

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4197

Appeal MA20-00074

City of Toronto

May 13, 2022

Summary: The appellant seeks access to records relating to complaints he filed against the City of Toronto's (the city's) Building staff. The appellant also sought access to records relating to two of his properties. The city located records responsive to the appellant's request and granted him partial access to them. The city withheld some of the records under the ongoing prosecution exclusion in section 52(2.1) of the *Act*. The appellant appealed the city's decision. During mediation, the appellant identified additional records that he believed should have been located in response to this request. The city took the position that these records are outside the scope of the appellant's request. In this decision, the adjudicator upholds the city's decision and dismisses the appeal.

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).

OVERVIEW:

[1] The appellant is currently in a dispute with the City of Toronto (the city) regarding the city's enforcement, investigation and prosecution concerning violations of the *Building Code Act, 1992* and O. Reg. 332/12, otherwise known as the Ontario Building Code. The city states that Toronto Building Staff conducted an investigation and determined there was construction at the appellant's property in contravention of the *Building Code Act* and the Ontario Building Code. As a result, the city states it issued Orders to Comply with the *Building Code Act* regarding the appellant and his property. When these Orders to Comply with were not followed, the city commenced

prosecutions for non-compliance with the *Building Code Act*.

[2] The city states the appellant made a number of complaints to a variety of city employees, elected and appointed officials, and Accountability Officers regarding the city's conduct in relation to this matter. The city states the appellant alleged misconduct on the part of the city's enforcement of the *Building Code Act* and violations of the city's Code of Conduct and Conflict of Interest Policies.

[3] The city states the prosecution relating to the appellant and his property concerning the *Building Code Act* violations is ongoing. While the trial commenced prior to the COVID-19 pandemic, the city states the prosecution has not yet concluded.

[4] In the context of these matters, the appellant filed an access request with the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the city. The appellant later clarified his request to the following:

A copy of the investigation and notes in connection to the complaints filed by [the appellant] of [identified address] and [another identified address]; including emails to and from [four named individuals], and interview notes. The complaints relate to violation of the Code of Conduct or the Conflict of Interest Policies of Building staff specifically [two named individuals]. Record search from Jan. 1, 2019 to Sept. 8, 2019. Any internal notification sent or received by Building about [identified address] and any reference to complaint filed by [the appellant] regarding [the identified address]. Any updated information from [Toronto and Region Conservation Authority] TCRA about [identified address] since last [FOI file number] completed in Nov. 2018.

[5] After locating responsive records, the city issued an access decision granting the appellant partial access to them. The city withheld some of the records under the discretionary exemptions in sections 8(1)(a) (law enforcement matter) and (b) (law enforcement investigation) and 12 (solicitor-client privilege) of the *Act*.

[6] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[7] During mediation, the city issued a revised access decision and disclosed additional records to the appellant. The city disclosed the records it withheld under sections 8(1)(a) and (b) to the appellant; accordingly, these records and the law enforcement exemptions are no longer at issue in this appeal. However, the city raised the possible application of the exclusion in section 52(2.1) (ongoing prosecution) to some of the records. The city also applied the mandatory personal privacy exemption in section 14(1) to some of the withheld records. The city continued to rely on the exemption in section 12 to withhold some of the records.

[8] The appellant confirmed he does not pursue access to the information subject to

the city's section 14(1) claim. Therefore, the information deemed to be personal information and withheld under section 14(1) is not at issue in this appeal.

[9] The appellant confirmed his interest in the remainder of the records withheld from disclosure.¹ In addition, the appellant states that he seeks access to records relating to a training or procedure manual for Toronto Building staff and records regarding an internal investigation into the conduct of staff following his complaints. The city advised the appellant that records relating to the investigation of city staff is beyond the scope of his request. The appellant disagrees. As such, the scope of the request is now at issue in this appeal.

[10] Mediation did not resolve the appeal and the file was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I am the adjudicator in this appeal and I began my inquiry by inviting the city to submit representations in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. The city submitted representations. I then sought and received representations from the appellant in response to the Notice of Inquiry and the city's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*.

[11] In the discussion that follows, I find the records are excluded from the scope of the *Act* due to the application of section 52(2.1). I also find that the additional records the appellant requests are either outside the scope of his request or have already been located by the city. The appeal is dismissed.

RECORDS:

[12] There are 64 pages of email correspondence between city staff, Toronto Building Staff, and Toronto and Region Conservation Authority staff at issue. All of the records are subject to the city's section 52(2.1) claim.

PRELIMINARY ISSUE

Timelines

[13] In his representations, the appellant takes issue with the city's lack of adherence to timelines, in relation to his access requests and various complaints with the city. However, the city's timing in relation to his complaints filed with the city, outside of the FOI process, is not a matter I will comment on.

[14] With regard to the city's timing in the context of his access requests, the

¹ I note that it appears the records at issue may contain the appellant's personal information. Therefore, access to the records may be considered under Part II of the *Act*.

appellant submits:

In September, 2019, I filed a second request for Freedom of Information from the City of Toronto. After 30 days, the City asked me for a 30-day extension to gather the information I had requested. I agreed to this extension. On January 7, 2020, a hearing² took place and I had still not received the requested documents. These documents were finally received by me on January 11, 2020, conveniently after the hearing. Not only is City policy not being followed, but officials are not even respecting the guidelines of the Privacy Commission. It would appear that the City is trying to manage information it deems damaging.

[15] It appears the appellant filed a number of requests with the city in September 2019. Upon review of the appellant's representations and the information before me, it is unclear whether the request before me is the "second request" he refers to above.

[16] In any case, it is important for the city to adhere to the timelines it sets out in relation to access and disclosure. While the city may extend the 30-day time limit set out in section 19 of the *Act*, it should adhere to the extended timeline. In this case, the appellant did not receive the records requested until four days past the extended deadline. However, I note the city disclosed the records to the appellant on January 11, 2020. Given these circumstances, I will not address the issue of timelines in relation to the city's disclosure further in this order.

ISSUES:

- A. What is the scope of the request?
- B. Does the ongoing prosecution exclusion at section 52(2.1) apply to exclude the records from the application of the *Act*?

DISCUSSION:

Issue A: What is the scope of the request?

[17] During mediation, the appellant advised the city that he seeks access to a training or procedure manual for Toronto Building Staff and records regarding an internal investigation into the conduct of staff following his complaint. The city takes the position that these records are outside the scope of his request. The appellant disagrees. For the reasons below, I find that the first type of records is not within the scope of the request and the second type is within the scope of the request. However, the appellant has not raised any basis for me to find that additional records of the

² The appellant did not elaborate on the type of hearing that took place or what matter it relates to.

second type exist but were not identified by the city.

[18] 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,

(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).

[19] To be considered responsive to the request, records must *reasonably relate* to the request.³ Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester's favour.⁴

[20] The city states that, when it received the appellant's original access request, it contacted the appellant to clarify because the request was vague. I will reproduce the appellant's clarified request for ease of reference:

A copy of the investigation and notes in connection to the complaints filed by [the appellant] of [identified address] and [another identified address]; including emails to and from [four named individuals], and interview notes. The complaints relate to violation of the Code of Conduct or the Conflict of Interest Policies of Building staff specifically [two named individuals]. Record search from Jan. 1, 2019 to Sept. 8, 2019. Any internal notification sent or received by Building about [identified address] and any reference to complaint filed by [the appellant] regarding [the identified address]. Any updated information from [Toronto and Region Conservation Authority] TCRA about [identified address] since last [FOI file number] completed in Nov. 2018.

[21] However, the appellant now takes the position that the clarified request includes

³ Orders P-880 and PO-2661.

⁴ Orders P-134 and P-880.

records related to the "investigation of city staff" which were not included in the responsive records located by the city.

[22] The city states it took the "broadest and most liberal approach possible to the interpretation of the request, for the purpose of best serving the spirit of the *Act*." The city submits that it interpreted the appellant's request to include all records relating to an investigation of city staff that related to the issues of the appellant's complaints or the larger issue of the city's enforcement and prosecution. The city submits the appellant has "stated nothing more than his opinion that the [clarified request] should include any 'investigations' of the specified City staff." In addition, the city submits it is unclear what types of records the appellant believes would be responsive to his request but not included in the scope of the city's response.

[23] The city states that it expended "extensive effort" to clarify the original request with the appellant. The city states it was not until the mediation stage of the appeal process that the appellant disputed the scope of, and the records found in response to, the clarified request. In any case, the city submits that it has not been provided with sufficient information to articulate a basis to dispute its interpretation of the appellant's clarified request and response.

[24] The appellant did not directly address the issue of scope or the city's representations relating scope in his representations. However, the appellant states he seeks access to information relating to his complaint, including who was involved in the investigation and the process of the investigation.

[25] Based on my review of the appellant's clarified request and the information provided by the city, I find the training or procedure manual for Toronto Building staff to be outside the scope of the appellant's request. While the appellant's request is quite broad, I find this training or procedure manual could not be considered to be a copy of the investigation and notes in connection to the complaints filed by the appellant. Nor could this manual relate to the internal notification sent or received by Toronto Building staff about the property in question or the appellant. Finally, I find this manual cannot be considered to be "any updated information from TRCA" about the identified property. Therefore, I agree with the city that this training or procedure manual is not within the scope of the appellant's request.

[26] With regard to the appellant's request for records regarding an internal investigation into the conduct of staff following his complaint, it is unclear what type of records beyond those the city has searched for the appellant claims were overlooked by the city during its search. It is clear the appellant seeks access to notes and other records relating to the complaints he filed with the city and Toronto Building; however, what is not clear is the type of records he believes remains outstanding. The appellant was provided with an opportunity to clarify the types of records he believes to be outstanding and within the scope of his request. The appellant was also provided with an opportunity to review and respond to the city's representations on the issue of

scope. He did not provide any additional clarification. In the absence of any clarification from the appellant and upon review of the city's representations, I find the city interpreted the scope of the appellant's clarified request properly and it does not appear there are any types of records that were inappropriately excluded from the scope of his request, or the city's search, that reasonably relate to it.

[27] In conclusion, I find the city interpreted the clarified request properly and there is no basis to order the city to search for the additional information identified by the appellant during mediation.

Issue B: Does the ongoing prosecution exclusion at section 52(2.1) apply to exclude the records from the application of the *Act*?

[28] The city takes the position that all of the records are excluded from the application of the *Act* under the ongoing prosecution exclusion in section 52(2.1). As such, the records may not be obtained through an access request made under the *Act*. 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.

[29] 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.⁵ The purposes of section 52(2.1) include protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.⁶

Parties' Representations

[30] The city takes the position that section 52(2.1) applies to all of the records at issue because they relate to the city's investigation and prosecution of the appellant concerning violations of the *Building Code Act, 1992* and O. Reg. 332/12, otherwise known as the Ontario Building Code. The city submits that, to establish the applicability of section 52(2.1), the city must establish that a prosecution exists, that all proceedings related to this prosecution have not concluded, and there is *some connection* between the records and the prosecution.

[31] The city submits at the time of the request, there was a *prosecution* for the purposes of section 52(2.1). Specifically, there was and still is a proceeding before the Ontario Court of Justice for violation of the *Building Code Act* and the Ontario Building Code, which is a "criminal or quasi-criminal charge laid under an enactment of Ontario

⁵ Order PO-2703.

⁶ *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.).

or Canada and may include regulatory offenses that carry *true penal consequences* such as imprisonment or a significant fine.” The city refers to section 36 of the *Building Code Act*, which identifies the penalties that may be imposed for violations of the *Building Code Act*.

[32] The city also confirms that the matter has not been concluded. Prior to the issuance of this order, the city confirmed the matter is ongoing and the first court appearance has been set for May 2022, in which the trial dates will be scheduled.⁷

[33] Finally, the city confirms there is *some connection* between the records at issue and the prosecution. The city submits the records can be divided into the following sub-categories or topics relating to the city’s enforcement of the *Building Code Act*/Ontario Building Code in the context of the active prosecution:

- Information concerning the conditions at the appellant’s property and the effect on the city’s enforcement and prosecution of the *Building Code Act*/Ontario Building Code violations,
- Allegations concerning the appellant’s property and other locations which were alleged to be relevant,
- Discussions relating to allegations concerning the conduct of Toronto Building Staff in the enforcement and prosecution of the *Building Code Act*/Ontario Building Code in relation to the property, and
- Advice from the city’s Legal Services regarding the appellant and/or the property.

[34] The city submits the contents of the records “repeatedly and expressly note the connection between the content of these records and the enforcement and/or resulting prosecution” of the *Building Code Act*/Ontario Building Code violations. Given these circumstances, the city submits there is clearly *some connection* between the records in issue and an ongoing prosecution. Therefore, the city submits the records are excluded from the application of the *Act* pursuant to section 52(2.1).

[35] The appellant does not directly address the application of the exclusion in his representations. However, the appellant submits the city is obligated to release the information in some form upon request. The appellant submits the city is purposefully withholding documents to protect its employees. The appellant takes the position that he is entitled to have access to the information related to his complaint, including who was involved in the investigation and “the process of the investigation.”

Analysis and Finding

[36] The city bears the burden of proof to establish that the exclusion in section

⁷ Email correspondence from the city dated April 20, 2022.

52(2.1) applies.⁸ Specifically, the city must establish that: there is a prosecution; there is some connection between the records and the prosecution; and the prosecution is ongoing.

[37] Having reviewed the city's representations and the records themselves, I am satisfied the exclusion applies to all of the records at issue in this appeal.

[38] First, the IPC has found that a prosecution for a provincial offence under legislation such as the *Building Code Act* may constitute a prosecution within the meaning of section 52(2.1).⁹ The offences under section 36 of the *Building Code Act* are regulatory offences that carry with them a significant fine. Accordingly, I find that prosecution of these offences qualifies as a *prosecution* under section 52(2.1) of the *Act*. In addition, the city has established that there is a prosecution relating to the appellant and alleged violations of the *Building Code Act* and the Ontario Building Code, thereby satisfying the first requirement for the application of the section 52(2.1) exclusion.

[39] Second, I find the records are all connected to the investigation and enforcement activities of the city with respect to the appellant's alleged non-compliance with building code requirements. The records consist of email correspondence between city staff, Toronto and Region Conservation Authority staff and Toronto Building Staff regarding the appellant and the alleged violations of the *Building Code Act*/Ontario Building Code. The records contain detailed information regarding the alleged violations, the city's investigation and enforcement, and the current stage of the prosecution of the appellant's alleged non-compliance with the city's orders. The records also include the advice provided by the city's legal counsel regarding the investigation, enforcement and prosecution of the appellant in relation to the violations of the *Building Code Act*/Ontario Building Code.

[40] Given the types of records at issue before me, I find there is *some connection* between the records at issue and the prosecution itself, thereby satisfying the second requirement for the application of section 52(2.1). The appellant did not dispute that the records relate to proceedings brought by the town against him or that such proceedings qualify as a prosecution for the purposes of section 52(2.1). Rather, the appellant simply takes the position the city should not be permitted to withhold the records from him. However, in the case where records are excluded from the *Act* by virtue of section 52(2.1) (or other exclusions), the IPC has no jurisdiction to order their disclosure.

[41] Third, on the issue of whether "all proceedings in respect of the prosecution" have been completed, I accept the city's representations that the prosecution of the appellant for the alleged violations of the *Building Code Act* is ongoing. As the city

⁸ Orders MO-3316, MO-2439, and MO-3294-I.

⁹ See Order MO-3480, for example.

indicated, the first court appearance will take place in May 2022 to set the trial date(s). Therefore, it is clear that all proceedings in respect of the prosecution have not been completed and the third requirement for the application of the exclusion in section 52(2.1) has been satisfied.

[42] In conclusion, I find that the exclusion in section 52(2.1) of the *Act* applies to the records.

ORDER:

I uphold the city's decision and dismiss this appeal.

Original signed by: _____

Justine Wai
Adjudicator

_____ May 13, 2022