

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4546

Appeal PA22-00129

Ministry of the Solicitor General

August 20, 2024

Summary: The appellant asked the Ministry of the Solicitor General (the ministry) for a copy of a report prepared by the Ontario Provincial Police for the Toronto Police Services Board (the police). The ministry denied the request and the requester appealed the ministry's access decision. The police were invited to make representations and said that the report is excluded from the operation of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* by the ongoing prosecution exclusion at section 52(2.1) of that act. They argued that the appellant should not be able to obtain it from a different institution under the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

In this decision, the adjudicator concludes that because she already determined that the report is, at this time, excluded by the prosecution exclusion at section 52(2.1) of *MFIPPA* in Order MO-4554, it is not necessary to also consider whether the appellant can obtain the report pursuant to *FIPPA* and she dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 65(5.2); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(2.1).

Orders Considered: MO-4554.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request, under the *Freedom of Information and Protection of Privacy Act (FIPPA)*, for a copy of a report

prepared by the Ontario Provincial Police (the OPP) about the removal of drug exhibits from Toronto Police Services Board facilities by a retired Toronto Police Services Board Detective.

[2] The ministry issued a decision to deny access to a 50-page responsive report (the report) pursuant to the exclusion for labour relations and employment information at section 65(6) of *FIPPA*. The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

[3] The IPC appointed a mediator to explore resolution. During mediation, the ministry issued a revised decision stating that it did not have custody or control of the report and that the appellant should instead make his request to the Toronto Police Services Board (the police). The ministry's revised decision also stated that it was no longer relying on section 65(6) of *FIPPA*. The appellant advised that he wished to move to the adjudication stage of the appeals process.

[4] An adjudicator commenced a written inquiry pursuant to the *FIPPA* and sought and received written representations from the ministry and the appellant in response to a Notice of Inquiry she sent. After considering the parties' representations, the adjudicator decided to invite the police to make representations as well.

[5] The police submitted representations in which they stated that the appellant had already made a request to them for the same report under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. The police said that they denied access based on the section 52(2.1) exclusion in *MFIPPA* for records relating to an ongoing prosecution. The appellant appealed the police's decision and the IPC file number MA23-00557 was assigned to the matter. The police say that the appellant is attempting to bypass their decision by seeking access to the same report from the ministry.

[6] The adjudicator in the current appeal then sought additional representations from the police on the potential application of the prosecution exclusion at section 52(2.1) of *MFIPPA* and provided the appellant with an opportunity to respond.

[7] After the parties' representations were submitted, the matter was transferred to me, along with Appeal MA23-00557, because both appeals related to another appeal already assigned to me with similar parties and voluminous records connected to the retired police detective that is the subject of the report.¹

[8] During the inquiry for Appeal MA23-00557, I invited the Ministry of the Attorney General (MAG) to make representations about whether the section 52(2.1) exclusion applied to the report. MAG submitted representations in support of its assertion that the exclusion applied. The parties in the current appeal were provided with a copy of MAG's

¹ The voluminous appeal is PA22-00128. In PA22-00128, the same appellant is seeking access to emails sent or received by specific OPP staff that reference the retired police detective that is the subject of the report. This appeal is currently at the inquiry stage.

representations and told that I would be considering them in this inquiry as well. The appellant was offered the opportunity to make additional representations in response. Rather than making an additional submission, the appellant asked that I consider his representations for MA23-00557 in this inquiry as well.

[9] I have completed the inquiry for MA23-00557 and Order MO-4554 is being issued concurrently to this one as both appeals involve the same parties, the same record, and a similar issue. In Order MO-4554, I upheld the police's decision that the prosecution exclusion at section 52(2.1) of *MFIPPA* applied to the report. In this decision, I provide my reasons for declining to consider the issue of whether the ministry has custody or control of the report and dismissing the appellant's appeal.

DISCUSSION:

[10] The record the appellant seeks access to is a 50-page report prepared by the OPP for the police about a detective's removal of drug exhibits from police facilities. As noted above, the appellant also made a request to the Toronto Police Services Board (the police) for a copy of the same report. The police denied access based on the exclusion for records related to an ongoing prosecution at section 52(2.1) of *MFIPPA* and the appellant appealed that decision.²

[11] In Order MO-4554, I concluded that the report at issue was temporarily excluded from the operation of *MFIPPA* by section 52(2.1) of that act. As discussed in that order, section 52(2.1) excludes a record that relates to a prosecution if all the proceedings in respect of the prosecution have not been completed. I set out the three-part test for finding that the exclusion applies, as follows:

1. There must be a prosecution;
2. There is "some connection" between the record at issue and the prosecution; and
3. The proceedings with respect to the prosecution are not complete.

[12] I also set out my reasons for finding that the police and MAG had established that there was an ongoing prosecution, that there was "some connection" between the report at issue and the prosecution, and that the proceedings related to the prosecution were not complete. As a result, I concluded that the report was excluded from the operation of *MFIPPA*.

[13] In this order, I am now in the position of considering whether the appellant may obtain a copy of the same report from the Ministry of the Solicitor General pursuant to

² I note that the copy of the report provided by the police in MA23-00557 contained redactions. I confirm that I have reviewed both the redacted and unredacted copies of the report and I find that it is the same report at issue in both inquiries.

FIPPA.

[14] The ministry submits that report is not in its custody or under its control. However, for the reasons set out below, I find that it is not necessary for me to consider that issue because I have already determined that the report relates to an ongoing prosecution. As I explain below, this finding is relevant to the present appeal.

[15] As noted by an IPC adjudicator in Order MO-3094, the section 52(2.1) exclusion in *MFIPPA* is identical to the exclusion found in section 65(5.2) of *FIPPA*.³ Both sections state the following:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[16] In my view, the exclusions created by the wording of these sections are tied to the record that relates to the prosecution, regardless of which institution a request is made to, and regardless of whether that request is made pursuant to *FIPPA* or *MFIPPA*. To be clear, this means that if a record is found to be excluded pursuant to section 52(2.1) of *MFIPPA*, it would also be excluded by section 65(5.2) of *FIPPA*, so long as the prosecution connected to the record remains ongoing.

[17] As noted above, the appellant is seeking the same report from the ministry that I have already concluded is, at this time, excluded from the operation of *MFIPPA* by section 52(2.1) of the act. It follows that, at this time, the report is also excluded from the application of *FIPPA* by section 65(5.2).⁴ As a result, it is not possible for me to adjudicate whether the record is in the ministry's custody or under its control as *FIPPA* has no application to the report at this time.

[18] Finally, it is important to reiterate that the exclusions at section 52(2.1) of *MFIPPA* and 65(5.2) of *FIPPA* are time limited. The exclusions 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 at that time.

ORDER:

The appeal is dismissed.

Original signed by: _____
Meganne Cameron

August 20, 2024

³ See footnote 1 in Order MO-3094.

⁴ In making this decision, I considered the appellant's desire to access the information that was redacted in the version of the report at issue in MA23-00557 and unredacted in the version at issue in this inquiry. However, as per my findings in Order MO-4554, the prosecution exclusion at section 52(2.1) of *MFIPPA* applies to the entire report. Given that the provisions are identical, the exclusion at section 65(5.2) would also apply to the entire report.

Adjudicator