

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4615

Appeal MA23-00268

City of Greater Sudbury

January 16, 2025

Summary: The appellant requested records of communications between the City of Greater Sudbury (the city) and the Electrical Safety Authority. The city withheld the responsive records based on section 52(2.1), the exclusion for records that relate to an ongoing prosecution, in the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed the city's access decision. In this order, the adjudicator upholds the city'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).

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request from a company under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

A copy of all correspondence and documents with Electrical Safety Authority (ESA) in regards to [specific address], Sudbury, from the following departments from January 1, 2021 to March 1, 2023:

- Property Standards
- By Law Department/By-Law Enforcement

- Building Services
- Fire Department

[2] The city issued a decision denying access to the responsive records. It said the responsive records related to an ongoing prosecution, and as a result, they are excluded from the application of the *Act* pursuant to section 52(2.1). The company, now the appellant, appealed the city's decision. The appellant asserted that there was no ongoing prosecution. The mediator followed up with the city who confirmed that the prosecution was still ongoing. Further mediation was not possible, and the matter proceeded to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry pursuant to the *Act*.

[3] I commenced an inquiry by inviting the city to make representations on the issues set out in a Notice of Inquiry. After receiving those representations, I made a preliminary assessment that the appellant had requested records that related to an ongoing prosecution, and that the appeal should be dismissed. I provided the appellant with a letter explaining the reasons for my preliminary assessment and invited it to make representations in response to my letter, the Notice of Inquiry, and the city's representations.

[4] The appellant provided representations in response. I have reviewed those representations, and my assessment of the matter remains unchanged. In this decision I find that section 52(2.1) of the *Act* applies to the information the appellant has requested and that as a result, that information is excluded from the application of the *Act* at this time. As noted below, this exclusion is time-limited, and the appellant may wish to make a new access request once all the proceedings in the prosecutions have concluded.

DISCUSSION:

[5] The sole issue in this inquiry is whether the exclusion at section 52(2.1) of the *Act* applies to the information the appellant requested. 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.

[6] 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

ongoing prosecution.¹

[7] 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.²

[8] For the exclusion to apply, there must be “some connection” between the records and the case to be made by the prosecuting authority.³ 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.

[9] The phrase “in respect of” requires some connection between “a proceeding” and “a prosecution.”⁴ 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.⁵

The city’s representations

[10] The city says that a leak in the roof of the building at the address in the appellant’s request (the Property) resulted in water infiltration into the Property’s electrical systems. It says that the departments listed in the appellant’s request (including Building Services, Fire Services and By-law Department) coordinated an investigation into the Property with the Electrical Safety Authority (the ESA).

[11] The city submits that the investigations revealed deficiencies that needed to be rectified for the Property to meet the requirements of the *Electrical Safety Code*. It says various enforcement options were explored and that the ESA issued violations against the Property.

[12] The city provided email correspondence with an Inspector from the ESA in support of its assertion that violations were issued against the Property and that the ESA laid charges. Specifically, the city’s email confirmed that the ESA advised that it laid 21 charges in connection with the Property, that the appellant had lost an appeal to an order and charge, and that the ESA expected additional appeals from the appellant given the number of charges. The city also provided email correspondence it received from the ESA

¹ *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.).

² Order PO-2703.

³ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25, and Order MO-3919-I.

⁴ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

⁵ Order PO-2703.

Inspector during this appeal confirming the ESA matters were ongoing and had not resolved.

[13] Additionally, the city says that the roof at the Property was altered and then replaced without the requisite permit under the *Building Code*. As a result, the city says it also charged the appellant with a violation of the *Building Code*.

[14] The city submits that a city Building Inspector issued a summons to the appellant for violating the *Building Code*. The city says that this matter is still unresolved. It provided a court schedule showing that the matter has been before the Provincial Offences Court on four separate occasions. The city says the matter is scheduled to continue on January 20, 2025. The city confirmed that this information is also available on the city's website.

[15] The city refers me to Order MO-4197 and says that the IPC has previously found that provincial offence violations of the *Building Code* constitute a prosecution in accordance with section 52(2.1) of the *Act*.⁶ The City submits that much like charges laid under the *Building Code*, violations of the *Electrical Safety Code*, which is enforced by the ESA, also benefits from the same status. The city submits that there were, and continue to be, active prosecutions.

[16] Next, the city submits that the responsive records relate to the ongoing prosecutions described above. It says that the records at issue are emails and attachments that "trace the investigation" regarding the state of the Property. The city says that there are records of discussions coordinating the investigation, inspection notes, pictures, and discussions regarding enforcement.

[17] The city says that the ESA is the enforcement agency for violations of the *Electrical Safety Code* and it concedes that it does not have access to their prosecution files. However, the city argues that because of the fluid nature of prosecutions, it is not necessary for records to be included in a prosecution brief for the exclusion outlined in section 52(2.1) to apply.

[18] In support of this assertion, the city refers to Order MO-3970, where the appellant sought access to maintenance and service records for equipment used for blood alcohol testing from the Peel Regional Police Services Board. The adjudicator concluded that "prosecution materials are not static" and that as a matter progresses through the judicial system, documents that may not have been part of the original brief may "become integral to the prosecution over the course of the proceedings." The city says that as a result of this reasoning, the adjudicator upheld the police's decision to deny access to the maintenance and service records pursuant to the section 52(2.1) exclusion.

[19] The city also refers me to Order M0-4197, where it says the records at issue were emails between various staff members and a conservation authority regarding the appellant and *Building Code* violations. The city says the records contained details of the

⁶ At paragraph 38.

alleged violations, the investigation, and enforcement, and the adjudicator determined that the emails had "some connection" to the prosecution and the exclusion in section 52(2.1) applied.

[20] The city submits that as in MO-4197, the records at issue in this matter have some connection to prosecution as they provide details of the alleged violations, the investigation and enforcement. Furthermore, the city submits that records documenting an investigation often become material to a prosecution as they substantiate the occurrence violations of legislation.

The appellant's representations

[21] The appellant denies that the ESA prosecutions referred to by the city exist. It concedes that the ESA issued an inspection order but denies that there were any prosecutions. The appellant asserts that "all of the so called defects" related to the inspection order "were cleared by ESA quite some time ago."

[22] The appellant denies that the city is qualified to speak to matters that they are not "involved with" and says that the "ESA is statute barred from prosecuting their Inspection Order as it has been greater than 2 years since it was issued."

[23] The appellant submits that the "existing prosecution" the city referred to relate to charges issued regarding a building permit that have nothing to do with its request for records of the city's correspondence with the ESA.

[24] The appellant provided a copy of the letter it sent to the prosecutor's office about the building permit with the city that is scheduled to be spoken to on January 20, 2025. The appellant says it wrote this letter because the prosecution has not provided proper disclosure on this matter prior to each hearing.

[25] The appellant reiterates that there are no "summons" issued by the ESA "on the project you write on the letter." It says that section 52(2.1) does not apply to the information it requested from the city, and does not relate to "items 1, 2, and 3" in the Notice of Inquiry. Specifically, the appellant denies that there is a prosecution and denies that records related to the ESA are also related to the matter under the *Building Code*. As such, the appellant denies that section 52(2.1) applies such that the records at issue are excluded from the *Act*.

Findings and analysis

[26] Below are my reasons for upholding the city's decision that section 52(2.1) of the *Act* excludes the records at issue from the application of the *Act*.

1. There must be a prosecution

[27] Based on the city's representations, and the email evidence it provided, it appears

clear that the ESA laid at least 21 charges in connection with the Property pursuant to the *Electrical Safety Code* and that the appellant appealed at least some of those charges. A redacted copy of the email relied on by the city was provided to the appellant. The unredacted portions referred to both the ESA's charges and the appellant's appeal of those charges. The appellant's failure to explain why it continues to claim there were no ESA charges, despite the city's evidence to the contrary is not helpful to its case.

[28] The city's evidence also supports its assertions that there is an ongoing prosecution related to the alleged *Building Code* violation at the Property that is currently before the Provincial Offences Court. I agree with the city that, as outlined in Order MO-4197, provincial offence violations of the *Building Code* constitute a prosecution in accordance with section 52(2.1) of the *Act*.⁷ I also agree that provincial offence violations of the *Electrical Safety Code* constitute a prosecution for the purposes of section 52(2.1) of the *Act*.

[29] As such, based on the evidence provided by the city, I find that it has established that there is at least one, if not two, prosecutions.

2. There is "some connection" between the records at issue and the prosecution

[30] As I explained in my preliminary assessment letter to the appellant, it is reasonable to conclude that the records sought relate to the prosecutions described above. The city has explained that the responsive records consist of emails and attachments that evidence various investigations regarding the Property and include discussions coordinating those investigations, inspection notes, pictures, and discussions regarding enforcement. It says that these records relate to both the *Building Code* and ESA matter and I accept that assertion.

[31] The appellant's request is for records about the Property during the timeframe that is relevant to the matter before the Provincial Offences Court regarding the *Building Code*, and the ESA charges. In circumstances where the request includes specific departments that could be expected to be involved in both of those matters, I find that it is reasonable to conclude that there is "some connection" between the records and the prosecutions.

[32] To be clear, I accept that the records relating to the investigations into the ESA matter may also be related to the *Building Code* matter, and vice versa.

3. The proceedings with respect to the prosecution are not complete

[33] The city provided evidence that the prosecutions are ongoing. It provided a copy of a court schedule of the previous hearing dates for the matter related to the *Building Code*. It stated, and the appellant confirmed, that this matter is scheduled to continue at

⁷ At paragraph 38.

the Provincial Offences Court on January 20, 2025.

[34] The city also provided email evidence that, at the time of the request, the appellant had appealed charges laid under the ESA. The city also confirmed with an Inspector from the ESA that there were 21 charges laid, and they expected additional appeals from the appellant. In the absence of any specific evidence to the contrary from the appellant, I accept the city's assertion that the ESA matters remain ongoing.

[35] For the reasons set out above, I find that the three-part test for section 52(2.1) has been satisfied and the responsive records are 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.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Meganne Cameron
Adjudicator

_____ January 16, 2025