

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 PO-4554

Appeal PA23-00327

Ministry of the Solicitor General

September 26, 2024

**Summary:** The ministry denied a request for access to probation records of an individual who, while on probation, was charged with homicide and is awaiting trial. The adjudicator finds that the records relate to an ongoing prosecution and are excluded from the *Act* due to the time limited exclusion in section 65(5.2) for records connected to ongoing prosecutions. The adjudicator dismisses the appeal, noting that the appellant may seek access once all proceedings in respect of the prosecution have been completed.

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

**Cases Considered:** *Ministry of the Attorney General and Toronto Star et al.*, 2010 ONSC 991 (CanLII), March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

### OVERVIEW:

[1] This appeal involves a request by a member of the media for access to the probation records of an individual currently awaiting trial for first-degree murder in connection with a stabbing that occurred while he (the accused) was on probation. According to published reports,<sup>1</sup> the accused has a history of violent offences, including convictions for assault, and had breached earlier probation conditions.

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<sup>1</sup> Submitted with the appellant's representations.

[2] The appellant made a request to the Ministry of the Solicitor General (the ministry) for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the accused's probation records. The appellant argues that public interest necessitates their disclosure.

[3] The ministry denied the request on the basis of, among other things, personal privacy and law enforcement exemptions.<sup>2</sup>

[4] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). The appeal proceeded to mediation,<sup>3</sup> was not resolved, and was transferred to the adjudication stage of the appeal process. As the adjudicator assigned to this appeal, I decided to conduct a written inquiry.

[5] In Notices of Inquiry sent to the parties, I asked them to comment on the IPC's jurisdiction to consider the appeal in light of the timing and status of the prosecution and the relationship of the records to it.

[6] In this order, I find that the records are excluded from the application of the *Act* at this time by operation of the exclusion in section 65(5.2).

## **RECORDS:**

[7] The records are the accused's probation records.

## **DISCUSSION:**

[8] Before considering the ministry's various exemption claims, I must be satisfied that I have jurisdiction to do so. Accordingly, I have first considered whether the records at issue are excluded from the *Act* under the ongoing prosecution exclusion in section 65(5.2). For the following reasons, I find that they are.

[9] Section 65(5.2) excludes records relating to an ongoing prosecution from any part of the *Act*, including the general right of access in section 10(1). The exclusion is time limited. It states that:

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<sup>2</sup> The ministry relied on the mandatory personal privacy exemption in section 21(1), various law enforcement exemptions in section 14(1), and section 15(b) for relations with other governments to deny access. The ministry also stated that "some of the information requested is a type of information that is outside the scope of [the *Act*]."

<sup>3</sup> During mediation, the parties confirmed that the request was a partial transfer to the ministry from Tribunals Ontario, and that Tribunals Ontario's decision that there are no responsive Ontario Parole Board records is not at issue in this appeal.

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

[10] The term “prosecution” in section 65(5.2) means proceedings in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada.

[11] The phrase “relating to” means that there must be “some connection” between the records and the case to be made by the prosecuting authority.<sup>4</sup> The exclusion is not limited to the Crown or prosecution brief and has been found to apply to records in the control of investigating authorities and other parties.

[12] The phrase “in respect of” requires some connection between “a proceeding” and “a prosecution.”<sup>5</sup> 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.<sup>6</sup>

## **Representations**

### ***Ministry’s representations***

[13] The ministry submits that the records relate to the ongoing prosecution of homicide charges against the accused under the *Criminal Code*,<sup>7</sup> with the trial currently scheduled to start in January 2025. It says that, given the severity of the offences with which the accused is charged, a conviction is likely to result in a lengthy incarceration. The ministry says it has consulted with the assigned prosecutors, who believe that the records will be relevant at trial, including for challenging potential defences and during sentencing.

[14] The ministry submits that the records were created in relation to offences committed by the accused over the past five years, both in Ontario and elsewhere, for which probation was imposed. It argues that the temporal proximity of these offences to the current charges establishes a close connection between the records and the prosecution. Additionally, the ministry says that the records document violent offences, some of which are related to the current charges, and argues that the recurring nature of the accused’s violent behaviour establishes a “definite connection” between the records and the current prosecution.

[15] Relying on the Divisional Court’s decision in *Ministry of the Attorney General and Toronto Star et al.*<sup>8</sup> (*Toronto Star*), citing the Supreme Court of Canada in *Markevich v*

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<sup>4</sup> *Ministry of the Attorney General and Toronto Star et al.*, 2010 ONSC 991 CanLII, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.) (*Toronto Star*). See also *Canada (Information Commissioner) v Canada (Commissioner, RCMP)*, 2003 SCC 8 (CanLII), at para. 25.

<sup>5</sup> *Toronto Star*, supra.

<sup>6</sup> Order PO-2703.

<sup>7</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

<sup>8</sup> 2010 ONSC 991 (Div. Ct.)

*Canada*<sup>9</sup> (*Markevich*), the ministry argues that the words “in respect of” have been held “to be words of the broadest scope that convey some link between two subject matters.”

### ***Appellant’s representations***

[16] The appellant argues that the records are not related to the ongoing homicide prosecution. She disputes the ministry’s claim of a “close connection” between the timing of the prior offences and the current charges, asserting that there is no factual link between them. Additionally, the appellant submits that the Crown has not sought to introduce the records as similar fact evidence. While acknowledging the violent nature of the past offences, the appellant also questions the existence of probation records specifically related to the current charges, arguing that the records stem from earlier cases and are historical. She maintains that no clear connection exists between the records and the ongoing prosecution, nor do they risk jeopardizing the ongoing prosecution.

### **Analysis and findings**

[17] As set out above, for section 65(5.2) to apply to the records, I must be satisfied of three elements: that there is a prosecution, that the records have some connection to it, and that all proceedings with respect to the prosecution are still ongoing. I find that all three requirements are met.

[18] The section 65(5.2) exclusion is designed to protect the integrity of the criminal justice system. It reflects the legislature’s intent to preserve the integrity of ongoing legal proceedings and the administration of justice by limiting access to certain records during sensitive periods.

[19] There is no dispute that the accused is awaiting trial for first-degree murder, or that the trial is scheduled to start in January 2025. I am satisfied that a prosecution is ongoing, thereby meeting the first and third requirements. The remaining issue is whether there is “some connection” between the records and the prosecution. I find that there is.

[20] The Divisional Court considered the section 65(5.2) exclusion in *Toronto Star* and rejected a narrow approach to its interpretation. The court found that the exclusion’s purpose is to maintain the integrity of the criminal justice system, ensure fair trials, protect solicitor-client and litigation privilege, and control public dissemination of records relating to prosecutions. In considering whether an adjudicator could receive records related to an ongoing prosecution, in part to determine whether the IPC had jurisdiction, the court stated at paragraphs 50 and 51 that:

[50] We agree with the Ministry’s submissions that there are additional important purposes underlying s. 65(5.2), including the following:

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<sup>9</sup> 2003 SCC 9 (CanLII), at paragraph 26.

(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; and

(2) to ensure that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials.

[51] The purposes of s. 65(5.2) are far broader than the purpose suggested by the Adjudicator and include maintaining the integrity of [the] criminal justice system and 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...

[21] Citing the Supreme Court in *Markevich*, the court held that the requirement for a record to be related to a prosecution should not be interpreted narrowly, and that the terms should be given the "broadest scope that conveys some link between the two subject matters."<sup>10</sup>

[22] The court also rejected the argument that section 65(5.2) should apply only to the contents of Crown briefs, noting that Crown brief materials are not static, and that it is impossible to determine with exactitude what may become relevant and included in the actual prosecution.

[23] Following the court's reasoning, I find that there is some connection between the records and the ongoing prosecution involving the accused.

[24] I accept the ministry's submission that records not directly related to the current charges may still be excluded under section 65(5.2) if they could be introduced during the prosecution, whether to challenge potential defences or for sentencing considerations. I find that there is some connection between prior probation records and a prosecution on a new charge, particularly where the new charge involves an alleged offence committed while the accused was on probation. Probation records typically contain detailed information regarding an individual's past conduct, compliance with court-imposed conditions, and circumstances of earlier offences. In the context of an individual awaiting trial on serious new charges, such records may be directly relevant to issues like behavioural patterns and potential risk factors. I am satisfied that, in these circumstances, this information could influence both prosecution and defence strategies and could potentially impact sentencing in the event of conviction.

[25] Section 65(5.2) reflects the legislature's clear intent to prioritize the protection of legal proceedings by excluding such records from disclosure while a criminal trial is ongoing. While I acknowledge the appellant's interest in transparency and the public's right to information, section 65(5.2) operates as a safeguard to ensure the integrity of

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<sup>10</sup> See *Toronto Star*, *supra*, at para. 42.

the judicial process. The timing of disclosure is a critical consideration, and public access to the records must be deferred until the prosecution has concluded, at which time access may be reviewed against any applicable exemptions.

[26] As noted above, the court in *Toronto Star* affirmed that section 65(5.2) is a time-limited provision, expiring once the appeal period for an ongoing prosecution has lapsed. Accordingly, the IPC only acquires jurisdiction once all proceedings in respect of the prosecution have been completed,<sup>11</sup> at which point the appellant may make a new request.

[27] For these reasons, I find that this appeal cannot proceed because the records are excluded at this time by operation of section 65(5.2) of the *Act*.

**ORDER:**

The appeal is dismissed.

Original Signed by: \_\_\_\_\_  
Jessica Kowalski  
Adjudicator

\_\_\_\_\_ September 26, 2024

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<sup>11</sup> *Toronto Star*, supra.