

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3670

Appeal MA17-494

Peel Regional Police Services Board

October 12, 2018

**Summary:** The appellant sought access to certain records related to two specified pieces of equipment used by the police for sobriety testing. The police denied access to the records identified as responsive pursuant to the ongoing prosecution exclusion in section 52(2.1) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed the access decision to this office. The adjudicator upholds the access decision of the police and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(2.1).

**Cases Considered:** *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div Ct).

### OVERVIEW:

[1] The Peel Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following records:

I am requesting access to maintenance records and other information in the possession or control of the Peel Regional Police in relation to the Drager Alcotest [specified numbers] bearing [a specified] serial number, in operation by Peel Regional Police on [a certain date in 2017]. I am

requesting service records, maintenance records, and calibration data maintained in relation to this Alcotest ... for approximately 90 days prior to [the given date].

I am also requesting access to maintenance records and other information in the possession or control of the Peel Regional Police in relation to Intoxilyzer Model [specified letters and numbers]. The said unit was in operation at 21 Division of the Peel Regional Police on [a certain date]. I am requesting service records, maintenance records, and COBRA data maintained in relation to the 50 tests that were done prior to 00:11:12 and 00:32:50 on [the given date].

[2] In response to the request, the police issued a decision advising that access to the responsive records was denied in full, pursuant to the exclusion in section 52(2.1) (ongoing prosecution) and the discretionary law enforcement exemption in section 8(2)(b) (disclosure would constitute an offence).

[3] The requester (now the appellant) appealed the police's decision to the IPC, which appointed a mediator to explore the possibility of resolving the appeal. Although mediation was attempted, a resolution of the appeal could not be reached, and it was transferred to the adjudication stage for an inquiry. I began my inquiry into the appeal by sending the police a Notice of Inquiry outlining the issues and seeking representations, which I received. I shared the representations of the police with the appellant, who decided not to submit representations.

[4] In this order, I find that the records are excluded from the *Act* pursuant to section 52(2.1), and I dismiss the appeal.

## **RECORDS:**

[5] The records at issue are the specified service and maintenance records for the Alcotest, as well as the COBRA data for the Intoxilyzer, which were provided to this office on a CD.

## **DISCUSSION:**

[6] The only issue I address in this order is whether the records are excluded from the operation of *MFIPPA* by virtue of section 52(2.1). This provision 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.

[7] Section 52(2.1) is the only time-limited exclusion under *MFIPPA*, and it excludes records from access under the *Act* for as long as the related prosecution is ongoing.

The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused's 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.<sup>1</sup>

[8] 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.<sup>2</sup>

[9] 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."<sup>3</sup>

[10] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed; a question that must be decided based on the facts of each case.<sup>4</sup>

[11] Since records which would otherwise be accessible under the *Act*, as stipulated by section 4(1),<sup>5</sup> are not accessible because of the application of the exclusion in section 52(2.1), the law of evidentiary burdens places the onus of proof to establish that on the institution. The failure of an institution to establish the application of section 52(2.1) will result in a finding that the *Act* applies and that access to the record must be decided under section 4(1) and any applicable exemptions. The evidence can be found in the representations of the parties, the circumstances of the appeal, and the records themselves.<sup>6</sup>

## **Representations**

[12] The police submit that the records requested by the appellant are excluded from the *Act* because they relate to an ongoing prosecution. Referring to the purposes of the exclusion for prosecution-related records described in *MAG v. Toronto Star*, the police state that the Court "unequivocally held" that the exclusion is not limited to records found in the Crown Brief, or those deemed "relevant" to the prosecution by the Crown. Rather, the police note that the Divisional Court held that the exclusion applies to any

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<sup>1</sup> *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) (*MAG v. Toronto Star*).

<sup>2</sup> Order PO-2703.

<sup>3</sup> *MAG v. Toronto Star*, cited above; see also *Canada (Information Commissioner) v Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 SCR 66 at para 25.

<sup>4</sup> Order PO-2703.

<sup>5</sup> Section 4(1) of the *Act* establishes a positive right of access to information in the custody or under the control of an institution unless the request is frivolous or vexatious or a specific exemption, exclusion or confidentiality provision applies.

<sup>6</sup> Orders MO-3139-I and MO-2439.

record that has some connection to a prosecution during the course of the proceedings.

[13] According to the police, a prosecution clearly encompasses proceedings in respect of a criminal charge. Citing the occurrence number of the incident, the police explain that on the date listed in the request, the appellant was charged with Dangerous Operation of a Motor Vehicle and Impaired Operation with Excess Blood Alcohol. The police note that breath samples were provided for analysis by the identified Intoxilyzer.

[14] The police argue that the records have “some connection” to the prosecution because they are the records leading up to and pertaining to the precise time the individual submitted breath samples. The police also argue that the connection of the requested records to the ongoing prosecution is made clear by the fact that the appellant previously requested them, unsuccessfully, through the responsible Crown counsel. The police submit that the relation of these types of records to impaired driving prosecutions has been the subject of “extensive litigation,” noting that:

... [The] Court of Appeal in *R. v. Jackson*<sup>7</sup> has clearly addressed the procedure for addressing requests for precisely the same category of records as are being sought by the Appellant, in the context of an ongoing criminal proceeding. The Court in that decision concluded that these types of records are third party records and their production/disclosure is governed by the process outlined in *R. v. O'Connor*. ... The very fact that the Court of Appeal has determined that the records must be sought by way of a third party records application and that they may be relevant in some circumstances, ... is decisive of the fact that the records are “related to” the ongoing proceeding.

[15] The police maintain that the relevant criminal prosecution is ongoing and indicate that the date of the individual’s next court appearance is approximately five weeks from the date of the representations.<sup>8</sup>

[16] When I requested submissions from the appellant, I noted the police’s evidence of the next court appearance in this matter (still a month away at that point) and asked the appellant to address the application of the exclusion “with specific reference to the apparently ongoing nature of the prosecution.” As stated, the appellant did not submit representations. When contacted by this office on a date following the next indicated court date, the appellant confirmed that the appeal was still being pursued and asked that I rely on the material previously filed.

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<sup>7</sup> *R. v. Jackson*, 2015 ONCA 832, at paragraph 90.

<sup>8</sup> August 7, 2018.

## Analysis and findings

[17] In order for the exclusion in section 52(2.1) to apply, the party relying on section 52(2.1) must establish three things: first, that there is a prosecution; second, that there is “some connection” between the record and a prosecution; and third, that all of the proceedings with respect to the prosecution have not been completed.<sup>9</sup>

[18] As noted previously, the term “prosecution” in section 52(2.1) of the *Act* includes proceedings in respect of criminal charges laid under the Criminal Code of Canada.<sup>10</sup> The evidence of the police in this appeal is that the appellant has been charged with, and is being prosecuted for, two Criminal Code offences: dangerous operation of a motor vehicle and impaired driving with excess blood alcohol. The specific Criminal Code provisions are identified in the affidavit evidence provided with the written representations as sections 249(1) and 253(1)(b), respectively. Based on this evidence, I find that the first part of the test under section 52(2.1) is met.

[19] The next point for me to decide is whether there exists “some connection” between the records at issue and the prosecution. As stated, *MAG v. Toronto Star* established that “relating to” requires some connection between “a record” and “a prosecution.” The request here is for records regarding the calibration, accuracy, inspection, maintenance and service of two specific pieces of equipment used by police for roadside sobriety screening and the analysis of breath samples at the police division. The time periods identified for those records are very specific. The police submit, and I accept, that those time periods coincide with the time before, the time leading up to, and the precise time of, the breath samples that resulted in the laying of these Criminal Code charges. It has been suggested that the records are “not relevant” to the prosecution and therefore lack the requisite connection. However, in *MAG v. Toronto Star*, the Divisional Court observed that:

The Crown Brief and prosecution materials are not static. Documents that are not yet part of the Crown Brief may become part of the Crown Brief later and prosecution materials may relate or become integral to the prosecution over the course of the proceedings.<sup>11</sup>

[20] In the circumstances of this appeal, I conclude that it is reasonable to expect that the records sought may yet become relevant to the prosecution of these offences. In this context, I find that the responsive records meet the threshold for establishing that there is some connection between them and the prosecution. This meets the second part of the test under section 52(2.1).

[21] The final requirement of the test for the exclusion of a record under section

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<sup>9</sup> See Order PO-3260.

<sup>10</sup> R.S.C., 1985, c. C-46.

<sup>11</sup> Paragraph 56.

52(2.1) of *MFIPPA* requires a determination of whether the proceedings in respect of the prosecution are ongoing. From the evidence of the police, which the appellant has not rebutted, the proceedings in respect of the Criminal Code charges are not completed. As I am satisfied of the ongoing nature of these proceedings, I find that the third part of the section 52(2.1) test is met.

[22] In sum, I am satisfied by the evidence that the records at issue in this appeal have "some connection" to the ongoing prosecution of the appellant for *Criminal Code* offences. Therefore, I find that the records fall within the ambit of the section 52(2.1) exclusion as "records relating to a prosecution." This means that the records are excluded from *MFIPPA* and that they cannot be accessed under the *Act* at this time.

[23] As a result of my decision that the exclusion in section 52(2.1) of *MFIPPA* applies to the records, it is unnecessary for me to review the possible application of the law enforcement exemption in section 8(2)(b) to them.

**ORDER:**

I uphold the police's decision, and I dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ October 12, 2018