

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4287

Appeal PA19-00060

Ministry of the Solicitor General

August 10, 2022

Summary: The appellants are the parents of a child whose tragic death was the subject of investigation by the Ontario Provincial Police (OPP) and another police service. Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the appellants made a request to the Ministry of the Solicitor General (the ministry), which is responsible for the OPP, for OPP records relating to the appellants' interactions with two OPP victim liaison officers in relation to the death investigation. The ministry denied access to the records, initially based on a claim there was (at the time) an ongoing investigation into the child's death. Some time after the appellants appealed the ministry's decision to the IPC, an individual was arrested and charged under the *Criminal Code* in connection with the child's death. The ministry now takes the position that the records are excluded from the *Act*, under section 65(5.2), because they relate to an ongoing prosecution. In this order, the adjudicator upholds the ministry's decision. She accepts the evidence that the records have the necessary degree of connection ("some connection") to the ongoing prosecution of the individual charged in the child's death. As a result, the exclusion at section 65(5.2) applies to the records, and they are not subject to the *Act* until all proceedings in respect of the prosecution are completed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 65(5.2).

Orders and Investigation Reports Considered: Orders PO-3999, MO-3847-I, MO-3890-F, and MO-3122.

Cases Considered: *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII).

OVERVIEW:

[1] The appellants are the parents of a child whose tragic death was investigated by a municipal police service, and, later, by the Ontario Provincial Police (OPP). Since their child's death, the appellants have made a number of access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*), and its municipal counterpart (the *Municipal Freedom of Information and Protection of Privacy Act*), in an attempt to obtain information about the investigation into their child's death. I discuss some of these requests, and the resulting appeals, further below. In short, there are four current appeals (of which this appeal is one), and 10 previous appeals that were resolved by way of IPC orders that are currently the subject of judicial review applications.¹

[2] As I will explain in more detail below, some time after the appellants made the access request giving rise to this appeal (and the other requests giving rise to the other current appeals), the OPP and the municipal police service arrested and charged an individual in connection with the child's death.

[3] In the discussion that follows, I find that the records at issue in this appeal are not subject to the *Act*, because they fall within the exclusion at section 65(5.2) of the *Act* for records relating to an ongoing prosecution. In this order, I explain the reasons for my finding.

[4] First, I will briefly summarize the history of this appeal, including some significant developments after this file reached the adjudication stage of the appeal process.

The access request and the ministry's decision giving rise to the appeal

[5] This appeal arises from the appellants' November 2018 request under the *Act* to the Ministry of the Solicitor General (the ministry), then known as the Ministry of Community Safety and Correctional Services, for certain OPP records relating to the investigation into their child's death. (The ministry is responsible for the OPP.) In its January 2019 decision letter, the ministry described the appellants' request as covering the following:

[OPP] reports, officer notes, audio recordings, synopsis, text messages, telephone messages and correspondence with respect to any interactions between [the appellants] and [two named OPP officers] as it relates to [the appellants'] son's death investigation.

[6] The two OPP officers named in the request were "victim liaison officers" assigned to assist the appellants. In representations made during the inquiry, the ministry explained that the role of the victim liaison officers was "to provide policing support to

¹ The appellants in this appeal also have an active complaint against a hospital, filed under the *Personal Health Information Protection Act, 2004*, relating to the same underlying facts.

the appellants as a result of the tragic death of their son.”

[7] In this initial decision, the ministry denied access to all responsive records, in full, on the ground the records concern a matter that, at that time, was under active investigation. On this basis, the ministry claimed the discretionary exemption at section 49(a) of the *Act* (discretion to refuse requester’s own information), read with a number of discretionary law enforcement exemptions in section 14(1), to withhold the records. The ministry also withheld some information relating to other individuals under the discretionary personal privacy exemption at section 49(b) of the *Act*.

[8] The appellants appealed the ministry’s decision on this access request, as well as the ministry’s decisions on two related access requests, to the Information and Privacy Commissioner of Ontario (IPC). Under the *Act’s* municipal equivalent, the appellants also appealed to the IPC an access decision made by the municipal police service. These four appeal files, which I will refer to collectively in this order as the “four current appeals,” generally concern records relating to the investigation into the death of the appellants’ child.²

[9] After attempts at mediation did not result in the settlement of the issues, the four current appeals were moved to the adjudication stage of the IPC appeal process.

Adjudication of Appeal PA19-00060

[10] An IPC adjudicator initially conducted a joint inquiry into this appeal (PA19-00060) and the two related appeals filed by the appellants against the ministry (Appeals PA19- 00059 and PA19-00099). The two related appeals against the ministry relate to records that, broadly speaking, concern allegations of misconduct in relation to the death investigation.³

[11] In initial representations submitted during the joint inquiry, the ministry took the position that the records at issue in this appeal (PA19-00060) “relate to the same general subject matter” as previous appeals filed by the appellants. As the ministry notes, and as I discuss in more detail below, the IPC disposed of those previous appeals in IPC Order PO-3999. Given this, the ministry advised that it would be relying on the representations it had filed in those previous appeals, and would not be filing further representations in this appeal.

² The ministry is the respondent in the related current appeals PA19-00059 and PA19-00099. Appeal PA19- 00059 concerns records relating to an investigation into the appellants’ allegations of breach of trust by an officer involved in the death investigation. Appeal PA19-00099 concerns records created by an officer of the OPP’s Professional Standards Bureau in connection with the appellants’ allegations of employee misconduct by certain other officers involved in the death investigation. Appeal MA19-00730, filed against the municipal police service, concerns police records relating to the police’s “decision to cease” the death investigation.

³ See footnote 2. For reasons I describe further below, the appeal against the municipal police service was put on hold at the adjudication stage before an inquiry was commenced.

[12] The appellants provided representations in response to the ministry's representations, and the ministry provided reply representations. The parties' representations were exchanged in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[13] The four current appeals (including this appeal) were then transferred to another IPC adjudicator.

[14] In January 2021, that adjudicator decided to place the four current appeals on hold because of potential overlap between an issue to be decided in these appeals and matters currently before the Divisional Court on the appellants' applications for judicial review of two orders of the IPC.

[15] Specifically, in IPC Order PO-3999 (issued in October 2019), the IPC disposed of five previous appeals filed by the appellants against the ministry. In IPC Orders MO-3847- I (issued in October 2019) and MO-3890-F (issued in January 2020), the IPC disposed of five previous appeals filed by the appellants against the municipal police service. Orders PO-3999, MO-3847-I, and MO-3890-F are currently the subject of judicial review applications brought by the appellants to the Divisional Court.

[16] In her letter to the parties explaining her decision to place the four current appeals on hold, the adjudicator observed that an issue arising in both the judicial review applications and the four current appeals is the institutions' reliance on certain law enforcement exemptions in the *Act* and in the *Act's* municipal counterpart.⁴ Given this, and the overlap in the parties and in some of the records at issue in the current four appeals and the three above-noted IPC orders, the adjudicator decided to place the four current appeals on hold pending the court's decisions on the judicial review applications.

[17] The four current appeals were later reassigned to me as the new adjudicator.

[18] After these files were transferred to me, there were some significant developments with consequences for the four current appeals.

[19] On June 23, 2021, the OPP announced that the OPP and the municipal police service had arrested and criminally charged an individual following their joint investigation into the death of the appellants' child. In light of this, I asked the ministry to revisit its position in this appeal and the two related appeals involving the ministry.

[20] On October 15, 2021, the ministry issued a revised decision in this appeal (PA19-00060). In this decision, the ministry states:

⁴ In the context of this appeal, this issue arises because of the ministry's (initial) reliance on certain law enforcement exemptions at section 14(1) of the *Act* to withhold the records at issue.

Our office has recently been advised by the OPP that their investigation is now complete and that the matter is currently before the courts. As a result, the Ministry will no longer be relying on section(s) 14(1)(a), 14(1)(b), 14(1)(f), 14(1)(l), 21(2)(f), 21(3)(b), 49(a), or 49(b) of the *[Act]*.

The Ministry will now be relying upon section 65(5.2) of the *Act* as the information contained in the records relates to a matter that is currently under prosecution.

[21] The appellants confirmed receipt of the ministry's revised decision, and their interest in pursuing this appeal.

[22] I decided to remove the hold on this appeal and to continue the inquiry into this matter. In addition, given the different facts and records in the three appeals against the ministry, I decided to conduct separate inquiries in the three appeals, rather than to continue the joint inquiry in these files. As noted above, the records at issue in this appeal relate to the appellants' interactions with OPP victim liaison officers, while the two related appeals relate to records that, broadly speaking, concern allegations of misconduct in relation to the death investigation.

[23] In this appeal, I asked the parties to address the ministry's new claim that all the responsive records in this appeal are excluded from the operation of the *Act* by virtue of section 65(5.2). The parties provided representations, which again were exchanged in accordance with the *Code of Procedure* and *Practice Direction 7*.

[24] In this order, I find that the records at issue in this appeal relate to an ongoing prosecution, and are thus excluded from the *Act* by virtue of section 65(5.2). I uphold the ministry's decision to withhold the records on this basis.

RECORDS:

[25] The ministry describes the responsive records as reports, officer notes, audio recordings, synopses, text messages, telephone messages, and correspondence between one or more victim liaison officers and the appellants.

[26] The ministry did not provide the IPC with the responsive records during the appeal. However, as I explain below, I have been able to decide the issues in this appeal in consideration of all the materials before me, including the evidence of the parties.

DISCUSSION:

Does the section 65(5.2) exclusion for records relating to a prosecution apply to the records?

[27] For the reasons that follow, I find that the records at issue in this appeal are excluded from the operation of the *Act* by virtue of section 65(5.2). This section excludes records relating to an ongoing prosecution from any part of the *Act*, including the *Act's* access scheme.

[28] Section 65(5.2) 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 purposes of section 65(5.2) 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 sharing and publication of records relating to an ongoing prosecution.⁵

[30] The term "prosecution" in section 65(5.2) means proceedings in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada.

[31] The phrase "relating to" in section 65(5.2) means there must be "some connection" between the records and the case to be made by the prosecuting authority.⁶

[32] The phrase "in respect of" requires some connection between "a proceeding" and "a prosecution."⁷ All proceedings in respect of the prosecution have been completed only after any relevant appeal periods have expired. Whether a prosecution has been "completed" depends on the facts of each specific case.⁸

[33] The ministry submits that there is a current prosecution under the *Criminal Code* against an individual who has been charged with manslaughter in connection with the death of the appellants' child. The prosecution is ongoing: The charge was laid in June 2021, with a trial date still to be set.

[34] It is not in dispute that proceedings in connection with the charge laid under the *Criminal Code* qualify as a "prosecution" within the meaning of section 65(5.2). It is not

⁵ *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) (*Toronto Star*).

⁶ *Toronto Star*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII), [2003] 1 SCR 66 at para 25, and Order MO-3919-I.

⁷ *Toronto Star*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, cited above, at para 25.

⁸ Order PO-2703.

in dispute that this prosecution is ongoing.

[35] The dispute between the parties lies in whether the records at issue in this appeal are records “relating to” that prosecution, within the meaning of the exclusion at section 65(5.2).

[36] The appellants assert that the records they seek do not have the necessary degree of connection (“some connection”) to the prosecution of the individual charged in connection with their child’s death. They emphasize that the records they now seek are, in their view, distinct from records about the investigation into their child’s death:

Our previous requests were for interrogations and polygraph interviews conducted by police officers assigned to **investigate** our son’s death. The current request is for interactions with victim liaison(s), whose role was to **provide information about the investigation** to the appellants [emphasis theirs].

[37] In support of their argument, the appellants refer to extracts from the 2017 Ontario Major Case Management Manual, a ministry document that sets out standards for the management and operation of major case investigations by police forces. The appellants refer to the manual’s characterization of the role of a victim liaison officer. Among other things, the manual states that the victim liaison role can be filled by a civilian member (i.e., not an officer), and that victim liaison officers control all information released by the investigative team to the victim, and ensure that all such information releases are authorized by the Major Case Manager. The appellants observe that the manual does not indicate there is any investigative function to the victim liaison role.

[38] It is thus the appellants’ position that the responsive records (being records relating to their interactions with two victim liaison officers) do not have “some connection” to the prosecution of the individual who has been criminally charged in their child’s death. This is because, in the appellants’ submission, the records they seek are purely administrative records, forming part of the Major Case Manager’s administrative file, and not records that could be said to have investigative value.

[39] For the appellants, what is relevant is that the records were not “prepared by the investigative team to support criminal charges,” and so were “not prepared for the purpose of prosecution,” but rather were “prepared by a victim liaison officer, whose role was to provide authorized information releases to the appellants as victims of crime.” They argue that the ministry has not provided any proof that the records they seek form part of the prosecution file, will be relied upon by the Crown in the prosecution, or have any probative value in the prosecution of the individual charged in connection with their child’s death. Instead, they say, the records they seek are akin to the administrative records considered in Order MO-3122, which were found not to be excluded under the equivalent exclusion in the *Act’s* municipal counterpart.

[40] Order MO-3122 concerned a request to a police board for the costs, including overtime hours, incurred in a 27-hour standoff that led to an arrest and charges under the *Criminal Code*. In that order, the IPC adjudicator rejected the police board's claim that the responsive records were records "relating to" the prosecution of the arrested individual, and so found that the prosecution exclusion did not apply to those records.

[41] The adjudicator in Order MO-3122 described the responsive records in that case as administrative records generated by the police board's human resources and fleet/property units, and she found the police board had not provided sufficient evidence to establish the necessary degree of connection ("some connection") between the records and the prosecution. The adjudicator described some ways in which that connection could be shown: for example, where records are shown to have been prepared for the purposes of prosecution, to form part of the prosecution file, or to have probative value in the prosecution. On the facts before her, however, the adjudicator concluded that she had not been provided with evidence to support any such findings.

[42] I do not find the scenario in Order MO-3122 to be analogous to the facts before me. First, I do not agree that the records at issue in this appeal can be characterized as purely administrative records, akin to the cost breakdowns at issue in that order. In that case, given their purely administrative nature, the adjudicator could not discern from the records themselves what connection, if any, they would have to the prosecution, and the institution in that case failed to provide sufficient evidence to establish any such connection.

[43] The appellants also rely on Order MO-3122 to suggest that in order to meet the test of "some connection" between the records and the prosecution, the ministry must provide proof that the records were prepared for the purpose of prosecution, or that they form part of the prosecution file, or that they have probative value in the prosecution. I do not agree that Order MO-3122 establishes such a test. The adjudicator in that order was describing some of the types of evidence that the institution in that case could have presented, but did not present, in support of its exclusion claim. In that case, in the absence of this type of evidence, or other evidence to support its claim, the adjudicator was not satisfied that the institution had established "some connection" between the records at issue in that appeal and the prosecution in question.

[44] In the appeal before me, the records at issue are records of interactions between the appellants and OPP victim liaison officers in relation to the death investigation. I have considered the appellants' representations about the distinction between the role of a victim liaison officer and an investigating officer. However, I am unable to accept the claim that records generated from interactions with victim liaison officers must be exclusively administrative in nature, and on that basis cannot have "some connection" to a prosecution. Even if I accept the appellants' assertion that the OPP officers who were the victim liaison officers in this case had no investigative function, this does not

preclude the possibility that the records could have “some connection” to the prosecution in question. Indeed, I find such a connection here.

[45] The ministry states, and I have no reason to doubt, that the Crown attorneys who are currently prosecuting this matter have requested from the OPP the very records that are at issue in this appeal, and that the OPP has provided these records to them. The Crown is now reviewing the records for the purpose of the prosecution. The connection between the records at issue in this appeal and the prosecution is not diminished by the fact the records may originally have been prepared by officers who played no investigatory role in the death investigation (assuming this is the case). What is relevant, in my view, is that the Crown requested the records at issue in this appeal for the purpose of the prosecution, and the records have been provided to the Crown for that purpose. This establishes that, at least at this time, the Crown has identified the records as potentially relevant in the prosecution.

[46] The Divisional Court in *Toronto Star* (cited above) made clear that the prosecution exclusion is not limited to materials in the Crown or prosecution brief, and that, particularly in the case of a complex prosecution, it may be difficult to accurately state what records are within or outside the brief. Documents that are not 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.⁹ The ministry is not required to establish that the records will in fact be relied upon by the Crown in the prosecution, or to quantify the probative value of the records, in order to establish the application of the exclusion in these circumstances. However, it is still necessary to establish “some connection” between the records at issue and the claimed exclusion that is relevant to the statutory scheme and objects understood in their proper context.¹⁰ I have no difficulty finding such a connection in this case.

[47] For these reasons, I find that the exclusion at section 65(5.2) of the *Act* applies to the records. As a result, the right of access in the *Act* does not apply to the records.

[48] I want to acknowledge the appellants’ thoughtful and deeply personal representations in support of their pursuit of these records. Some of their submissions, including on the presence of their own personal information in the records, the case for disclosure on compassionate grounds, and the possibility of severance of the records, are based on the right of access in the *Act*, which cannot apply to records that are excluded from the scope of the *Act*. However, as the Divisional Court noted in *Toronto Star*, section 65(5.2) is a “time-limited” exclusion. Although the records are not now subject to the *Act*, the exclusion ceases to apply when all proceedings in respect of the prosecution have been completed. The appellants may wish to pursue their access rights under the *Act* at that time.

⁹ *Toronto Star*, cited above, at paras 55-56.

¹⁰ *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (CanLII), at para 39.

ORDER:

I uphold the ministry's decision to deny access to the records on the ground they are excluded from the operation of the *Act*. I dismiss the appeal.

Original Signed by: _____

Jenny Ryu
Adjudicator

August 10, 2022 _____