Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4554

Appeal MA23-00557

Toronto Police Services Board

August 20, 2024

Summary: The appellant requested a report prepared by the Ontario Provincial Police for the Toronto Police Services Board (the police). The police withheld the report based on section 52(2.1), the exclusion for prosecution records in the *Act*. The appellant appealed the access decision. The adjudicator agrees with the police's application of section 52(2.1) of the *Act* 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).

Orders Considered: Order PO-3652.

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

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Police Services Board (the police) for a copy of a report prepared by the Ontario Provincial Police (OPP) regarding a retired police detective and the removal of drug exhibits from the police's facilities.

[2] The police located the report and informed the appellant that they would not provide him access because it relates to prosecutions that have not been completed, and

as a result, is excluded from the *Act* by section 52(2.1).

[3] The requester (now the appellant) appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC). During the initial stages of the appeal process, it became apparent that the record, the issues, and the parties in this appeal overlapped with other appeals already at the adjudication stage of the appeals process.[1] As a result, this appeal was transferred to the adjudication stage of the appeals process and assigned to me, along with the others.

[4] I decided to conduct a written inquiry pursuant the *Act* and sought and received representations from the police and the appellant. I also invited the Ministry of the Attorney General (the ministry) to make representations, which it did. Those representations were provided to the appellant, who submitted representations in reply.[2]

[5] In this decision, I uphold the police's application of section 52(2.1), and I find that the report is excluded from the application of the *Act* at this time.

RECORDS:

[6] The record at issue is a 50-page Investigation Report (the report) completed by the OPP.

DISCUSSION:

[7] The sole issue in this inquiry is whether the exclusion at section 52(2.1) of the *Act* applies to the report. Section 52(2.1) of the *Act* excludes records relating to an ongoing prosecution from the *Act*. It 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.

[8] As a result, if section 52(2.1) applies to the report, the *Act*'s access scheme does not apply to it and the appeal must be dismissed. As set out in the Notice of Inquiry provided to the parties at the beginning of this inquiry, 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 sharing and publication of records relating to an

[1] The related appeals are PA22-00128 and PA22-00129.
[2] The ministry's representations were also provided to the parties to Appeal PA22-00129, where the same requester made a request for the same report to the Ministry of the Solicitor General. Order PO-4546, issued concurrently to this decision, deals with Appeal PA22-00129.

ongoing prosecution.[3]

[9] The term "prosecution" in section 52(2.1) means proceedings in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada. A "prosecution" may include prosecuting a regulatory offence that carries "true penal consequences" such as imprisonment or a significant fine.[4]

[10] For the exclusion to apply, there must be "some connection" between the records and the case to be made by the prosecuting authority.[5] However, the exclusion has not been limited to the Crown/prosecution brief and has been found to apply to records in the control of investigating authorities and third parties.

[11] The phrase "in respect of" requires some connection between "a proceeding" and "a prosecution."[6] 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.[7]

The police's representations

[12] The police say that the report at issue was prepared by the Ontario Provincial Police (OPP) following its investigation into the removal of drug exhibits from Toronto Police Service Board facilities by a former police officer.

[13] The police submit that the initial issue that triggered them to ask the OPP to investigate also impacted court proceedings involving the officer. Specifically, the police say that issues relating to their evidence management systems were determined to have affected the fair administration of justice in numerous cases.

[14] The police say that they denied the appellant access to the report pursuant to section 52(2.1) of the *Act* because it was submitted as an exhibit in a court proceeding connected with three ongoing prosecutions identified in their representations. Specifically, the police say that the Crown had a duty to disclose a redacted copy of the report to the defence in the prosecutions and that the information became critical to the proceedings.

[15] The police state that while it appeared as though all proceedings in relation to the prosecutions were complete, the expiration of the appeal windows had not expired and the police were later advised that all three parties had lodged appeals. The police argue that because the appeals are ongoing and the prosecutions are outstanding, the report should continue to be excluded in accordance with section 52(2.1) of the *Act* until the

---

[3] *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.) (*Toronto Star*).
[4] Order PO-2703.
[5] *Toronto Star,* cited above, at para. 25, and Order MO-3919-I.
[6] *Toronto Star,* cited above.
[7] Order PO-2703.

proceedings are complete.

[16] The police also note that a copy of the redacted report was made public by the Court after being entered as a court exhibit. The police say that it was eligible for public access and major media outlet obtained a copy of the report from the Clerk of the Court. The police say that the resultant article identified that the findings of the report could impact 17 criminal cases.[8]

The appellant's representations

[17] The appellant submits that police's section 52(2.1) claim should be disregarded because it is misplaced and irrelevant to the matter under appeal.

[18] The appellant asserts that I must consider the purpose of section 52(2.1) when determining whether that section applies to the report. He refers me to Order PO-2703, where an IPC adjudicator concluded that the purpose of the analogous provision in the *Freedom of Information and Protection of Privacy Act* is to protect prosecutors from having to address access-to-information requests for records that are part of their prosecution file where the matter is ongoing.[9] The appellant notes that his request was sent to the police, and that no prosecutor would be involved in the fulfilment of the request.

[19] Furthermore, the appellant argues that the prosecution used only a small portion of the report to respond to the defence's claim that there are systemic problems with the police's management of evidence. The appellant submits that most of the report was redacted prior to being entered as evidence and says that neither the Crown nor the defence had access to the redacted portions. As a result, the appellant says that none of the information he is seeking access to relates to a prosecution, as that information was not part of the exhibit at court.

[20] The appellant argues that contrary to the police's representations, safeguarding evidence against premature disclosure and/or protecting the integrity of criminal proceedings are not purposes of section 52(2.1) of the *Act*. He submits that the report is an administrative record prepared for the police to document issues with their safe-guarding of evidence and that with the exception of the small portion of the report that was used in court, it does not relate to any prosecutions.

[21] The appellant reiterates that I must consider the broader purpose of the legislation. He says that the police's "refusal to release even a scrap of responsive material is clearly contrary to the *Act*'s stated purpose of granting access to information under the control of institutions." He argues that denying access to the report would be a misuse

---

[8] The article is available here: https://www.thestar.com/news/gta/scattered-on-the-floor-toronto-police-s-dated-drug-lockers-opened-door-to-officer-theft/article_60938206-6ddc-50fe-a693-f53b2bf7dddc.html?utm_medium=social&utm_source=email&utm_campaign=user-share

[9] Section 65(5.2).

of section 52(2.1) and its intended purpose of protecting both prosecutors and prosecutions.

The ministry's representations

[22] As noted above, the Ministry of the Attorney General (the ministry) was invited to make representations in response to a Notice of Inquiry and the other parties' representations. The ministry submits that section 52(2.1) of the *Act* applies to the report. It says that the report forms part of a Crown Brief and was tendered as an exhibit in a Superior Court criminal drug prosecution relating to drug trafficking. The ministry submits that the accused were convicted, and penitentiary sentences were imposed.[10] The ministry says that the convicted individuals have submitted appeals to the Ontario Court of Appeal and that those proceedings are now at the early stages.

[23] Regarding the connection between the report and the prosecution, the ministry submits the following:

- the accused were part of a large "take down" conducted by the police;
- drugs were seized when the police exercised warrants that authorized their entry into residences;
- some of the drugs seized were lodged in a secure property room in a local police station;
- an officer related to this seizure of drugs allegedly accessed some of the drugs without the appropriate authority;
- the officer did so in a personal capacity and in violation of his official duties;
- the police asked the OPP to act as an independent third-party and conduct a review of the situation, including charges facing the officer;
- the record at issue is a copy of the report resulting from the OPP's investigation.

[24] The ministry says that it consulted with the trial Crowns about the role that the report played in the trial process and was advised that it was a critical piece of evidence. The ministry says that that the accused parties relied upon the report to make full answer and defence to the charges they faced. Specifically, the ministry submits that the accused relied on the report as evidence that their Charter rights were violated by the police misconduct. The accused argued that although their trial had been fair, a stay was required because of the abuse of process that related to the integrity of the drug exhibits. As a result, the ministry argued that the report is highly significant to the ongoing

[10] I note that the ministry provided the names of the accused and the style of cause for the criminal proceedings. The accused in these prosecutions are not the police officers who are named in the report.

prosecutions.

[25] The ministry submits that although the convictions were entered, the criminal process continues as an appeal has been filed and the proceedings are now moving forward before the Ontario Court of Appeal. The ministry says it expects that the report will continue to be of significance as the appeal moves forward. The ministry argues that all legal issues related to the report remain at stake. Its says that if the Court of Appeal upholds any of the grounds asserted by the convicted individuals, it may overturn the original finding of guilt entered by the Superior Court and remit the case for a re-trial.

[26] As a result, the ministry argues that until all proceedings are concluded, section 52(2.1) of the *Act* continues to apply to exclude the report.

The appellant's reply

[27] In response to the ministry's representations, the appellant reiterates his original submission that only "a tiny portion" of the report is connected to the prosecutions identified by the ministry. He provides evidence in support of his assertion that neither the Crown prosecutor nor defence counsel saw the redacted portions of the report.[11]

[28] The appellant challenges the ministry's claim that the report was a "critical piece of evidence" in the prosecutions. He submits that most of the report was redacted, and that the unredacted portions that were not filed as part of the exhibit cannot be said to be related to an ongoing prosecution or appeal. The appellant argues that it would be "ludicrous to suggest that a report is related to a prosecution when the prosecutors themselves have not seen the report."

[29] The appellant reiterates his position that none of the purposes of section 52(2.1) of the *Act* are served by withholding the report. He points out that the Act states that "necessary exemptions from the right of access should be limited and specific" and emphasizes that the ministry has not considered whether the risks associated with disclosing the report could be mitigated, or even eliminated, by applying limited redactions. Rather than ask for precise redactions to the report, the appellant says that the ministry is advocating for complete secrecy in "clear violation of both the letter and spirit of the *Act*."

[30] Furthermore, the appellant says that the ministry has not weighed the potential harms of disclosure against the benefit of a public more educated on police misconduct. Instead, he says the ministry insists the entire report be withheld in its entirety because a small portion of it is relevant to the three defendants' ongoing appeals. The appellant urges the IPC not to adopt an approach to responsive materials that is so stringent it precludes the release of public records that might have some link to a future prosecution. He argues that this type of an approach would place countless records outside the reach

[11] The appellant provided excerpts of a conversation he had with a defence lawyer representing an accused in his original representations and referred to these conversations again in his reply.

of the *Act*, and greatly undermine the law's stated purpose of granting access to public information.

Analysis and findings

[31] As set out above, the police must establish three things for the exclusion in section 52(2.1) of the *Act* to apply to the report: first, that there is a prosecution; second, that there is "some connection" between the report and a prosecution; and third, that the proceedings with respect to the prosecution are not complete. Below are my reasons for finding that the police have met each of these three requirements.

[32] The police identified three prosecutions by name in their representations that they say are ongoing. The ministry provided additional information about those prosecutions. The ministry submits that the accused were convicted, that penitentiary sentences were imposed and that each of the three convicted individuals have submitted appeals to the Ontario Court of Appeal. The ministry says that the appeals are now at the early stages.

[33] The appellant does not object to the police and the ministry's assertion that the prosecutions exist and are ongoing. Instead, his representations focus on his submission that the three appeals are linked only to "a tiny portion" of the report. I am satisfied, based on the information provided by the police and that ministry, that the three prosecutions exist and are ongoing.

[34] The next step is to determine whether there is "some connection" between the report and the prosecutions.

[35] Based on the parties' representations, there is no dispute that a redacted copy of the report was entered as an exhibit in the court proceeding associated with the prosecutions. The ministry says, and I accept, that the redacted version of the report is part of the Crown Brief and continues to be relevant to the appeals that are underway. While the appellant questions the ministry's assertion that the redacted report is "critical" to the proceedings, there does not appear to be any question that there is "some connection" between the redacted report and the prosecutions. The test for section 52(2.1) is not whether the record at issue is critical to the proceedings, but whether there is some connection. Based on the representations provided by the police and the ministry, I find that there is.

[36] Finally, I find that the third part of the test in section 52(2.1), that the proceedings with respect to the prosecution have not been completed, is also satisfied. The police and the ministry both submit that the appeals are in the preliminary stages before the Ontario Court of Appeal. I accept this evidence. I find that all three parts of the test in section 52(2.1) have been established, and as a result, the report is excluded from the *Act* at this time.

[37] However, this is not the end of the analysis. As noted by the appellant, the copy of the report used in the proceedings was redacted. The appellant asserts that most of

the report was redacted and says that he is seeking access to the unredacted portions. Based on the evidence provided by the appellant, it appears that neither the Crown Counsel, nor the defence, received a copy of the unredacted report. The appellant's argument is that since the unredacted portions of the report were not used in the proceeding, section 52(2.1) does not apply to those portions.

[38] I have reviewed both the redacted and unredacted versions of the report. While I agree that a large portion of the report is redacted in the copy used as an exhibit in the court proceeding, significant portions were disclosed in the exhibit. These portions are detailed and include information about the background of the investigation and the OPP's mandate and scope, Toronto Police Services Board processes, details about the evidence the OPP gathered and its observations, as well as specific recommendations. I disagree that this is amounts to a "tiny" amount of information, as characterized by the appellant.

[39] In any event, as explained below, section 52(2.1) either applies, or does not apply, to a record as a whole. Due to the wording of the section, I am not able to review the report line by line and make findings that section 52(2.1) excludes some of the information in the report but that the *Act* applies to other information in the same report.

[40] I base this finding on the wording of section 52(2.1), which 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 [emphasis added].

[41] The reference to the singular word "record" can be contrasted with the language of section 52(5), which states that the *Act* does not apply to "identifying information **in a record** relating to medical assistance in dying" [emphasis added]. While section 52(5) specifies that a specific type of information in a record is excluded from the operation of the *Act*, section 52(2.1) refers to the record as a whole.

[42] The language in 52(2.1) is similar to section 52(3), which excludes certain records related to employment and labour relations. Section 52(3) states, in part,

> this Act does not apply **to records** collected, prepared, maintained or used by or on behalf of an institution in relation to [various employment and labour relations information; emphasis added]

[43] This office has consistently taken the position that the exclusions at section 52(3) of the *Act* (and the equivalent section at 65(6) in the *Act*'s provincial counterpart) are record-specific and fact-specific.[12] This means that to qualify for an exclusion, a record is examined as a whole. This whole-record method of analysis has also been described as the "record-by-record" approach when applied by this office in considering the application

[12] See Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, PO-3456-I and many others.

of exemptions to records.[13] The "record-by-record" method of analysis is set out in Order M-352.[14] Under this method, the unit of analysis is the whole record, rather than individual paragraphs, sentences or words contained in a record.

[44] The question is whether the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*.[15] This approach to the exclusions is consistent with the language of the exclusions, which applies to records that meet the relevant criteria. As noted in Order PO-3642, it also corresponds to the Legislature's decision not to incorporate into the *Act* a requirement for the severance of excluded records, in contrast to its treatment of records subject to the *Act*'s exemptions.[16]

[45] Based on this reasoning, I find the report must be considered as a whole when determining whether section 52(2.1) applies. While I understand that it may seem incongruous to the appellant that redacted portions of the report that were not included in the copy tendered as an exhibit in the proceeding are also captured by section 52(2.1) of the *Act*, the report cannot be severed, or separated into parts, for the purposes of determining whether the exclusion applies. The exclusion applies to all of the record, or none of the record.

[46] For the reasons set out above, I find that the three-part test for section 52(2.1) has been satisfied and the report is currently excluded from the operation of the *Act.* However, it is important to note that the section 52(2.1) exclusion is time limited. The exclusion will cease to apply when all proceedings in respect of the prosecutions have been completed. The appellant may wish to submit a new request and pursue his access rights under the *Act* at that time.

[47] I note the appellant made several arguments focusing on his belief that the police should have weighed the risks associated with disclosing the report against the public's right to know about police misconduct, and that they also should have considered whether the risks associated with disclosure could have been mitigated by applying some limited redactions to the report. While an institution is certainly permitted to disclose information outside of the *Act,* and the police could have considered the points raised by the appellant and decided to do disclose some of the report, I have no jurisdiction to consider these submissions because the *Act* does not apply at this time.

[48] The appellant also questioned whether the police's application of section 52(2.1) of the *Act* fit with the purpose of that section. He argues that the purposes of section

---

[13] Order PO-3652.
[14] I note that while M-352 deals with personal information, the approach is the same.
[15] Order PO-3642.
[16] Section 10(2) of the Act states: "If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions."

52(2.1), such as the need to protect prosecutors from having to address access-to-information requests for records or to safeguard solicitor-client privilege, do not apply in this case.

[49] As noted in *Ministry of Attorney General and Toronto Star et al*, the purposes of the prosecution exclusion are broad in nature. They 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 and litigation privilege, and
- controlling the dissemination and publication of records relating to an ongoing prosecution.[17]

[50] Directly to the last point, the Court has the responsibility and power to supervise and protect its own records.[18] The decision to release court exhibits to the public is at the discretion of the presiding judge.[19] As emphasized by the Supreme Court of Canada, courts are the custodians of exhibits and are responsible for inquiring into the use that is to be made of them and regulating their use by securing appropriate undertakings to protect competing interests.[20]

[51] As the appellant and the police both pointed out, a media requester sought and obtained a copy of the redacted report from the Court. It was within the Court's jurisdiction to determine whether the media requester could obtain a copy of the report and set any parameters or restrictions on its use. I do not have the jurisdiction to do the same, given the operation of section 52(2.1) of the *Act.*

[52] In making this decision, I assure the appellant that I have reviewed, considered and understood all of his representations. I appreciate his point that the portions of the record that he is seeking access to were not used, nor are they likely to be used, in the prosecutions identified by the police and the ministry. However, for the reasons set out above, section 52(2.1) applies to the entire record. As a result, I am not able to make a finding that section 52(2.1) applies to some portions of the report but not others and I must dismiss this appeal.

---

[17] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above.
[18] *MacIntyre v Attorney General of Nova Scotia et al*, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, at p. 193.
[19] *R v CBC*, 2011 SCC 3 (CanLII), [2011] 1 SCR 65, at para 12.
[20] *Vickery v Nova Scotia Supreme Court (Prothonotary)*, 1991 CanLII 90 (SCC), [1991]1 SCR 671, *per* Stevenson J, at paras 24 to 25. Also, see generally, Peter Dostal's "Access to Court-Filed Exhibits" in *The Criminal Law Notebook*, (2018); See also, the Ministry of the Attorney General's "Report of the Attorney General's Advisory Committee on Charges, Screening, Disclosure and Resolution Discussions" (1993), which discusses some of the other various difficulties that publicly disseminating disclosure material may pose.

[53] The appellant may make his request again once the prosecutions have concluded.

ORDER:

The appeal is dismissed.

Original signed by:	August 20, 2024
Meganne Cameron Adjudicator	