environment Knowledge Exchange" including the presentation as well as notes, minutes, attendance lists, emails and other records. The city granted access to certain records, but denied access to portions of emails on the basis that they were not responsive to the request. It also took the position that the portion of the presentation relating to the appellant was excluded from the operation of the *Act* as a result of section 52(2.1) (records relating to an ongoing prosecution) because the city was in the process of prosecuting the appellant for violation of the city's "Holiday Shopping" by-law.

This order upholds the city's decision that portions of certain emails are not responsive to the request. It also finds that section 52(2.1) does not apply to the withheld portion of the presentation as this record does not relate to an ongoing prosecution, and orders the city to provide the appellant with an access decision on it.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17 and 52(2.1).

Orders Considered: Orders P-880, MO-3101, MO-3103, PO-2703 and PO-3260.

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 appellant, a company involved in the food service industry, made a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to an identified presentation called the "Healthy Environment Knowledge Exchange." The appellant later clarified that the request was for:

1. Copy of the presentation
2. Copy of the speakers notes
3. Attendance lists
4. Questions asked by attendees and [responses] provided by speakers
5. Minutes taken during the presentation
6. E-mail/notes correspondence with relation to [the appellant] from [two named individuals].

[2] The city asked for further clarification regarding the request, and the appellant advised as follows:

> At the present time we are looking for all records pertaining to [the appellant]. Also include a list of attendees and a list of who received an invitation to attend the knowledge exchange.

[3] In response to the clarified request, the city issued a decision granting partial access to the records. It granted access to the "Healthy Environments Knowledge Exchange" agenda, list of attendees, and various emails and abstracts relating to the event. The city also confirmed that some personal information was severed from the records on the basis of the exemption in section 14(1) (personal privacy) of the *Act*.

[4] The decision letter also indicated that access to the portion of the presentation relating to the appellant was denied on the basis of the exclusion in section 52(2.1) [ongoing prosecution] of the *Act*. In addition, the city also stated that some portions of the records were not responsive to the request, including the portions of the presentation which relate to two other entities, as well as some emails which pertain to administrative issues.

[5] The appellant (through its representative) appealed the city's decision.

[6] During mediation, the appellant's representative confirmed that he was appealing the city's application of section 52(2.1) of the *Act* to the portion of the presentation relating to it. He also confirmed that he was appealing the city's decision that the severed portions of the emails are not responsive to the request. In addition, he stated that he was not appealing the application of section 14(1) to portions of records.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I decided to send a Notice of Inquiry identifying the facts and issues in this appeal to the city, initially. The city provided representations in response and I sent the non-confidential portions of them, along with the Notice of Inquiry, to the appellant, who also provided representations. The city was then invited to respond to the representations of the appellant, which it did with reply representations.

[8] In this order, I find that the withheld portions of the emails are not responsive to the request. I also find that section 52(2.1) does not apply to the record for which it is claimed, as this record does not relate to a current proceeding in respect of an ongoing prosecution. As a result, I order to the city to provide an access decision on this record to the appellant.

RECORDS:

[9] The record for which the exclusion in section 52(2.1) is claimed consists of a 42-page power-point presentation made by city staff to the attendees at the "Healthy Environments Knowledge Exchange" event (hereafter the "presentation"). It relates to the investigation and prosecution of the appellant in 2011 for certain public health matters.

[10] The information identified as non-responsive and remaining at issue consists of portions of the emails on pages 12, 14 and 15.

ISSUES:

A. Are the withheld portions of pages 12, 14 and 15 responsive to the request?

B. Is the 42-page presentation relating to the appellant excluded from the *Act* on the basis of section 52(2.1)?

DISCUSSION:

Issue A: Are the withheld portions of pages 12, 14 and 15 responsive to the request?

[11] The city takes the position that portions of emails on pages 12, 14 and 15 are not responsive to the request.

[12] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[14] In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to [section 17(2) of the *Act*] to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[15] In this appeal, the appellant's initial request was for records regarding an identified presentation, and included a list of various types of records including "copies of email correspondence." After discussions with the city, the appellant clarified the request as set out above. With respect to any email correspondence, the appellant confirmed that it was requesting "e-mail/notes correspondence with relation to [the appellant] from [two named individuals]." The appellant later confirmed that, with respect to the emails, it was seeking "all records pertaining to [the appellant]."

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[1] Orders P-134 and P-880.

[16] The city denied access to the withheld portions of the emails on the basis that they do not relate to the appellant, and that they pertain to "administrative issues." In its representations, the city states that the appellant clarified the request and confirmed that it was seeking emails pertaining to the appellant, not relating to the presentation generally. The city then submits that the withheld portions of the emails relate to the event generally, and "not the specific presentation" which was the subject of the request.

[17] The appellant does not address this issue in its representations.

[18] On my review of the brief withheld portions of the emails, I am satisfied that they relate to administrative matters concerning the event, and that they do not relate to the appellant. Based on the appellant's clarified request, in which it confirmed that it was only seeking access to emails pertaining to it, I find that the withheld portions of the emails are not responsive to the appellant's clarified request.

Issue B. Is the 42-page presentation relating to the appellant excluded from the *Act* on the basis of section 52(2.1)?

Background

[19] The appellant is a company involved in the food service industry, and has a number of retail locations in the city. Because of its involvement in the food service industry, Toronto Public Health is involved in inspections and in responding to health-related complaints about the various locations operated by the appellant. Because it is a retail establishment, the appellant is also subject to the requirements relating to holiday shopping, set out in the city's *Municipal Code* Chapter 510, (the city's by-law regulating "Holiday Shopping").

[20] The city states that in 2011, an investigation and prosecution was conducted by Toronto Public Health involving one of the retail locations operated by the appellant (the subject location). It states that, due to health concerns, this investigation resulted in a closure order being issued with respect to that location. The city also confirms that these enforcement and prosecution activities of the city in relation to that location were eventually resolved. It then confirms that the 42-page presentation at issue in this appeal relates to the 2011 health-related investigation and prosecution, and that this presentation was given in May of 2013. I will refer to this health-related prosecution as the "2011 prosecution."

[21] The city then states that in August of 2013 it commenced a proceeding before the Ontario Court of Justice under the *Provincial Offences Act*, concerning potential violations of the city's *Municipal Code* Chapter 510, related to various business locations operated by the appellant on a holiday (July 1, 2013 - Canada Day). The city refers to these proceedings as the "First Prosecutions."

[22] The city also states that further proceedings before the Ontario Court of Justice under the *Provincial Offences Act* were commenced in September of 2013, also concerning potential violations of the city's *Municipal Code* Chapter 510, related to various business locations operated by the appellant on a holiday (September 2, 2013 - Labour Day). The city refers to these as the "Second Prosecutions."

[23] The city confirms that the First and Second Prosecutions relate to various locations operated by the appellant, including the subject location referenced in the presentation, which was the subject of the 2011 prosecution.

[24] The city takes the position that the 42-page presentation is excluded from the *Act* because of the application of the exclusion in section 52(2.1), which reads:

> 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

[25] 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.[2]

[26] 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.[3]

[27] 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."[4]

[28] 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.[5]

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[2] *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.).
[3] Order PO-2703.
[4] *Toronto Star*, cited above. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP),* 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.
[5] Order PO-2703.

Preliminary issue - Burden of proof

[29] The city confirms that section 52(2.1) is not an exemption as referred to in section 42 of the *Act*, and that the issue of whether the exclusion in section 52(2.1) applies is a jurisdictional issue. The city then argues that, where a jurisdictional issue is raised, the burden of proof that the exclusion applies does not rest primarily or solely on the city.

[30] In its representations, the city refers to previous orders of this office which have established that the onus of proof for a proposition lies with the party who is advancing it.[6] The city argues that, in the current appeal, it is the appellant that is advancing a proposition (that the general right of access provided by section 4 of the *Act* applies to the responsive record), and that the appellant therefore has the onus to show that the exclusion does not apply. It states:

> In the current circumstances, the proposition that must be established is [the appellant's] allegation that the general right of access provided by section 4 of [the *Act*] applies to documents responsive to the request, and not whether an exemption applies to deny access to the records.

[31] In support of its position, the city refers to one of the purposes of the section 52(2.1) exclusion (to ensure that on-going prosecution[s] are not impeded by requiring institutions having to address access-to-information requests related thereto), and that placing the onus on the city to "disprove unsupported allegations" that the request for the record does not have some connection to the current prosecution is "not consistent with the purpose of the exclusion."

[32] The city also provides an ancillary argument, claiming that if an onus is imposed on the city to establish that section 52(2.1) applies, this onus on the city "cannot be absolute," because whether or not a record has or will have a connection to a prosecution "is not a matter which is primarily or entirely within the knowledge of the city."[7]

[33] In its reply representations, the city reviews its record-holdings relating to various health-related complaints resulting in enforcement and prosecution activities by the city, including the presentation referencing the 2011 prosecution, which is the record at issue in this appeal. The city also states that the "First" and "Second" prosecutions relate only to prosecutions for holiday shopping. The city notes that the request for information in this appeal, (and similar requests by the appellant relating to other records and/or locations) was submitted by the appellant very shortly after the "First Prosecutions" were commenced.

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[6] The city refers to the case of *Dow Chemical of Canada v. Pritchard* [1970] OJ. No. 829 (H.C.J.).

[7] A more detailed review of the city's arguments can be found in Orders MO-3101 and MO-3103, where the city made similar arguments about the burden of proof for section 52(2.1).

[34] The city then states:

> … the City has alleged that section 52(2.1) applies …, and [the appellant] states it does not. While the City agrees that in such a determination, the City may need to advance information to establish the application of section 52(2.1), some information necessary to determine the question of jurisdiction is unknown to the City, and lies squarely with [the appellant], as such the onus imposed on the City concerning the application of [the *Act*] cannot be absolute.
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> In particular, confirmation of whether or not [the appellant] is intending to use this information in relation to a proceeding related to a prosecution, … has not been provided to the IPC.
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> The City has reasonably assumed, in the absence of this information, however, based on [the appellant's] pattern of conduct and the nature of the information in question that there some connection between this information, and a proceeding relating to a prosecution.

[35] Previous orders have considered the issue of the burden of proof in circumstances where an exemption claim is not at issue. As noted, this office has previously established that the onus of proof for a proposition lies with the party who is advancing it. In Order MO-2439, former Senior Adjudicator John Higgins reviewed the onus of proof in circumstances when exemptions are not at issue. In that appeal, the senior adjudicator had to determine whether the confidentiality provision in section 181 of the *City of Toronto Act, 2006* (COTA) applied and prevailed over the *Act*. In his discussion of the burden of proof, he stated:

> I agree with the city that section 181 of the *COTA* is not an exemption under the *Act*, and strictly speaking, section 42 therefore does not apply. However, for the reasons that follow, I do not agree that section 181 of the *COTA*, … has the effect of creating an onus on requesters to prove that it does not apply.
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> Although section 42 is not strictly applicable as assigning an onus of proof where an institution relies on a confidentiality provision in another statute, rather than an exemption under the *Act*, I believe that this section still provides assistance in assessing the question of onus. In my view, section 42 indicates an intention on the part of the Legislature that, where a record is in the custody or under the control of an institution such as the City, the onus of proving non-accessibility under the *Act* rests with the institution. This is consistent with the purpose of the *Act* in section 1(a)(i) to "provide a right of access to information under the control of

institutions in accordance with the principle[] that … information should be available to the public."

Even without relying on section 42, the City's argument that the burden of proof in this case falls on the appellant is without merit and unsustainable in law.

Section 4(1) of the *Act* stipulates that "[e]very person has a right of access to a record or part of a record under the custody or control of an institution unless …" the record is exempt under sections 6 to 15 or the request is frivolous or vexatious. This is the primary section establishing that the *Act* applies to the record holdings of institutions. There are several other sections setting out instances where the *Act* either does not apply (section 52), or records are not accessible because of a prevailing confidentiality provision (section 53). As noted above, the City relies on section 53 in conjunction with section 181 of the *COTA*.

Based on section 53 of the *Act* and section 181 of the *COTA*, the City seeks to prove that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are in fact not accessible because of a prevailing confidentiality provision. The City thus seeks to oust the accessibility of records under the *Act*, which would otherwise be subject to the access scheme established under the *Act* for records under the City's custody or control.

Seen in that light, it is clear that section 4(1) of the *Act* establishes a positive right of access on which members of the public are entitled to rely. The City wishes to remove the requested record from that positive right. In my view, the law of evidentiary burdens would place the onus of proof to accomplish that objective on the City. Failure by the City to establish the application of section 181(1) of the *COTA* will have the result that the City does not succeed on this point, and the *Act* would be found to apply.[8]

It is also unfair, unreasonable, and contrary to the purpose of the *Act*, cited above, for the City to suggest that requesters have the onus of disproving that section 181 of the *COTA* applies to records they have requested. To discharge such an onus, a requester would need: (1) detailed knowledge of the City's record holdings; (2) knowledge of the precise nature of what records exist in the City's record holdings that may be responsive to his or her request, and (3) knowledge of where copies of such records would be located within the City's records. This information

[8] The former Senior Adjudicator refers to *The Law of Evidence in Canada* by John Sopinka, Sidney N. Lederman and Alan W. Bryant (Markham: Butterworths, 1992) at p. 57.).

> would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, [1970] O.J. No. 829 (H.C.J.), the onus of proving information that is peculiarly within the knowledge of a party rests with that party, in this case, the City.
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> For all these reasons, I find that the burden of proving the application of section 181 of the *COTA*, in conjunction with section 53 of the *Act*, falls on the City in this appeal.

[36] I adopt the conclusions of former Senior Adjudicator Higgins, and apply them to the circumstances of this appeal.

[37] In this appeal, the city takes the position that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are not accessible because of the application of the exclusion in section 52(2.1). The law of evidentiary burdens places the onus of proof to establish that on the city, and failure by the city to establish the application of section 52(2.1) will result in a finding that the *Act* applies.

[38] I also agree with the former senior adjudicator that it is unfair, unreasonable, and contrary to the purpose of the *Act* to suggest that requesters have the onus of disproving that the exclusion applies. As stated in Order MO-2439, this would require a requester to have: (1) detailed knowledge of the city's record holdings; (2) knowledge of the precise nature of what records exist in the city's record holdings that may be responsive to the request, and (3) knowledge of where copies of such records would be located within the city's records. This information would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, the onus of proving information that is peculiarly within the knowledge of a party rests with that party. In this case, the city is that party, as it has the records.

[39] As a result, I find that the burden of proving the application of section 52(2.1) of the *Act* falls on the city in this appeal.

[40] Lastly, with respect to the city's position that any onus on it to establish that section 52(2.1) applies cannot "be absolute," in my view, this alternative argument does not go to the issue of which party has the burden of proof, but rather, it goes to the weight of the evidence regarding whether the exclusion applies. This evidence can be found, *inter alia*, in the representations of the parties, the circumstances of the appeal, and the records themselves. I review the evidence in this appeal regarding whether section 52(2.1) applies below.

Representations on whether section 52(2.1) applies

The city's initial representations

[41] The city states that the request in this appeal relates generally to the city's law enforcement activities concerning a retail location operated by the appellant. It also confirms that this location was the subject of previous health-related enforcement and prosecution activities, which were eventually resolved.

[42] The city claims that section 52(2.1) applies to the 42-page presentation relating to the appellant, and states that it is currently in the process of proceeding with the "First" and "Second" prosecutions. It also confirms that these on-going prosecutions concern the specific subject location referred to in the presentation, which was the location of the 2011 prosecution.

[43] Regarding the application of the exclusion in section 52(2.1) the city refers to the following three elements that must be established for the section 52(2.1) exclusion to apply:[9]

- 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.

[44] The city then states that, in the current matter, there is "no possibility of dispute concerning the fact that the first and third elements have been established." It states:

> Currently … the City has commenced prosecutions for the offences of "Sell or Offer Any Goods or Services for Sale on a Holiday," contrary to section 510-2A of Chapter 510 at the very location which is the subject of the current request, along with other locations. By any metric - it cannot be stated that the two sets of prosecutions are concluded - at the time of the request, the prosecutions were in the process of being commenced, or had just recently been commenced. …

[45] The city then summarizes the various court dates and appearances, and states "It cannot be stated that all matters relating to these prosecutions are concluded." It then confirms its position that the only outstanding issue is whether there is "some connection" between the 42-page presentation and the on-going prosecutions. It states:

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[9] See Order PO-3260.

> In mediation, [the appellant] has submitted that the City cannot rely on the current prosecution as this request is for documents arising from a previous prosecution by the City - which is concluded. The sole point of contention is not whether there is ongoing prosecutions or matters relating to prosecutions - but rather if there is a connection between the documents and the on-going prosecutions which exist. [The appellant] stated in mediation that there is not.

[46] The city then submits that the appellant's position is not correct, and states:

> As noted in the presentation, the documents contain information concerning the actions taken, and the effectiveness of these particular actions in obtaining suitable results. A summary of previous enforcement and prosecution efforts concerning the same party at the same location may be useful in the context of current prosecutions. There is not a need for a document to rely only to one prosecution to be subject to section 52(2.1). …
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> What is known, is that [the appellant] - the defendant in the First and Second Prosecutions - has requested a presentation concerning the previous "law enforcement actions" at the location that is the subject of the current proceedings. [The appellant] has made the current request for a presentation concerning a previous investigation and prosecution relating to [the subject location]. There will be some factual relationship between the content of these records (i.e. the location of the investigation, etc.) and the records, which are currently proposed to be used in the prosecution, by the City. The City has made full disclosure of the information, which the City believes is relevant to the First and Second Prosecutions.
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> Additionally, [the appellant] has made additional access requests dealing with previous investigations and law enforcement activities during the last three and a half years, concerning [the subject location], as well as two other … locations. The content of these records being the subject matter of other on-going appeals involving [the appellant] currently before the IPC.

[47] The city then states that while it may believe that all of the information relevant to the First and Second Prosecutions has been produced in accordance with the city's disclosure obligations, the defendant in those prosecutions (who is the appellant in the present appeal) may have a different opinion, and is seeking additional disclosure. It states:

> While the City believes that all information that the City as Prosecutor believes can reasonably be used by the defence to meeting the case advanced in the First and Second Prosecution, advancing a defence, or otherwise in making a decision which may affect the conduct of the trials (such as the decision to call evidence on a point) has been presented to [the appellant], this may not be the opinion held by [the appellant]. Perhaps [the appellant] is attempting to undertake research in preparation for actions related to the First and Second Prosecutions - such as motions relating to disclosure obligations or otherwise. It is not in keeping with the purposes of [the *Act*] to require the City to process requests for information relating to a previous prosecution in the middle of addressing the obligations to disclose information in the context of the current prosecutions.
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> The purpose of section 52(2.1) is to prevent such uses of [the *Act*], as to preserve the integrity of the court system by requiring such research to be undertaken within the context of the processes established for the exchange of information in these contexts.

[48] The city then distinguishes this appeal from the finding in Order PO-3260. It states:

> While the City is unable to conclude with certainty as to the purpose or motivation for the current request, this is unlike the situation in Order PO-3260, as there is some connection to the subject matter of the current request and the First and Second Prosecutions. The City notes that in Order PO-3260, the request was by a third party - and not the defendant - for "probation" records relating to a concluded prosecution that was completely unrelated to the criminal proceedings subsequently having been commenced in another province. In the current circumstances, it is the defendant who has filed a request days after one prosecution had been commenced, and another investigation conducted seeking a presentation concerning the previous enforcement activities at the location.

[49] The city also confirms that the request was made "at the same time as numerous other requests for information" and that:

> These requests for information included requests relating to past and present enforcement and investigation efforts concerning [the appellant's] operations, the subject matter of the current prosecutions, including the previous aforementioned 2011 enforcement efforts.

[50] The city then states that it believes that the appellant's conduct establishes a belief that the information has "some connection" to the current or previous prosecutions.

[51] Finally, the city reviews the purposes of section 52(2.1) and states that a finding that this section applies in this appeal would meet those purposes. It concludes by stating:

> To conclude otherwise, would require the city, in the first instance, or the IPC, in the current appeal, to be satisfied that [the appellant] simply, days after the current prosecutions, requested a volume of information relating to past and current prosecutions for reasons (as of yet undisclosed) unrelated to the current or past prosecutions. With respect, the city does not believe that it is reasonable to conclude in these circumstances that in the absence of evidence to the contrary, that this request is not for documents which [the appellant] believe[s] have some connection to the current prosecutions.

The appellant's representations

[52] The appellant also refers to the *Toronto Star* decision[10] and its finding that there must be "some connection" between the records and the prosecution. The appellant argues that there is no connection between the record at issue in this appeal and the current ongoing prosecutions. It refers to the city's representations, and states:

> … the city mentions an investigation, enforcement and prosecution relating to [the subject location] which commenced in 2011. However, as the city readily acknowledges, the enforcement and prosecution activities "were eventually resolved". They have since been completed, such that section 52(2.1) does not apply.
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> … the city goes on to describe two ongoing prosecutions relating to Holiday Shopping infractions.
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> However, as the city submits … and as the portions of the presentation that have been disclosed plainly reveal, the Healthy Environment Knowledge Exchange presentation arises from public health matters and has nothing to do with Holiday Shopping.

[10] See footnote 1, above.

[53] It then states:

> The Access Request that is the subject of this appeal was made to Toronto Public Health.
>
> The purported prosecutions pertaining to [the appellant's locations] are narrow and specific proceedings. They relate strictly to the sale of goods on a single specified date, and have nothing whatsoever to do with Public Health, which is the subject of the within Access Request.
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> There is no reasonable basis to believe that the investigation into the sale of goods on a single date would in any way involve the files requested in the within Access Request.
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> … the city is attempting to deny the within access request on the basis of purported investigations and proceedings concerning entirely different subject-matters.

Reply representations

[54] In reply, the city notes that the test is not whether a document relates to an investigation, but rather a proceeding that is related to a prosecution. It also states that the subject matter of the request could have "some connection" to the on-going prosecutions, and identifies "other methods" in which the requested documents could have some connection to the current prosecutions or "non-concluded proceedings related to previous prosecutions." It states:

> For example, [the appellant] could not share the City's opinion [that it got full disclosure in the prosecutions] and is seeking additional disclosure, believing that this information is relevant to advancing a defence, or otherwise in making a decision which may affect the conduct of the trials (such as the decision to call evidence on a point). One example is that [the appellant] may be seeking to undertake actions related [to] the current prosecutions and is seeking the documents in support of a Charter challenge to the current prosecution (for example, a motion as was advanced in the last prosecutions in support [of the appellant's] allegations of enforcement behavior "singling" out [the appellant] in contravention of the Charter). Perhaps, [the appellant] may be seeking to undertake actions related to previous prosecutions; and is attempting to utilize [the *Act*] to obtain disclosure of information, outside of the processes established for these purposes.

[55] The city also states that the appellant could have disproved potential connections between a document and a proceeding by stating that it is aware of no proceeding that;

a) is not concluded; b) relates to a prosecution; and c) has some connection to the documents in question. The city states that the appellant has "refused to provide this information - which is entirely within their knowledge."

[56] The city concludes by reviewing the purpose of section 52(2.1) and stating:

> In the current circumstances, it is [the appellant] who has filed a request days after one prosecution had been commenced, and another investigation conducted, as part of a pattern of requests. The city believes that the conduct of [the appellant] establishes a belief that the information has "some connection" to the current prosecution.

Analysis and findings

[57] In order for the exclusion in section 52(2.1) to apply, the party relying on section 52(2.1) 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.[11]

[58] The issue before me is whether there exists "some connection" between the 42-page presentation at issue and the First and Second prosecutions.

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

> We agree … that there are additional important purposes underlying [section 52(2.1)], including the following:
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> > 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 criminal justice system and ensuring that the accused and the Crown's

[11] See Order PO-3260.

> 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 …

[60] In this appeal, the record at issue is the 42-page presentation, made to the attendees of the "Healthy Environment Knowledge Exchange," relating to the 2011 prosecution of the appellant for public health violations. However, the ongoing prosecutions relate to possible violations of the city's "holiday shopping" by-law.

[61] The city, which is conducting the ongoing prosecutions (which relate solely to the possible violation of the city's holiday shopping by-law), has not provided evidence that it intends to rely on the record at issue, which relates to a 2011 public health investigation and prosecution, in the current prosecutions. The city speculates as to how the appellant might use the record in the current prosecutions. The only real evidence provided by the city about a connection between the record and the ongoing prosecutions is the fact that both relate to the same subject location, and that the request in this appeal (and other requests made by the appellant) was made very shortly after one of the current prosecutions was commenced, and while the other investigation was ongoing. It states that the conduct of the appellant establishes a belief that the information has "some connection" to the current prosecutions.

[62] I have reviewed the representations of the parties, including the city's summary of the circumstances surrounding this request and other similar requests made by the appellant. I have also reviewed the record at issue in this appeal, which relates exclusively to the public health investigation, enforcement and prosecution activities undertaken by the city in 2011.

[63] The city has confirmed that the 2011 health-related enforcement and prosecution activities to which the requested record relates were eventually resolved. In that regard, this health-related prosecution, or any related proceedings, are not "ongoing" for the purpose of section 52(2.1). Although the city alludes to possible "non-concluded proceedings related to previous prosecutions," it has not provided evidence that these proceedings are ongoing and/or not concluded, and specifically states that the prosecution activities to which the record relates were eventually resolved. In that regard, to the extent that the records are "prosecution materials" for the purpose of section 52(2.1), they relate to the 2011 health-related prosecution, all proceedings in respect of which have now been completed.

[64] With respect to the ongoing First and Second prosecutions (relating to holiday shopping), I find that the record at issue cannot be considered "prosecution materials" which apply to these prosecutions, as contemplated by the court in *Toronto Star.* There is no evidence that the city will be relying on the record as part of its case in the ongoing prosecutions. As found in Order PO-3260, even if the exclusion could protect a broader range of materials than those relevant to the prosecutor's case or the conduct

of the proceedings, the evidence in this appeal does not establish the requisite relationship between the record and the proceedings in the ongoing prosecutions.

[65] I find that the 42-page presentation at issue in this appeal does not fall within the ambit of section 52(2.1). The city's speculations about potential use of the information by the appellant provide no basis for finding that it does. On my review of the representations, the record and the circumstances of this appeal, I find that the city has not provided sufficient evidence to establish "some connection" between the 42-page presentation at issue and the First and Second prosecutions.

[66] Because the 42-page presentation is not excluded from the operation of the *Act*, I will require the city to issue a decision respecting access to it.

ORDER:

1. I uphold the city's decision that the withheld portions of pages 12, 14 and 15 are not responsive to the request.

2. I order the city to provide the appellant with a decision respecting access to the 42-page presentation, as contemplated by section 19 of the *Act*, treating the date of this order as the date of the request.

Original signed by: October 15, 2014
Frank DeVries
Adjudicator