Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3673-I

Appeal PA15-277-2

Ministry of the Attorney General

December 7, 2016

Summary: The appellant seeks access to all records relating to the homicide investigation, his prosecution and conviction in relation to the death of an identified individual. Initially, the ministry denied the appellant access to the records under the solicitor client privilege exemption in section 49(a), read with section 19, and the personal privacy exemption in section 49(b). However, during the inquiry, the ministry took the position that the records fall outside of the scope of the *Act* as a result of the operation of section 65(5.2). The basis for the ministry's position is that the appellant's application to the Ontario Superior Court of Justice relating to his post-conviction right to disclosure of records relating to his conviction, and an application for ministerial review of his conviction under section 696.1 of the *Criminal Code,* constitute "proceedings in respect of the prosecution". In this interim order, the adjudicator finds that section 65(5.2) has not been established and, therefore, that the records fall within the scope of the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(5.2), *Criminal Code*, R.S.C. 1985 c. C-46 section 696.1, *Criminal Appeal Rules*, SI.94-169 sections 4(2) and 7.

Orders and Investigation Reports Considered: Orders MO-2439, PO-2693

Cases Considered: *Ontario (Attorney General) v. Toronto Star* 2010 ONSC 991

OVERVIEW:

[1] The appellant was convicted of manslaughter in 1986 after pleading guilty to killing an individual. The appellant was sentenced to ten years in jail. In 1989, the appellant appealed his sentence, but not his conviction, to the Ontario Court of Appeal

and his sentence was reduced to seven years. The appellant was released from prison in 1992. In 2010, the appellant approached the Osgoode Hall Law School Innocence Project (the Innocence Project) to assist him in appealing or overturning his criminal conviction.

[2] The Innocence Project is a clinical legal program which investigates cases of possible wrongful conviction. In pursuit of a finding of wrongful conviction, the Innocence Project recently filed an application for ministerial review pursuant to section 696.1 of the *Criminal Code*[1] (the "section 696.1 application"). This section states as follows:

> An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

[3] The process under section 696.1 requires that applicants provide new and significant evidence to obtain a finding from the federal Minister of Justice that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. Applicants must also demonstrate that their rights of judicial review or appeal with respect to their conviction have been exhausted. If the Minister of Justice is satisfied that a reasonable basis to conclude that a miscarriage of justice likely occurred, the Minister may, pursuant to section 696.3(3) of the *Criminal Code*, order a new trial or refer the matter to the court of appeal as if it were an appeal by the convicted person. I note that section 696.4 states that an application under section 696.1 "is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy."

FOI Request

[4] In preparation for filing his section 696.1 application, the Innocence Project, on behalf of the appellant, wrote to the Crown Law Office-Criminal with the Ministry of the Attorney General (the ministry) requesting full disclosure of the Crown Brief and police investigative files, as comprised of records held by the ministry, the Ministry of Community Safety and Correctional Services (MCSCS), the Brantford Police Services Board (Brantford Police) and the Waterloo Regional Police Services Board (Waterloo Police). According to the appellant, this informal request was made in 2012.

[5] However, after working with the ministry for three years and, in his view, not obtaining a complete copy of the records, the appellant filed a number of access to information requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) and its municipal counterpart with the ministry, MCSCS, Brantford Police and

[1] RSC 1985 c. C-46.

Waterloo Police. The request that is the subject of this appeal was filed with the Ministry of the Attorney General. In his request, the appellant stated that he sought access to the following:

> …general records and [the appellant's] own personal information in relation to the investigation of the death of [an identified individual] in 1983, the prosecution of the [the appellant] for this death, and [the appellant's] 1986 conviction.
>
> … [the appellant] is requesting access to all records, information and documents in [the ministry's] file relating to the homicide investigation and conviction noted above.

[6] After receiving the appellant's request under the *Act*, the ministry advised him that it extended the time to respond to his request under section 27(1)(a) of the *Act*. The appellant appealed the ministry's time extension and Appeal PA15-277 was opened. Appeal PA15-277 was closed when the ministry located responsive records and issued an access decision to the appellant.

[7] In its decision letter, the ministry denied the appellant access to all responsive records pursuant to the discretionary exemptions in sections 49(a), read with section 19 (solicitor client privilege), and 49(b) (personal privacy) of the *Act*. The ministry also indicated that the presumption of an unjustified invasion of personal privacy in section 21(3)(b) of the *Act* applies to the records as the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The appellant appealed the ministry's decision and Appeal PA15-277-2 was opened.

[8] As noted above, the appellant filed a number of access requests with various law enforcement agencies, including Brantford and Waterloo Police. Both police services transferred the appellant's requests and responsive records to the ministry pursuant to section 18(3) of the *Municipal Freedom of Information and Protection of Privacy Act*. The requester appealed both Brantford Police's (Appeal MA15-246) and Waterloo Police's (Appeal MA15-254-2) decisions to transfer his requests.

[9] I confirm that this interim decision *only* addresses the appellant's appeal of the ministry's decision, PA15-277-2.

[10] During mediation of this appeal, the ministry confirmed its decision to deny the appellant access to the records in their entirety pursuant to sections 49(a), read with section 19(a) and (b), and 49(b) of the *Act*[2].

[11] The appellant advised the mediator that he believes that further responsive records exist, thereby raising the reasonableness of the ministry's search as an issue. The appellant provided the mediator with two lists of records he believed to be missing.

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[2] The ministry also confirmed that these exemptions applied to the records transferred from Brantford Police.

The mediator shared these lists with the ministry, with the appellant's consent.

[12] In response, the ministry advised that it maintained its decision to deny the appellant access to the records, in full, pursuant to the exemptions cited in its decision letter. Further, the ministry advised that it "will not undertake a further search, as the result would be the same."

[13] The appellant confirmed that he continues to pursue access to all the records that the ministry denied him access to. However, the appellant confirmed that he no longer takes issue with the ministry's search and, therefore, the reasonableness of the ministry's search is no longer at issue in this appeal.

[14] The appeal could not be resolved at mediation. Consequently, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry into the issues under appeal. I began my inquiry by inviting the ministry to submit representations on the application of the exemptions it claims. In addition, I asked the ministry to provide me with a complete copy of the records, as it did not do so during mediation.

Section 65(5.2) of the *Act*

[15] Concurrent with his request for access under the *Act*, the appellant filed an application under Rule 14.05(3)(g) of the *Rules of Civil Procedure* to the Ontario Superior Court of Justice (the Superior Court) for the following:

a. A declaration that the protection of the innocent is a principle of fundamental justice contained within section 7 of the *Canadian Charter of Rights and Freedoms*; and that one concrete application of this general principle is the right of a convicted offender, seeking to review a conviction after exhausting rights of appeal, to apply to a Superior Court for orders of production and disclosure; and

b. A declaration that a convicted offender seeking to review his or her conviction is not required to obtain the consent of the Attorney General of Ontario and his or her designates as a precondition to communicating with other public officials, or as a precondition for seeking information from other public officials regarding the conviction.

[16] For the sake of clarity, I will refer to this application as the "Superior Court application" in this order. The ministry, the respondent in that application, filed a motion to strike the appellant's Superior Court application. The ministry's motion to strike was heard on July 25, 2016 and was dismissed on October 24, 2016. In its representations, the ministry confirmed that it is seeking leave to appeal this decision to the Divisional Court.

[17] In response to my first Notice of Inquiry, the ministry sent me a letter advising that it now claimed that the records are excluded from the operation of the *Act* under the on-going prosecution exclusion in section 65(5.2). In light of its new claim, the

ministry submitted that it was not required to provide me with representations on the exemptions it claimed to the records or a copy of the records at issue. The ministry issued a revised access decision to the appellant reflecting its new position.

[18] Upon review of the ministry's letter, I invited it to submit representations on the application of the prosecution exclusion in section 65(5.2) to the records. The ministry advised that it would submit representations on the application of the exclusion to the records at issue in Appeal PA15-277-2, but that its representations would also apply to the records subject to the appellant's related appeals filed with MCSCS (PA15-484), Brantford Police (MA15-246) and Waterloo Police (MA15-254-2).

[19] The ministry submitted representations on the application of section 65(5.2) to exclude the records at issue from the *Act*. The ministry's representations were shared with the appellant, in accordance with this office's *Practice Direction Number 7* and the appellant provided representations in response.

[20] In October 2016, the appellant confirmed that he filed an application under section 696.1 of the *Criminal Code* for ministerial review of his conviction. I sought and received further representations from the ministry in light of this development.

[21] In this interim decision, I address the preliminary jurisdictional issue of whether the exclusion at section 65(5.2) 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.

[22] Based on the reasons that follow, I find that the ministry has not established that the exclusion at section 65(5.2) applies to the records at issue. Specifically, I find that the appellant's section 696.1 and Superior Court applications do not constitute *proceedings in respect of the prosecution*.

RECORDS:

[23] The records at issue in this appeal consist of documents relating to the investigation into the death of an individual and the appellant's prosecution and subsequent conviction. I note that the ministry did not provide me with copies of the records at issue in this appeal to review. However, I find that I am not required to review the records in order to make a determination as to whether the records are excluded from the scope of the *Act* under section 65(5.2).

DISCUSSION:

Does section 65(5.2) apply to exclude the records from the application of the *Act*?

[24] Section 65(5.2) of the *Act* 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.

[25] 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 dissemination and publication of records relating to an ongoing prosecution.[3]

[26] 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.[4]

[27] 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*.[5]

[28] 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.[6]

Representations

[29] The ministry claims that the appellant seeks documents that are already in his possession as received in response to his informal request to the ministry's Crown Law Office-Criminal in support of his section 696.1 application. The ministry also asserts that the appellant continues to pursue these same documents through a number of different sources and different routes, namely, his access request under the *Act* and Superior Court application, as described above.

[30] The ministry refers to *Ontario (Attorney General) v. Toronto Star*[7], which was the first time the Divisional Court considered section 65(5.2) of the *Act*. In that decision, the Divisional Court considered Senior Adjudicator John Higgin's order which compelled the ministry to produce to the IPC copies of the records to determine whether the records fell within that exclusion or one of the exemptions claimed by the ministry. In the case before the adjudicator, the criminal proceedings that were the subject of the records at issue were still before the courts. The Divisional Court considered section 65(5.2) and enumerated the following purposes of the exclusion:

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[3] *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.). (*Toronto Star)*
[4] Order PO-2703.
[5] *Supra* note 3. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, at para. 25.
[6] Order PO-2703.
[7] *Toronto Star*, *supra* note 3.

- 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;

- To ensure that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials; and

- Controlling the dissemination of records relating to an ongoing prosecution.

[31] Applying these principles, the Divisional Court found that the adjudicator narrowly interpreted the scope of the exclusion to include only documents contained in the Crown brief.

[32] In addition, the Divisional Court considered the words *relating to* and *in respect of* as they appear in section 65(5.2) of the *Act*. The Divisional Court, applying the principle articulated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*[8], found that the adjudicator erred when he interpreted *relating to* as requiring a *substantial connection* between the record and the prosecution. In the case of section 65(5.2), the Divisional Court found that it is necessary to consider (a) the original purpose for preparing the record, (b) when the intent to prosecute had crystallized and (c) the date the record was originally prepared or created.[9] If the purpose of preparing records was to assist or to be used in a prosecution and the intent to prosecute had already crystalized when the records were created, the Divisional Court found that these records would "clearly" *relate to* the prosecution for the purpose of section 65(5.2) of the *Act*. Therefore, the Divisional Court concluded that all that is required for a record to *relate to* a prosecution is for there to be *some connection* between the two. Similarly, the Divisional Court, applying the broad interpretation articulated in *Nowegijick v. The Queen*[10], held that *in respect of* requires only *some connection* between the prosecution and a proceeding.

[33] Given the *Toronto Star* decision, the ministry submits that records falling under section 65(5.2) 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* and *proceedings in respect of the prosecution* should be interpreted as widely as possible such that there only be *some connection* between applicable subject matters.

[34] The ministry submits that the appellant's Superior Court application is for an

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[8] (1998), 36 OR (3d) 418, [1998] 1 SCR 27, [1998] SCJ No. 2 at para. 21: "… the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

[9] *Toronto Star, supra* note 3, at para 53.

[10] [1983] 1 SCR 29 at p. 39: "The words 'in respect of' are, in my opinion, words of the widest possible scope. They import such meanings as 'in relation to', 'with reference to' or 'in connection with'. The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters."

order of production in relation to the Crown Brief and any investigative files pertaining to his 1986 conviction so that he may have his conviction reviewed/appealed/overturned, either by way of section 696.1 of the *Criminal Code* or through a formal appeal to the Ontario Court of Appeal. The ministry submits that the appellant's motion for declaratory relief is "directly connected" to his overall efforts to have his conviction reviewed and overturned.

[35] In light of the above, the ministry submits that there is "no difficulty in satisfying the requirements of section 65(5.2)" of the *Act*. The ministry states that the records responsive to the appellant's request clearly relate to his 1986 prosecution and conviction. Further, the "present court proceedings, in concert with the s. 696.1 application process, are proceedings in respect of the original prosecution/conviction". The ministry submits that the "special nature of the records at issue" in this appeal, that is, the Crown Brief and police investigative records connected to the appellant's 1986 conviction, along with the appellant's efforts to have his conviction appealed/overturned, "dictate that the Crown and courts maintain control over the disclosure of such records until such time that the appellant's legal matters are complete."

[36] In further representations submitted after the appellant filed his section 696.1 application, the ministry submits that this application "further solidifies" the ministry's position that all proceedings in respect of the criminal prosecution have not been completed. The ministry submits that the records involved in the section 696.1 application are exactly the same as those subject to this appeal. Further, the ministry reiterates that the section 696.1 application stands in addition to the appellant's Superior Court application and relates directly to his criminal conviction from 1986.

[37] In response to the ministry's original decision letter, the appellant raised a concern with regard to the ministry's position that he "resurrected and retriggered" the prosecution by questioning the validity of his conviction. The appellant is concerned with the ministry's suggestion that anyone claiming wrongful conviction would "always be thwarted from receiving investigative materials" by section 65(5.2). Further, the appellant notes that he was convicted by a trial court in 1986.

[38] In further response to the Notice of Inquiry and the ministry's representations on the application of section 65(5.2), the appellant confirms his disagreement with the ministry's position. The appellant states that he was convicted and all relevant time periods for appellate review expired. As such, the appellant does not agree that the records being sought relate to "proceedings in respect of the prosecution which have not been completed" as required by section 65(5.2) of the *Act*. The appellant submits that an application for ministerial review under section 696.1 of the *Criminal Code* is not a court process or a continuation of a prosecution.

[39] The appellant also raises a concern that, if the ministry is correct in relying upon section 65(5.2), any individual who questions their conviction will not be granted statutory access to disclosure materials.

Analysis and Findings

[40] In order for the exclusion in section 65(5.2) to apply, the ministry must establish the following:

1. There is a prosecution;

2. There is some connection between the records and the prosecution; and

3. All the proceedings with respect to the prosecution have not been completed.[11]

[41] In Order MO-2439, Senior Adjudicator Higgins stated that the municipal equivalent of section 10(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 places the onus of proof to accomplish that objective on the institution. He stated 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. Senior Adjudicator Higgin's approach was adopted in Order MO-3139-I and I find it relevant to the circumstances in this appeal.

[42] Based on my review of the parties' representations and the circumstances of this appeal, I find the requirements for the application of section 65(5.2) have not been met.

[43] To begin, with respect to the first two parts of the test set out above, I am satisfied that there is *some connection* between the records at issue and the prosecution. The ministry states and I am satisfied that the records, namely, the investigation notes and reports from the Brantford Police and the ministry's Crown Brief, are connected to the appellant's prosecution and subsequent conviction in 1986.

[44] However, I do not agree with the ministry that all the *proceedings in respect of the prosecution* have not been completed. The ministry's main contention is that all proceedings in respect of the appellant's criminal prosecution have not been completed on account of his recent efforts to have his 1986 manslaughter conviction reviewed/appealed/overturned on the basis of wrongful conviction. While I do not dispute that the appellant is making efforts to overturn his conviction, I find that these "efforts", that is his Superior Court and section 696.1 applications, do not amount to *proceedings in respect of the prosecution*.

[45] In support of its position, the ministry refers to the appellant's application for a declaration that the appellant has the right to apply to a Superior Court for orders of production and disclosure to seek a review of his conviction. The ministry submits in its representations that "the present proceedings, in concert with the s. 696.1 application process, are proceedings in respect of the original prosecution/conviction."

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[11] Orders PO-3260 and MO-3294-I.

[46] In October 2016, the appellant confirmed that he filed an application for ministerial review under 696.1 of the *Criminal Code*. However, the appellant has not filed a formal appeal of his conviction with the Ontario Court of Appeal.

[47] It is my understanding, from a review of the materials submitted by both the appellant and the ministry in relation to his Superior Court application, that the appellant's goal in commencing the application is the same as that for this appeal: to gather sufficient fresh and significant evidence to determine whether he can apply for a ministerial review or formal appeal of his conviction. As the ministry states in its representations, "the appellant continues to pursue the same documents [that is, the Crown Brief and related investigation records] from a number of different sources, via a number of competing routes; namely the FOI process and the courts." Based on my review of the appellant's Superior Court application and the ministry's own characterization, the appellant's Superior Court application is akin to a freedom of information request. The goal of the application is the same the appellant's request under the *Act*: to obtain complete access to all records, information and documents in the ministry's and other law enforcement institutions' files relating to the homicide investigation and conviction of the appellant. The Superior Court application itself is not a proceeding in respect of the appellant's prosecution, although the records that are the subject of the proceeding do relate to the appellant's prosecution.

[48] Further, in the factum he submitted to the Superior Court and which was provided to me in this appeal, the appellant asserts that an application under section 696.1 of the *Criminal Code* and the formal appeal process requires him to provide "new or fresh and significant evidence" in order to proceed.[12] The appellant asserts that, without this fresh and significant evidence, both a section 696.1 application and a formal appeal will fail.[13] While the appellant has now brought his section 696.1 application for a ministerial review of his conviction, he has not taken any steps to commence a formal appeal of his conviction.

[49] Given these circumstances, while I agree that the proceedings relating to the appellant's Superior Court application have not been completed, I do not agree with the ministry's submission that this proceeding is *in respect of the prosecution* of the appellant. The Superior Court application is analogous to an FOI request for records relating to a prosecution. Based on my review of the circumstances, I find that the application is not *in respect of the prosecution* as it is merely a different avenue, as the ministry asserts, through which the appellant attempts to obtain access to records relating to his conviction. From my review, the proceeding before the Superior Court is in respect of the disclosure of records post-conviction and is not in respect of the prosecution or conviction of the appellant itself. Therefore, I find that there is not a connection between the proceeding before the Superior Court and the appellant's prosecution in the sense contemplated by the Divisional Court in *Ontario (Attorney*

[12] I refer the ministry to the appellant's factum dated March 24, 2016.
[13] *Ibid.*

General) v. Toronto Star[14].

[50] I also find that the appellant's section 696.1 application does not constitute a *proceeding in respect of the prosecution* as required by the exclusion. In its representations, the ministry states that the process under section 696.1 requires that applicants provide new and significant evidence to obtain a finding from the federal Minister of Justice that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. If the Minister of Justice is satisfied that a reasonable basis exists, the Minister *may*, pursuant to section 696.3(3) of the *Criminal Code*, order a new trial or refer the matter to the court of appeal as if it were an appeal by the convicted person.

[51] As I indicated above, section 696.4 of the *Criminal Code* states that any remedy available under section 696.3 of the *Criminal Code* is an "extraordinary remedy". Clearly, an application under section 696.1 of the *Criminal Code* is not in the regular course of a prosecution, conviction and subsequent appeal. The appellant was convicted over 30 years ago. Further, it appears from the ministry's representations and a review of the relevant provisions of the *Criminal Code* that the section 696.1 application would result in a determination of whether the appellant's conviction should be reviewed, *not* whether the appellant's conviction was appropriate. Given these circumstances, I find that there is not a connection between the application that was submitted to the Minister of Justice and the appellant's prosecution in the sense contemplated by the Divisional Court in *Ontario (Attorney General) v. Toronto Star*.[15]

[52] Moreover, upon review of the parties' representations and the circumstances of this appeal, I find that neither the Superior Court application nor the section 696.1 application, either alone or "in concert" as the ministry submits, constitute *proceedings in respect of the prosecution*. As stated above, the Superior Court application is akin to a freedom of information request for records and the section 696.1 application may result in the Minister of Justice referring the matter to a new trial or to an appellate court. Therefore, I am not satisfied that the appellant's Superior Court application and section 696.1 application constitute *proceedings in respect of the prosecution*.

[53] I note that the ministry submits that the appellant could also file an appeal to the Ontario Court of Appeal. However, if the appellant should pursue an appeal of his conviction through the Ontario Court of Appeal, initiating that process would require him to file an application for time extension under the *Criminal Appeal Rules*[16]. According to section 4(2) the *Criminal Appeal Rules*, "where the appeal is from conviction, sentence, or both, the notice of appeal shall be served within thirty days after the day of the sentence." Clearly, the time period during which the appellant could appeal his conviction has passed. He was convicted over 30 years ago. If the appellant were to pursue an appeal with the Ontario Court of Appeal, he would be required to file an application for time extension under section 7 of the *Criminal Appeal Rules*. If the

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[14] *Toronto Star*, *supra* note 3.
[15] *Toronto Star*, *supra* note 3.
[16] SI/93-169.

court does not grant the time extension request, the appellant would not be permitted to pursue an appeal of his conviction. In the circumstances of this appeal, I find that the appellant does not have a current and active right to appeal his conviction. Therefore, I find that the potential for the appellant to file a time extension under the *Criminal Appeal Rules* does not constitute a proceeding in respect of the prosecution as contemplated by section 65(5.2) of the *Act*.

[54] I find support for my finding that the records at issue are not excluded under section 65(5.2) in Order PO-2693. In that decision, Senior Adjudicator Higgins considered the application of the research exclusion in section 65(8.1)(a) of the *Act*. After considering the purposes of the *Act* and the legislative purposes of the exclusion, Senior Adjudicator Higgins concluded as follows:

> … the Legislature did not intend to create an exclusion from the application of the Act whose reach would be broader than is necessary to accomplish these stated objectives. It is important to note, in that regard, that section 65(8.1)(a) only relates to the question of whether the Act applies to the records. If the Act is found to apply, this does not automatically lead to disclosure. Where the Act applies, the records could be subject to one of the mandatory and/or discretionary exemptions from the right of access, which are found in sections 12 through 22 of the Act.[17]

[55] While the above analysis relates to the research exclusion, not the prosecution exclusion, I apply this analysis with regard to the scope of an exclusion to section 65(5.2) of the *Act*.

[56] As set out in the Divisional Court's decision in *Toronto Star*, the purposes of the prosecution exclusion 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.[18] The Crown's prosecution of the appellant was completed and the appellant was convicted of manslaughter 30 years ago. I have reviewed the parties' representations and the circumstances of this appeal and find that I do not have sufficient evidence to satisfy me that the inclusion of these records within the scope of the *Act* would, in any way, disrupt the integrity of the criminal justice system. Furthermore, I find that none of the other purposes for the prosecution exclusion set out in *Toronto Star* are engaged in this appeal. Finally, I note that section 10(1) recognizes the public's positive right of access to information held by government and exclusions such as section 65(5.2) would remove that positive right of access. As stated by Senior Adjudicator Higgins in Order PO-2693, the legislature did not intend to create an exclusion whose reach would be broader than necessary to accomplish the stated purposes of the exclusion itself.

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[17] Order PO-2693, page 7.
[18] *Toronto Star*, *supra* note 3.

[57] Based on my review of the circumstances in this appeal and the ministry's representations, I do not interpret section 65(5.2) to include the Superior Court application within the meaning of a *proceeding in respect of the prosecution*. As discussed above, the current Superior Court application relates to the appellant's rights to obtain access to all records relating to the prosecution that resulted in his conviction in 1986.

[58] In addition, I do not interpret section 65(5.2) to include the appellant's section 696.1 application within the meaning of a *proceeding in respect of the prosecution*. As discussed above, even with his section 696.1 application, the appellant does not have an active and current right to either a new trial or an appeal of his conviction. Further, any remedy in response to that application would be *extraordinary*. Accordingly, I find that section 65(5.2) does not apply to exclude the records at issue from the scope of the *Act*.

[59] Moreover, if I were to adopt the ministry's interpretation of section 65(5.2) of the *Act*, it would be difficult to see how the exclusion would not apply to all post-conviction requests for disclosure. I note that the ministry submitted prior to the appellant's formal filing of his section 696.1 application that even the contemplation of this application would trigger the application of section 65(5.2) of the *Act*. From my review of section 696.1 of the *Criminal Code*, it appears that the only requirement for filing such an application is that the applicant's "rights of judicial review or appeal with respect to the conviction or finding have been exhausted." Therefore, any individual who has been convicted and whose right of appeal or judicial review has been exhausted has a right to file an application under section 696.1 of the *Criminal Code*. Applying the ministry's reasoning, section 65(5.2) exclusion would arguably apply to any records responsive to a request made by an individual who has been convicted of a *Criminal Code* offence and whose right of appeal or judicial review has been exhausted. Having considered the purposes of the section 65(5.2) exclusion identified above and the purposes of the *Act* as a whole, I do not accept the ministry's claim that either the section 696.1 application or the Superior Court application are proceedings in respect of the appellant's original prosecution and/or conviction.

[60] Finally, as Senior Adjudicator Higgins stated in Order PO-2693, section 65(5.2) *only* relates to the question of whether the *Act* applies to the records. Even though I find that the *Act* applies to these records, this does not automatically lead to the disclosure of the records to the appellant. As stated above, the ministry claimed the application of sections 49(a), read with the solicitor client privilege exemptions in sections 19(a) and (b), and the personal privacy exemption in section 49(b) to the records. Therefore, even though I find that the prosecution exclusion in section 65(5.2) does not apply to the records, I am still required to consider whether these records are exempt from disclosure.

[61] For the reasons set out above, I find that section 65(5.2) does not apply and the records at issue are not excluded from the operation of the *Act*.

ORDER:

1. I do not uphold the ministry's decision that the exclusion at section 65(5.2) 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 issues of whether the records are exempt from disclosure under the discretionary exemptions in sections 49(a), read with section 19(a) and (b), and 49(b) of the *Act*.

Original Signed By: December 7, 2016

Justine Wai
Adjudicator