

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3480

Appeals MA16-147 and MA16-148

Town of Richmond Hill

August 4, 2017

Summary: The appellants sought access to the town's complete file for their two properties. The town located records responsive to the requests and denied access to them under the ongoing prosecution exclusion in section 52(2.1) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellants appealed the town's decisions and their two appeals were joined for adjudication purposes. The town's decisions are upheld and the appeals are dismissed.

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

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] Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the Town of Richmond Hill (the town) received two identical requests for two neighbouring properties from the appellants. The requests sought access to the town's complete file for each property, including planning, regulatory, by-law enforcement, fire and emergency services documents, and all inspection and investigation records. The town located responsive records related to each property and issued two access decisions denying the appellants access to the records on the basis of the exclusion in section 52(2.1) (ongoing prosecution) of the *Act*. In its decisions, the town also claimed

that the discretionary exemptions in sections 38(b) (personal privacy) and 8(1)(a) (law enforcement matter) apply to all of the records, while the discretionary exemption in section 8(1)(c) (reveal investigative techniques and procedures) applies to certain records.

[2] The appellants, who did not accept that the responsive records are excluded or exempt from disclosure as claimed by the town, appealed the town's decisions to the Office of the Information and Privacy Commissioner (IPC). Mediation was attempted but did not resolve the issues in these appeals. As a result, the appeals were transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*.

[3] The issues in each appeal are the same and some of the records at issue are responsive to both Appeals MA16-147 and MA16-148. Due to the similarities and overlap, I issued one Notice of Inquiry for the two appeals and invited the representations of the town on the issues set out below. The town provided representations, some parts of which satisfied the confidentiality criteria in the IPC's *Code of Procedure* and *Practice Direction Number 7*. I shared only the non-confidential portions of the town's representations with the appellants and invited them to respond to the issues set out in the Notice of Inquiry with reference to the town's representations. The appellants provided brief representations and the town provided a brief reply.

[4] In this order, I uphold the town's decisions in respect of Appeals MA16-147 and MA16-148 and dismiss these appeals.

RECORDS:

[5] The 84 pages of records at issue in the two appeals consist of various communications (correspondence, emails, handwritten notes, call logs, notices and inspection reports) about the neighbouring properties.

DISCUSSION:

[6] As a result of my decision in these appeals, the sole issue I address in this order is whether the records are excluded from the application of the *Act* by virtue of section 52(2.1) 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.

[7] The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused's 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

[8] 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

[9] 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

[10] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed; a question that must be decided based on the facts of each case.⁴

The town’s representations

[11] The town submits that section 52(2.1) applies to exclude all of the records at issue in the two appeals from the application of the *Act* because they all relate to a continuing prosecution in which all the proceedings have not been completed.

[12] The town submits that it is well established that “prosecution” for the purposes of section 52(2.1) of the *Act* includes quasi-criminal offences and regulatory offences that carry true penal consequences such as a significant fine. It states that all of the records at issue relate to prosecutions by its Chief Building Officer (CBO), or the CBO’s designate, pursuant to section 36 of the *Building Code Act*,⁵ which states, in part:

36 (1) A person is guilty of an offence if the person,

...

(b) fails to comply with an order, direction or other requirement made under this Act; or

(c) contravenes this Act, the regulations or a by-law passed under section 7.

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) (*MAG v Toronto Star*).

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 SCR 66 at para 25.

⁴ Order PO-2703.

⁵ 1992, SO 1992, c23.

...

(3) A person who is convicted of an offence is liable to a fine of not more than \$50,000 for a first offence and to a fine of not more than \$100,000 for a subsequent offence.

(4) If a corporation is convicted of an offence, the maximum penalty that may be imposed upon the corporation is \$100,000 for a first offence and \$200,000 for a subsequent offence and not as provided in subsection (3).

...

(6) Every person who fails to comply with an order made by a chief building official under subsection 14(1) or clause 15.9(6)(a) is guilty of an offence and on conviction, in addition to the penalties mentioned in subsections (3) and (4), is liable to a fine of not more than \$10,000 per day for every day the offence continues after the time given for complying with the order has expired.

[13] The town states that sections 36(1) and (6) of the *Building Code Act* enact quasi-criminal offences for contraventions, while sections 36(3), (4) and (6) enact true penal consequences in the form of significant fines that may be levied against any person or corporation convicted of contravening the *Building Code Act*. The town argues that the only reasonable conclusion to draw is that any proceeding against a person and/or corporation pursuant to section 36 of the *Building Code Act* is a prosecution within the meaning of section 52(2.1) of the Act.

[14] It continues that there is irrefutable evidence that the records at issue in these appeals relate to the prosecution of the appellants and their numbered companies pursuant to section 36 of the *Building Code Act*. The town points to the affidavit sworn by its CBO which affirms that:

3.The freedom of information request for the matter herein arises from an application for building permits for [two named addresses], Richmond Hill (collectively referred to as the "**Subject Lands**")...

13.[the appellants and their numbered companies] were ultimately convicted for failing to comply with an order to comply and failing to comply with certain regulations under the *Building Code Act* pertaining to the Subject Lands.

[15] The town asserts that there is an indisputable connection between the records at issue and the charges on which the appellants and their numbered companies were convicted under the *Building Code Act*. The town argues that these convictions establish the existence of a prosecution. It adds that although the appellants were convicted in May of 2016, the proceedings in respect of the prosecution are ongoing. The town

argues that the appellants have demonstrated a clear intent not to comply as is evidenced by the totality of the records and, as a result of the non-compliance, the CBO has had no choice but to prosecute the appellants and to continue to prosecute them for non-compliance with the *Building Code Act* in respect of the properties.

[16] The affidavit of the CBO attests to the fact that search warrants were executed on the properties and further Orders to Comply were issued in October 2016. It explains that each Order and Order to Comply that it issued to the appellants in October 2016 may result in further prosecution of the appellants for continuing non-compliance with the *Building Code Act*.

[17] The town acknowledges that the vast majority of building permits, complaints, inspections and related records will not always necessarily result in a prosecution. This is because most people and corporations voluntarily comply with the requirements of the *Building Code Act* making prosecution unnecessary, however, this is not the case in these appeals; the records clearly demonstrate that the appellants have not complied with the *Building Code Act* generally and Orders to Comply specifically.

[18] The town concludes by asserting that the October 2016 Orders and Orders to Comply are inherently connected to the original building permits issued in 2011 and as attested to in the CBO's affidavit, "the ongoing deficiencies prevent the town from issuing Occupancy Certificates pursuant to the Building Code." This, the town argues, means that all of the proceedings in respect of the prosecution will have been completed only when the appellants and their numbered companies comply with the *Building Code Act* and are issued Occupancy Certificates pursuant to it.

[19] The town also provides confidential representations on this issue which I am not able to describe in this order.

The appellant's representations

[20] In their representations, the appellants assert that the records at issue should be disclosed and they state, "The fact that these documents have a direct relation to ongoing legal proceedings, should be grounds alone for them to be produced forthwith."

[21] The appellants submit that any legal proceedings initiated by the town were completed months ago. The appellants also state that due to legal proceedings with the town that they initiated, they currently require a copy of the town's approved permit drawings for one of the properties, as these drawings are "crucial evidence" needed for their legal proceedings against the town and to further substantiate their claims. The appellants state that one of them drew and authored the approved permit drawings and there is no valid reason for the town to deny them access to these drawings.

[22] The appellants state that they also specifically seek the inspection records prepared by a named by-law enforcement officer. They explain that the enforcement

officer allegedly inspected their properties on a specific date, however, the CBO refuses to release the particulars of this inspection to them. The appellants ask that they receive one photograph or "shred of evidence" that the inspection actually took place and they invite me to remove any information from the inspection records needed in order to be able to order disclosure of these records.

The town's reply

[23] The town replies that it will disclose the permit drawings the appellants requested in their representations as it would be absurd for it to refuse to disclose documents that the appellants themselves submitted to the town. The town notes that the permit drawings are not part of the records at issue in these appeals, however, it confirms that it will nonetheless locate and disclose them to the appellants.

[24] In response to the appellants' assertion that the town's legal proceedings against them were completed months ago, the town states that it "remains under legal proceedings with respect to the prosecution of the appellants" as of August 1, 2017. It states there are multiple court proceedings that are scheduled in the near future. These include a court date in early August 2017 where it will respond to the appellant's appeal of its two *Building Code Act* Orders to Comply of October 2016, which directed the appellants to bring their properties in compliance with the approved drawings. The town notes that the statute of limitations for an infraction under the *Building Code Act* is one year from the date of the infraction and that it will be initiating charges against the appellants in August 2017.

[25] The town adds that it also initiated charges against the appellants for non-compliance with the zoning by-law in February 2017 and had a brief first court appearance on June 15, 2017. It states that one of the appellants appeared in court on that date and asked that the matter be adjourned to October 2017. The town submits that the October 2017 court date is yet another ongoing legal proceeding in its ongoing prosecution of the appellants for *Building Code Act* violations.

Analysis and finding

[26] Having reviewed the town's complete representations, including those that are confidential, and the records themselves, I am satisfied that the exclusion applies to all of the records at issue in these two appeals.

[27] The records are all connected to the investigation and enforcement activities of the town with respect to the appellants' non-compliance with building code requirements. On their face the records establish that they relate to the town's prosecution of the appellants and their numbered companies for offences under the *Building Code Act*. The offences under section 36 of the *Building Code Act* that the town identifies in its representations are regulatory offences that carry with them a significant fine; accordingly, prosecution of these offences qualifies as a "prosecution" under

section 52(2.1) of the *Act*.

[28] The appellants do not dispute that the records relate to proceedings brought by the town against them or that such proceedings qualify as a prosecution for the purposes of section 52(2.1). Their main argument is that these proceedings were completed long ago and, for this reason, the records do not qualify for exclusion under section 52(2.1).

[29] On the issue of whether “all proceedings in respect of the prosecution” have been completed, I accept the town’s submissions that it will continue to prosecute the appellants and their numbered companies under sections 36(1) and/or (6), which may in turn result in further convictions for continuing non-compliance with the *Building Code Act*, on the August 2017 court dates it has identified. The August 2017 court dates are evidence that all proceedings in respect of the town’s prosecution of the appellants as a result of continuing non-compliance arising from the building permits for the two properties are not completed.

[30] For the foregoing reasons, I find that the exclusion in section 52(2.1) of the *Act* applies to the records.

ORDER

I uphold the town’s decisions and dismiss these appeals.

Original Signed by: _____
Stella Ball
Adjudicator

August 4, 2017 _____