Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3294-I

Appeal MA14-557

City of Kingston

March 4, 2016

Summary: In this interim order, the adjudicator determines the preliminary issue of whether the exclusion for records relating to an ongoing prosecution at section 52(2.1) of the *Act* applies. The appellant sought access to records relating to the removal of a specified temporary sales office. The city denied access to the records in full claiming that they fall outside of the scope of the *Act* as a result of the operation of section 52(2.1). The adjudicator finds that section 52(2.1) has not been established and therefore, that the records fall within the scope of 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); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, as amended, sections 3(1)(h) and 15(1)(g).

Orders Considered: Orders MO-2439, MO-3139-I, and PO-2703.

OVERVIEW:

[1] The Corporation of the City of Kingston (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records relating to the removal of a specified temporary sales office. The appellant, an individual acting on behalf of the Board of Directors of a condominium corporation whose lands are adjacent to the land occupied by the sales office, sought access to information relating to a specific amending agreement that was registered in the Land Registry Office. In the request he explains that the site plan agreement for the land allows for a temporary sales office to remain for a period of five years, after which it is

to be either dismantled or, if it is to remain, an application to amend the site plan must be submitted. He further states that although no such application to amend the site plan was submitted, no action has been taken to remove the sales office. As a result, he seeks access to:

> [C]opies of all documentation, including records of the relevant departments of the city, including without limitation, the Planning Department, the Property Standards Branch, the City Clerk's Office, members from time to time of the Planning Committee and the Mayor's Office together with details of any and all legal proceedings contemplated or commenced by the city in respect of the said Temporary Sales Office, including all building permits issued.

[2] The request was to cover records up until the date of the request and to include "all materials and notes of discussions regarding a sale or potential sale of the owner's lands."

[3] The city issued a decision advising that records relating to the subject property were available for public viewing at the Planning Development Department. In the decision, the city explained the following:

> Searches have been conducted through the city's record holding, and there are no further records responsive to your *MFIPPA* request.

[4] In response to the decision, the appellant wrote to the city and explained that he sought access to all information relating to the sales office and was of the view that records relating to the removal of the sales office should exist. The appellant stated:

> …I remind you that what I am trying to ascertain is who made the decision that the city not pursue it[s] rights against the owner with respect to the sales office and what the reasons were for such a decision.

[5] The city issued a supplementary decision in which it indicated that any records in the prosecutor's office are privileged and exempt pursuant to the solicitor-client exemption at section 12 of the *Act*. The appellant appealed the decision.

[6] During mediation, the appellant advised that in addition to seeking access to the information that had not been disclosed to him, he was seeking access to a list of all the responsive records and the court file number. The city advised that it would not produce a list of responsive records. It also advised that the appellant could contact them directly to obtain information relating to the court file.

[7] The city confirmed its position that the responsive records are subject to solicitor-client privilege. The city also issued a supplemental decision in which it claimed that the exclusion at section 52(2.1) of the *Act* applies as it now takes the position that "the records are contained within a prosecutor's file where all proceedings in respect of a prosecution that has not yet been completed." The city declined to provide the

appellant with further details about the prosecution, including identifying the nature or type of proceeding being considered, the underlying legislation being relied upon for the proceeding, or a reasonable proximate date by which an actual formal proceeding might be commenced.

[8] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry to the city, initially. In that notice I stated that the city had not yet provided this office with a copy of the records at issue and requested that it do so. In its representations the city advised that it declines to provide this office with a copy of the records due to the application of the exclusion for records relating to a prosecution at section 52(2.1). The city provided representations on the application of that exclusion, as well as on its alternative claim that, should the *Act* apply, the records are exempt under section 12.

[9] The city's representations were shared with the appellant, in accordance with this office's *Practice Direction 7* and the appellant provided representations in response. With respect to the city's claim that the exclusion at section 52(2.1) applies to the records, the appellant takes the position that the city has not provided sufficient evidence to support such claim.

[10] In this interim order, I address the preliminary jurisdictional issue of whether the exclusion at section 52(2.1) for records relating to a prosecution applies in the circumstances of this appeal. If the exclusion applies, the records fall outside of the scope of the *Act* and this office has no jurisdiction with respect to their disclosure.

[11] Although I have not been provided with a copy of the records, based on the reasons that follow, I find that the exclusion at section 52(2.1) has not been established and the *Act* applies to the responsive records.

RECORDS:

[12] The records at issue have been described by the city as "records contained in the prosecutor's file." As noted above, the city has declined to provide this office with a copy of the records.

DISCUSSION:

[13] As noted, the sole issue that will be determined in this interim order is whether the exclusion at section 52(2.1) applies and whether the records fall outside of the scope of 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.

[14] 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]

[15] 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]

[16] 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]

[17] Only after the expiration of an 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.[4]

Representations

[18] In its representations, the city identifies that section 52(2.1) is an exclusion that limits this office's jurisdiction over records relating to a prosecution. It explains that this office only has jurisdiction over such records after all proceedings in respect to a prosecution have been completed.

[19] The city states that the purposes of the exclusion at section 52(2.1) are broad. It submits that they include (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, (2) to ensure the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials, (3) to maintain the integrity of the criminal justice system, and (4) to control the dissemination and publication of records relating to an ongoing prosecution.[5]

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[1] *Ministry of the Attorney General v. Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).
[2] Order PO-2703.
[3] *Supra,* note 1. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, at para 25.
[4] Order PO-2703.
[5] *Supra*, note 1 at paras 50 to 51.

[20] The city explains its interpretation of the exclusion at section 52(2.1) and how it believes that it should be applied:

> The meaning of "prosecution" in section 52(2.1) must be interpreted broadly enough to achieve the broad purposes of the subsection (as described in the foregoing). There must be a "prosecution" whenever a prosecutor is exercising the powers that constitute the core of the prosecutor's office and which are protected from the influence of improper political and other vitiating factors by the principle of prosecutorial independence. The Supreme Court of Canada described these core powers in *Krieger v. Law Society of Alberta*[6] as follows:
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> > As discussed above, these powers emanate from the office holder's role as legal advisor of an officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.
> >
> > Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a)the discretion whether to bring the prosecution of a charge laid by the police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code,* R.S.C. 1985, c. C-46, ss 579 and 579.1; (c)the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether…
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> There must therefore be a "prosecution" (for the purposes of s.52(2.1) of the *Act*) whenever a prosecutor is exercising prosecutorial discretion in choosing to bring or to not bring a prosecution.
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> Records "relating to" such an exercise of prosecutorial discretion must be excluded from the jurisdiction of the IPC until all proceedings in respect of the prosecution are complete.

[21] Addressing how its interpretation of the exclusion at section 52(2.1) applies to the records at issue, the city explains that the records "relate to the prosecution of offences that may be continuing offences." It submits that, [t]herefore, the City Prosecutor may exercise his or her discretion to bring a prosecution at any time until the continuing offence ends and any relevant limitation period expires." It further

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[6] 2002 SCC 65, paras 45 to 46.

submits that, [u]ntil then the exercise of prosecutorial discretion, and the prosecution itself are ongoing."

[22] The city concludes its representations by stating:

> The purposes of section 52(2.1) are therefore clearly engaged. The IPC lacks jurisdiction to order production of the records at issue.

Analysis and finding

Burden of Proof

[23] Although the city was not specifically asked to comment on who bears the burden of proof in establishing whether the exclusion at section 52(2.1) applies to the records at issue, in the circumstances of this appeal, for reasons that will become apparent below, it is my view that a discussion of the burden of proof in establishing that an exclusion applies is required.

[24] Previous orders have considered the issue of who bears the burden of proof in circumstances where an exemption claim is not at issue. Generally, this office has established that the onus of proof for a proposition lies with the party who is advancing it. This was considered and found by former Senior Adjudicator John Higgins in Order MO-2439. In that appeal, former Senior Adjudicator Higgins determined whether the confidentiality provision in section 181 of the *City of Toronto Act, 2006* applied and prevailed over the *Act*. He states:

> 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."

[25] The former senior adjudicator goes on to examine section 4(1) of the *Act* which 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. He also points to section 52, which sets out other limited instances where the *Act* does not apply, as well as section 53, which allows for circumstances where records are not accessible because of a prevailing confidentiality provision.

[26] In Order MO-2439, former Senior Adjudicator Higgins states that section 4(1) of the *Act* establishes a positive right of access on which members of the public are entitled to rely, and found that if an institution wishes to remove a record from that positive right, the law of evidentiary burdens would place the onus of proof to accomplish that object on the institution. He states that failure by the institution to

establish the application of a provision that removes a record from that positive right will have the result that the institution does not succeed on that point, and the *Act* will be found to apply. In coming to that conclusion, the former senior adjudicator relied on *The Law of Evidence in Canada.*[7]

[27] The reasoning expressed by former Senior Adjudicator Higgins in Order MO-2439 was reviewed, considered, and adopted by Senior Adjudicator Frank DeVries in Order MO-3139-I. That appeal dealt with records held by the public health department of the City of Toronto, and addressed, as in the current appeal, that city's claim that the exclusion for records relating to a prosecution at section 52(2.1) applied to oust those records from the scope of the *Act*. In that order, the senior adjudicator applies the findings established by former Senior Adjudicator Higgins in Order MO-2439 and states:

> 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.

[28] I agree with the reasoning expressed by former Senior Adjudicator Higgins in Order MO-2439, and subsequently followed by Senior Adjudicator DeVries in Order MO-3139-I, and find it be relevant to the circumstances of this appeal. I will consider the approach taken in both those orders and adopt it in my determination of whether section 52(2.1) applies to the records at issue in the current, which immediately follows.

Whether section 52(2.1) applies

[29] In order for the exclusion at section 52(2.1) to apply, the city must establish that:

(1) there is a prosecution;

(2) there is some connection between the record and the prosecution; and

(3) all the proceedings with respect to the prosecution have not been completed.[8]

[30] As addressed above, the city bears the onus of proof to establish that section 52(2.1) applies to exclude the records from the scope of the *Act*. In my view, the city has not provided sufficient evidence to establish that the requirements for the application of section 52(2.1) have been met and therefore, has not discharged its evidentiary burden.

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[7] John Sopinka, Sidney N. Lederman and Allan W. Bryant (Markham: Butterworths, 1992) at pg. 57.
[8] Order PO-3260.

[31] With respect to the first requirement, as the *Act* does not define the term "prosecution," former Senior Adjudicator Higgins considered its meaning in Order PO-2703. Having considered the approach applied by the British Columbia Information and Privacy Commissioner in relation to a similar provision, as well as the specific circumstances of the inclusion of 65(5.2) (the provincial equivalent of section 52(2.1) in the *Freedom of Information and Protection of Privacy Act*), he adopted the definition of "prosecution" used by the British Columbia Information and Privacy Commissioner for the purposes of interpreting the provision. He states:

> [The] term "prosecution" in section 65(5.2) 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…

[32] In its representations, the city submits that there is a prosecution whenever a prosecutor is exercising prosecutorial discretion in choosing to bring or not to bring a prosecution. It does not confirm prosecution has been commenced nor does it give any indication as to what type of prosecution might be brought; it does not submit that charges of a criminal or quasi-criminal nature have been laid, nor does it describe the types of such charges that it suggests it might be contemplating; and, it does not provide evidence to support a conclusion that any such prosecutions are reasonably being contemplated. The city simply implies, but does not specifically state, that it might be considering whether or not to bring an unidentified prosecution and provides no further evidence with respect to the likelihood of that possibility or on what basis such prosecution might be brought.

[33] To date this office has not had to determine whether the existence of a prosecution for the purposes of the first part of the three-part test established for the application of section 52(2.1), can be established on the basis of contemplated rather than existing prosecutions. The British Columbia Information and Privacy Commissioner, however, has previously considered circumstances when addressing a similar provision in its governing act that I consider to be helpful to my analysis here. While I am not bound by decisions of the British Columbia Information and Privacy Commissioner, I am not precluded from considering approaches taken in other jurisdictions.

[34] In Order No. 202-1997, Commissioner David Flaherty decided that a police department could invoke section 3(1)(h) of the British Columbia *Freedom of Information and Protection of Privacy Act* (the BC *Act*), which is that province's equivalent to section 52(2.1), to refuse to disclose records relating to prosecutions still before the courts.[9] He stated:

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[9] Section 3(1)(h) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 states:

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration record, but does not apply to the following…

(h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;…

> It is my view that this section only applies to records directly associated with a prosecution that is officially underway, which normally means that a charge has been laid. At that point, the legislature intended to insulate Crown Counsel from requests for access under this Act until a prosecution in completed.[10]

[35] I agree with this approach. As explained above, the exclusionary provision at section 52(2.1) removes from the public their positive right of access to information held by government as set out in section 4(1). In my view, had the legislature intended to fetter the public's right of access to records related to prosecutions that are merely contemplated as well those that are already underway, it would have specifically identified that in the wording of the exclusion.

[36] It should be noted that within the law enforcement exemptions set out in section 15(1) of the BC *Act*, section 15(1)(g) contemplates the discretionary exemption of information related to or use in the exercise of "prosecutorial discretion." That section reads:

> The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> > reveal any information relating to or used in the exercise of prosecutorial discretion.

[37] Accordingly, the British Columbia Legislature expressly considered the issue of prosecutorial discretion to contemplate prosecutions and included it in the legislation. Of note is that it chose to include it in the law enforcement exemption rather than the exclusion for records relating to a prosecution at section 3(1)(h). Although the *Act* which governs the current appeal contains no such provision within its law enforcement exemptions or elsewhere in its provisions, in my view, in the absence of specific mention of records related to contemplated prosecutions in section 52(2.1) I do not accept that the legislature wished such records to be *excluded* from the scope *Act.* The disclosure of such records, of course, remains subject to the possible application of the enumerated exemptions including those found at section 12 for solicitor-client privileged information (which has been claimed in the circumstances of this appeal) and those found at section 8 relating to law enforcement matters.

[38] Accordingly, in my view section 52(2.1) of the *Act* only applies to records directly associated with a prosecution that is officially underway, that is, where a charge has been laid. In the circumstances of this appeal, I have insufficient evidence before me to conclude that a prosecution relating to the records at issue is reasonably contemplated, let alone underway. As a result, I find that the first requirement of the three-part test to determine the application of the exclusion at section 52(2.1) has not been established.

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[10] See also British Columbia Information and Privacy Commissioner Order Nos. 20-1994 and 256-1998.

[39] As established in Orders MO-2439 and MO-3139-I, the law of evidentiary burdens places the onus of proof to establish that section 52(2.1) applies 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. For the reasons explained above, in my view, the city has not provided me with sufficient evidence to establish that the first requirement of the three-part test to determine the application of the exclusion at section 52(2.1) has been met. As all three parts of the test must be met for the exclusion to apply and I have found that the city has not discharged its evidentiary burden with respect to part 1, I find that section 52(2.1) does not apply in the circumstances of this appeal and the records at issue are not excluded from the operation of the *Act.*

ORDER:

1. I do not uphold the city's decision that the exclusion at section 52(2.1) applies to the records at issue and find that the records fall within the scope of the *Act.*

2. I remain seized of this appeal to address the remaining issue of whether the discretionary exemption at section 12(1) of the *Act* applies to exempt the records from disclosure.

Original signed by: March 4, 2016
Catherine Corban
Adjudicator