Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3818

Appeals MA17-244, MA17-245 and MA17-246.

Ottawa Police Services Board

August 14, 2019

Summary: The Ottawa Police Services Board (the police) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to reinforced gloves. The police denied access to the requested information citing the exclusion for records relating to a prosecution at section 52(2.1) of the *Act*. The appellant appealed the police's decisions not to disclose the requested records.

In this order, which addresses all three requests, the adjudicator finds that the exclusion at section 52(2.1) applies to the majority of the requested records and upholds the police's decision that they are excluded from the scope of the *Act*. However, she finds that emails to and from the Police Chief about gloves of a non-reinforced nature that pre-date an identified incident are not excluded under section 52(2.1). The adjudicator orders the police to issue an access decision with respect to those emails, in accordance with the procedure set out in the *Act*.

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] The Ottawa Police Services Board (the police) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to reinforced gloves. Specifically, the requester sought access to

the following:

> Request 1: All emails to and from Ottawa Police Chief [named individual] about gloves, from March 5, 2012 to date of this request.
>
> Request 2: Documents pertaining to the distribution of reinforced gloves to police including which units/members get them, when police first acquired them, what the protocols for use are, and any instructions or communications to officers about their use from Jan. 1, 2012, to date of receipt of this request.
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> Request 3: Copies of every invoice received for gloves reinforced with hardened knuckle plating from Jan. 1, 2012, to date of receipt of this request.

[2] The police issued three decisions, one for each of the requests, denying access to the responsive information pursuant to the law enforcement exemptions at section 8 and the exclusion for labour relations or employment-related information at section 52(3) of the *Act*. The police also stated that the information is excluded from the scope of the *Act* based on section 11 of the *Police Services Act*.

[3] Subsequently, the police issued revised decisions for each of the three requests denying access to the responsive information pursuant to the exclusion for records relating to a prosecution at section 52(2.1) of the *Act*. The police stated in the decisions that "…any premature disclosure of the records may interfere with the preparation of the matter before trial."

[4] The requester, now the appellant, filed appeals of the each of police's decisions to deny access to the information pursuant to section 52(2.1) of the *Act*.

[5] During the intake stage of the appeal, the police explained the records were being sought by the Special Investigations Unit (the SIU) in relation to the ongoing prosecution of a police officer charged with manslaughter, aggravated assault and assault with a weapon after an incident in July of 2016 that lead to the death of an individual. The police officer was wearing reinforced gloves at the time of the incident.

[6] As a mediated resolution could not be reached, the appeals were transferred to the adjudication stage of the appeal process for an inquiry. I decided to conduct a joint inquiry for all three appeals. The sole issue to be determined in these appeals is whether the records at issue are excluded from the scope of the *Act* as a result of the operation of section 52(2.1).

[7] I sought and received representations from both parties, which were shared in accordance with this office's sharing procedures set out in the *Code of Procedure* and *Practice Direction 7.* I determined that it was not necessary to share the police's reply representations with the appellant.

[8] In their representations the police advised that the Ministry of the Attorney General (the ministry) might have an interest in the requested records. As a result, I notified the ministry of the request and sought representations on their position as to whether the exclusion at section 52(2.1) applies to the records at issue. I received representations from the ministry, which I then shared with the appellant. The appellant did not submit reply representations in response.

[9] In this order, I find that the time-limited exclusion for records related to a prosecution in section 52(2.1) of the *Act* has been established for the majority of the requested records and I uphold the police's decision that those records are excluded from the scope of the *Act*. However, I find that the police have not established that the exclusion applies to the emails to and from the Police Chief about gloves of a non-reinforced nature that pre-date the incident that gave rise to the charges being addressed in the prosecution. I order the police to issue an access decision to the appellant with respect to access to those emails, in accordance with the procedure set out in the *Act*.

RECORDS:

[10] The records at issue can be described as follows:

- emails to and from the Ottawa Police Chief regarding gloves from March 5, 2012 to the date of the request;
- records related to the distribution of reinforced gloves to police including which units/members get them, when the police first acquired them, what the protocols for use are, and any instructions of communication to officers about their use from January 1, 2012 to the date of the request; and,
- invoices received for reinforced gloves from January 1, 2012 to the date of the request.

DISCUSSION:

Are the responsive records excluded from the scope of the *Act* as a result of the operation of section 52(2.1)?

[11] 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.

[12] 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]

[13] Section 52(2.1) is the only time-limited exclusion under the *Act* and it excludes records from access under the *Act* for as long as the related prosecution is going. 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 is decided based on the facts of each case.[2]

[14] Since records which would otherwise be accessible under the *Act*, as stipulated by section 4(1),[3] 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 institution. The failure of an institution to establish the application of section 52(2.1) will result in a finding that the *Act* applies and that access to the record must be decided under section 4(1) and any applicable exemptions. The evidence comes from the representations of the parties, the circumstances of the appeal, and the records themselves.[4]

Representations of the police

[15] In their representations, the police explain that in the summer of 2016, an Ottawa Police officer was involved in an incident that resulted in the death of an individual. They further explain that at the time of the incident the officer was wearing reinforced gloves. The police state that following an investigation conducted by the SIU, criminal charges were laid against the officer and these charges are presently before the court. The police submit that the requested records, including those relating to the distribution and protocols regarding their use of reinforced gloves, are excluded from scope of the *Act* because they relate to the ongoing prosecution of the officer who was charged. They submit that the next court date is scheduled for a specified date in the spring of 2019.

[16] The police submit that the Crown Attorney responsible for this prosecution stated via email that:

> It is not possible to say whether the records will be relied upon, by either party, at this time. It will depend on how the trial unfolds, and one cannot predict what evidence will be called, or whether the accused will call any

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[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.) (*Ontario (Attorney General) v. Toronto Star*).
[2] Order PO-2703.
[3] Section 4(1) of the *Act* establishes a positive right of access to information in the custody or under the control of an institution unless the request is frivolous or vexatious or a specific exemption, exclusion or confidentiality provision applies.
[4] Orders MO-3139-I and MO-2439.

> cased at all. With respect, it would be improper, and undermine the administration of justice, for the Crown to disclose evidence it intends, or is considering relying upon, before it is tendered in evidence at trial. It would be contrary to the fair trial rights of the accused, and the administration of justice, to disclose the request records while the trial is pending.

Representations of the appellant

[17] The appellant states that she was "very careful" not to ask for any documents regarding the use of reinforced gloves by the officer who was charged and takes the position that the records that she requested are "broader and general in scope." She further states that she does not see how the communication of general information relating to reinforced gloves could compromise the prosecution or infringe upon the officer's right to fair trial.

[18] The appellant elaborates:

> We know, for example, what kind of guns and conducted energy weapons Ottawa Police use, exactly how many of them they have in rotation, which officers get to use them and why, and have even sat in on training sessions for their use. This general information has not and would not compromise cases where accused officers used a Taser or a handgun. I just cannot see (and the police force has failed to explain) why general information about gloves should be treated any differently.

[19] The appellant notes that her request was for emails and documents going back to 2012. She submits that as the incident that gave rise to the charges against the officer occurred in the summer of 2016, the police have failed to explain how emails to the Chief and documents and invoices going back to 2012 would have an impact on the prosecution.

Reply representations of the police

[20] When asked to submit reply representations in response to the appellant's representations, the police stated:

> This request differs from other general requests for information regarding the use of equipment in use by the Ottawa Police Service because the records in question have become part of the ongoing criminal prosecution as stated in previous correspondence to your office.

Representations of the ministry

[21] The ministry submits that it is its position that records that pertain directly or indirectly to this appeal are subject, in their entirety, to the temporary exclusion for

records related to a prosecution set out in section 52(2.1) of the *Act*.

[22] The ministry states that the Divisional Court decision in *Ontario (Attorney General) v. Toronto Star*[5] provided a clear articulation of the scope, rationale and application of section 65(5.2) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), the provincial equivalent of section 52(2.1). The ministry lays out the Divisional Court's findings and states:

> Inherent within all the findings made by the Divisional Court is the implicit and explicit direction that records falling under the s. 65(5.2) umbrella should not be collected and disseminated before all proceedings relating to a court matter are completed and that the phrases "record relating to a prosecution" as well as "proceedings in respect of the prosecution" should be interpreted as widely as possible such that there only be "some connection" between applicable subject matters.

[23] Referring more specifically to the circumstances of this appeal, the ministry confirms that the SIU commenced an investigation into the death of an individual during the course of a police arrest and that subsequently, charges of manslaughter, aggravated assault and assault with a weapon were laid against the police officer involved.

[24] The ministry submits that the prosecution is ongoing. It submits that the matter commenced in February of 2019 and court dates have been scheduled into July 2019. Moreover, it submits that, as established in previous orders issued by this office, for the purposes of section 52(2.1), proceedings are not complete until any appeal periods have passed or any appeals have concluded.[6]

[25] The ministry submits that by seeking records from the police about gloves, the appellant seeks records that are "related" to an ongoing prosecution. It argues that there is a significant and continuing connection between the records about gloves and the prosecution.

[26] First, the ministry confirms that the issue of the gloves worn by the officer is a live issue in the prosecution. It states that in the Crown's opening statement to the court at the commencement of the trial, the Crown Prosecutor stated:

> We anticipate the evidence of [named witnesses] will establish that the knuckle-plated gloves worn by the accused were not issued or sanctioned by the Ottawa Police Service for use as a weapon.

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[5] *Supra*, note 1.
[6] The ministry refers to Orders PO-2703 and PO-2708 in support of its position.

[27] The ministry submits that the Crown Prosecutor not only referenced the import of "gloves" in his opening statement, but that he has also tendered into evidence in this trial as an exhibit before the court the gloves seized as part of the investigation. It also submits that newspaper articles reporting on the trial openly speculate about the role of the gloves worn by the officer who is before the court. It provided copies of newspaper articles in support of its position.

[28] Second, the ministry confirms that records responsive to the appellant's request are in possession of the Crown Prosecutors as they form part of the criminal disclosure on this case and constitute Crown Brief documents.

[29] The ministry submits that both the language in the Crown's opening statement and the fact that responsive records are in the Crown Brief demonstrate that the nature of the records sought (i.e. records relating to "gloves") clearly "relate to" the prosecution as required for the application of section 52(2.1).

[30] The ministry concludes its representations by stating that to disclose the records at issue prior to the completion of the proceedings (trial and appeal periods) would "potentially jeopardize the integrity of the criminal justice system and risk compromising the fair trial rights of the accused, and the administration of justice."

Analysis and findings

[31] In order for the exclusion in section 52(2.1) to apply, the party relying on section 52(2.1) must establish that:

1. there is a prosecution;

2. there is "some connection" between the record and a prosecution; and,

3. all of the proceedings with respect to the prosecution have not been completed.[7]

[32] For the following reasons, I find that the police have failed to discharge their evidentiary burden to establish part 2 of the test, that there is "some connection" between the record and a prosecution. I will consider that part of the test last.

Part 1

[33] 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

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[7] Order PO-3260.

as imprisonment or a significant fine.[8]

[34] I accept the evidence of the police and the ministry, which the appellant has not refuted, that charges under the *Criminal Code of Canada* have been laid against the officer involved in the incident that resulted in the death of an individual. Based on this evidence, I find that the first part of the test under section 52 (2.1) has been established.

Part 3

[35] I also accept the evidence of the police and the ministry, which again the appellant has not refuted, that all of the proceedings with respect to the prosecution of the officer have not yet been completed and the courts dates have been scheduled into July of 2019. As a result, I accept that proceedings are ongoing. I also acknowledge that even after the trial concludes, any appeal period will not expire for some time beyond the date of issuance of this order. Therefore, I find that the third part of the test under section 52(2.1) has been established.

Part 2

[36] The issue that remains before me is whether, under part 2 of the section 52(2.1) test, the police and the ministry have established that there exists "some connection" between the specific records sought by the appellant and the identified prosecution. As submitted by the ministry, in *Ontario (Attorney General) v. Toronto Star*[9] the Divisional Court established that the words "relating to" in the provincial equivalent of section 52(2.1)[10] requires "some connection" between a record and a prosecution. The Court stated that this connection need not be a "substantial connection" for the exclusion to apply.

[37] By her requests, the appellant seeks access to records about the police's use of reinforced gloves falling within a 5-year period, dating back to 2012. She seeks emails to the Chief regarding "gloves" generally, as well as records relating specifically to "reinforced gloves" including about their acquisition and distribution, protocols and instructions regarding their use, and invoices detailing their purchase.

[38] I have reviewed the records that the police have identified as responsive to the appellant's requests in light of the parties' representations. In the circumstances of these appeals, I find that the police and the ministry have established that there is "some connection" between the majority of the responsive records and the prosecution of the officer involved in the incident. Specifically I find that there is "some connection"

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[8] Order PO-2703.
[9] *Supra*, note 1.
[10] Section 65(5.2) of the *Freedom of Information and Protection of Privacy Act*.

between the prosecution and the emails to the Chief regarding reinforced gloves, the records responsive to the appellant's request for records related to their acquisition and distribution or protocols and instructions regarding their use, and the records responsive to her request for invoices detailing their purchase.

[39] Both the police and the ministry submit that the reinforced gloves worn by the officer who was charged are a central issue in the prosecution. I accept the ministry's submission that they are the "weapon" that is being considered in the charge "assault with a weapon." Based on the ministry's evidence, I accept that records responsive to the appellant's requests that relate to reinforced gloves form part of the Crown Brief and that the Crown intends to adduce evidence regarding the officer's use of reinforced gloves. In my view, this clearly meets the requirement that there be "some connection" between the record and the prosecution.

[40] Even if some of the responsive records are not ultimately used by the Crown during the trial, I accept that their connection is sufficiently material to the issue of the officer's use of reinforced gloves that it could choose to rely upon them in its case thereby meeting the requirement of "some connection." I find support for my view in this respect in *Ontario (Attorney General) v. Toronto Star,* where the Court observed:

> The Crown Brief and prosecution materials are not static. Documents that are not yet part of the Crown Brief may become part of the Crown Brief later and prosecution materials may relate or become integral to the prosecution over the course of the proceedings.

[41] Accordingly, I accept that the police and the ministry have adduced sufficient evidence to support a finding that the majority of the records responsive to the appellant's three requests have "some connection" to the prosecution and that the second part requirement of the three-part test for section 52(2.1) to apply has been met for those records. I will uphold the police's decision to apply section 52(2.1) to emails to the Chief regarding reinforced gloves, from the date of the incident to the date of the request. I will also uphold their decision to apply section 52(2.1) to the records responsive to the appellant's requests for records detailing their acquisition and distribution, protocols and instructions regarding their use, and invoices confirming their purchase.

[42] With respect to the emails about gloves of a non-reinforced nature that were generated prior to the date of the incident in July 2016 however, I find that neither the police nor the ministry have discharged their evidentiary burden to establish that there is "some connection" between them and the prosecution. The appellant's request does not specify that she seeks access to records relating to "reinforced gloves" but uses the more generic term "gloves." Having reviewed the emails identified as responsive that pre-date the incident, none of them relate to reinforced gloves; instead, they appear to relate to regular gloves that are not reinforced. The submissions of neither the police nor the ministry have provided me with evidence that sets out how records relating to gloves of a non-reinforced nature have "some connection" to the ongoing prosecution

[43] Therefore, I find that the police have failed to provide sufficient evidence to establish that the second requirement of the three-part test for section 52(2.1) has been met for the emails about gloves of a non-reinforced nature that pre-date the incident in July 2016. As all three parts of the test must be met for the exclusion to apply and I have found that the police have not discharged their evidentiary burden with respect to the second part, I find that the exclusion at section 52(2.1) does not apply to these emails and they are not excluded from the operation of the *Act.* Accordingly, I will order the police to issue an access decision to the appellant with respect to the disclosure of the emails regarding non-reinforced gloves that pre-date the incident.[11]

Summary

[44] In this order, I find that the exclusion at section 52(2.1) not been established for emails relating to gloves of a non-reinforced nature that pre-date the incident that gave rise to the charges being addressed in the identified prosecution. I will order the police to issue a decision letter to the appellant with respect to access to those emails, in accordance with the procedure set out in the *Act*.

[45] However, I am satisfied by the evidence before me that the time-limited exclusion for records related to a prosecution in section 52(2.1) of the *Act* has been established for the remainder of the records and uphold the police's decision that those records cannot be accessed under the *Act* at this time.

[46] The appellant is reminded that the section 52(2.1) exclusion applies to these records only as long as proceedings in respect of the prosecution are ongoing. Accordingly, once the criminal trial has concluded and any appeal period related to it has expired, these records will be subject to the *Act*. The appellant will then be able to make a new request for access to these specific records. At that time, if she is not satisfied with the police's decision she may open a new appeal with this office.

ORDER:

1. I uphold the police's decision that section 52(2.1) applies to exclude from the scope of the *Act*, emails to the Chief relating to reinforced gloves that were generated in and after July 2016; records relating to their acquisition and

[11] The appellant uses the more generic term "gloves" in her request for emails, from her representations and her related requests. However, she appears to be seeking access to records relating specifically to reinforced gloves. While I will order the police to issue an access decision with respect to all emails that relate to gloves of a non-reinforced nature, if the appellant is not interested in obtaining access to records relating to non-reinforced gloves she is to advise the police.

distribution, as well as protocols and instructions regarding their use; and invoices detailing their purchase.

2. I do not uphold the police's decision to apply the exclusion at section 52(2.1) to the emails relating to gloves of a non-reinforced nature that were generated prior to July 2016 and find that they fall within the scope of the *Act.*

3. With respect to my finding in provision 2, I order the police to provide the appellant with an access decision under the *Act*. For the purposes of the procedural requirements for access decisions under the *Act*, the police are to treat the date of this order as the date of the request.

4. In order to verify compliance with order provision 3, I reserve the right to require the police to provide me with a copy of the disclosure it makes to the appellant.

Original signed by
Catherine Corban
Adjudicator

August 14, 2019