Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4613

Appeal PA20-00771

Ministry of the Solicitor General

February 24, 2025

Summary: The appellant, a lawyer, made a request to the Ministry of the Solicitor General for records of calibration tests performed on a specific breathalyzer used by a detachment of the Ontario Provincial Police over a two-month period. The appellant was asking for results of periodic "standalone" tests conducted on the equipment to determine if it was in proper working order and not any tests conducted on actual breath samples. As the appellant would not confirm whether the requested records related to an ongoing prosecution, the ministry assumed the records related to a prosecution for an alcohol related offence under the *Criminal Code* and issued a decision denying access. The ministry maintained that the *Criminal Code* provides a complete code for disclosing records relating to breathalyzer equipment. Consequently, the ministry claimed that the doctrine of federal paramountcy applies to oust the application of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

During the inquiry into the appeal, the possible application of section 65(5.2) of the *Act* that excludes records relating to an ongoing prosecution was added as an issue to be determined.

In this order, the Commissioner finds that there is no direct conflict in the operation of the *Act* and the *Criminal Code* and that the operation of the *Act* does not frustrate the legislative intent of the Crown disclosure provisions of the *Criminal Code*. As a result, the doctrine of federal paramountcy does not apply to oust the application of the *Act.*

However, the Commissioner finds that the records are excluded from the scope of the *Act* under section 65(5.2). The right of access and the Commissioner's jurisdiction under the *Act* are determined based on the facts and law existing at the time the institution issues its decision. Given that the requested records related to a prosecution that was ongoing at the time of the ministry's decision, the exclusion at section 65(5.2) of the *Act* applied and the appellant did not

have a right to access them. The Commissioner upholds the ministry's decision denying access and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 65(5.2); *Criminal Code*, R.S.C., 1985, c. C-46, ss. 314, 320.28, 320.31, 320.34, 320.36.

Orders Considered: Orders PO-2703, MO-3139-I, MO-2439, PO-2991, MO-3670, and PO-3607.

Cases Considered: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Gubbins*, [2018] S.C.J. 44; *R. v. Jackson*, 2015 ONCA 832; *Ontario (Attorney General) v Toronto Star*, 2010 ONSC 991.

OVERVIEW:

[1] The appellant, a lawyer, made a request to the Ministry of the Solicitor General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following records from a specified detachment of the Ontario Provincial Police (OPP):

> All COBRA data from the Intoxilyzer 8000C with serial number SN 80-003691 at the Rockwood OPP detachment, from all control testing (i.e. testing not by detained subjects, but by the OPP breath technicians, conducted for control purposes (to ensure proper functioning of the machines)) for the period of July 10, 2019, to September 10, 2019.[1]

[2] The appellant's request letter went on to state:

> Because I am not seeking any data related to testing conducted on the public, this request is not barred by section 320.36(2) of the *Criminal Code*.

[3] In response to this request, the ministry wrote to the appellant asking two questions: was he, in his personal capacity, or one of his clients, charged with an alcohol-related offence during the relevant two-month time frame, or, alternatively, was the appellant a *bona fide* researcher seeking the information for statistical or research purposes?

[4] The appellant responded but did not address the ministry's questions. Instead, the appellant explained that there are two types of calibration tests performed on breathalyzer equipment. The first set of tests relate to "a particular test subject which under ss. 320.36(3) & (4) of the Criminal Code, can only be disseminated to the person

[1] COBRA is the acronym for Computer Online Breath Archives. The specific type of testing equipment used by the police in this case is called an "Intoxilyzer." The *Criminal Code* uses the generic term "approved instrument." In this order I use the term "breathalyzer" which is used by the appellate courts and is a term of common usage.

to whom the results relate or to bona fide researchers."

[5] The appellant described the second set of "standalone tests" as follows:

> [T]he police conduct stand-alone calibration checks (sometimes called control tests) which are independent of the subject testing sequence. Some of these standalone checks are done at times of maintenance. Some of them are done by solution change breath technicians whenever the alcohol standard solution is changed. Some are done at start of shift by any breath technician starting their shift and some are done in the hour or so before a subject is going to be tested. These are non-subject test calibration checks and are not, in any way, the results obtained of a bodily substance. These "control test" results are obtained of an alcohol standard that has come from a manufacturer of alcohol standard. Consequently, the results of these standalone calibration checks do not fall within the types of data captured under s. 360.36(3) or (4). It is these *non-subject calibration test results* that I am seeking through my FOI[2] request. (appellant's emphasis)

[6] The ministry has not taken issue with the appellant's description of the calibration records he seeks, which I take to be reliable.

[7] When the ministry received no direct response to its questions, it wrote to the appellant stating it had no choice but to assume the calibration test results he was seeking related to an ongoing criminal prosecution. Accordingly, it maintained that section 320.34(2) of the *Criminal Code* applied and that the appellant would have to make a request for this information to the court of competent jurisdiction. The ministry claimed the relevant provisions of the *Criminal Code* comprise a complete code developed to establish safeguards, procedures, and protections overseen by the judge as "gate keeper" in respect of the control tests. On that basis, it maintained that the constitutional doctrine of federal paramountcy applies, taking the information requested outside the scope of the *Act.*

[8] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[9] After the appeal was filed, intake staff at my office contacted the appellant to clarify the facts. The appellant confirmed to my staff that there was, in fact, an ongoing prosecution but that he had not advised the ministry of this fact. It therefore became apparent to my intake staff that the exclusion at section 65(5.2) of the *Act* for records relating to an ongoing prosecution may potentially apply in this case.

[10] The appeal then moved to mediation. The appellant advised the mediator that the prosecution he was involved in had concluded several months earlier, that his client had entered a guilty plea, that there was no appeal of his client's conviction, and that the

[2] The acronym "FOI" refers to Freedom of Information.

applicable appeal period had expired. With the appellant's permission, the mediator communicated this information to the ministry. Notwithstanding, the appeal could not be resolved, and it was referred to adjudication.

[11] The adjudicator sent a Notice of Inquiry to the ministry identifying the federal paramountcy issue and the potential application of the section 65(5.2) exclusion. The ministry made representations on both issues which were shared with the appellant. The ministry's representations on section 65(5.2) were brief, speculating that the request may relate to a prosecution and submitting that the records "could be subject to section 65(5.2)."

[12] The adjudicator also sought the appellant's representations on both issues, stipulating that he must provide answers to specific questions on the application of the section 65(5.2) exclusion, supported by an affidavit. The appellant's representations and accompanying affidavit were then shared with the ministry. The appellant's affidavit stated that he did not represent any client "currently facing a prosecution" for impaired driving resulting from testing on the breathalyzer in question during the two-month period mentioned in his request. He further affirmed that all appeal periods had expired for his past clients facing charges at that time.

[13] The ministry's reply representations continued to maintain that the doctrine of paramountcy applies but shifted their focus to the section 65(5.2) exclusion. In part, the ministry submitted that:

> The failure of the appellant to respond to our initial and reasonable efforts to identify the issues in the appeal and for also failing to provide any rationale for doing so has, in our view, been unhelpful to the point of being vexatious.

[14] After reciting the appellant's statement that he does not "represent any client *currently* facing a prosecution ..." (ministry's emphasis), the ministry continued:

> If in fact the appellant was representing clients facing a prosecution at the time of the decision letter, … the decision should be upheld on the basis of section 65(5.2) … there is therefore no need to consider the doctrine of paramountcy.

[15] Citing the appellant's alleged bad faith in failing to respond to its "legitimate and reasonable" questions at the initial request stage, the ministry maintained that its decision was reasonably based on the facts before it at the time, and the appellant should not have the right to obtain the records at the appeal stage "simply due to the passage of time."

[16] The appellant made sur-reply representations that essentially repeated his initial representations and added that he should not be required to submit another request for the records if the appeal were to be dismissed.

[17] Given the departure of the original adjudicator and the precedent-setting nature of the issues raised in this appeal, I decided to assume carriage of the inquiry as adjudicator to bring this matter to a conclusion.

[18] In this order, I find that the doctrine of federal paramountcy does not apply to the records at issue, but that the records are excluded from the *Act* pursuant to section 65(5.2). I dismiss the appeal on that basis.

ISSUES:

A. Is there a question of federal paramountcy with respect to the request?

B. Does the section 65(5.2) exclusion for records relating to a prosecution apply to the records?

DISCUSSION:

Issue A: Is there a question of federal paramountcy with respect to the request?

The relevant provisions of the Criminal Code

[19] The offence provisions of the *Criminal Code* for operating a conveyance[3] under the influence of alcohol are found at section 320.14(1)(a) and (b):

> 320.14 (1) Everyone commits an offence who:
>
> > (a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;
> >
> > (b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood; […]

[20] Under section 320.28 of the *Criminal Code*, the police may demand breath samples to determine whether a person is guilty of an "over 80" offence under section 320.14(1)(b). These breath tests must comply with conditions set out at section 320.31(1) which require a qualified technician to perform a "system blank test" and a "system calibration check" on the breathalyzer before each sample of breath is taken from the individual. Where these tests and checks satisfy other requirements at section 320.31(1), the results of the analyses of a person's breath samples are deemed to be

[3] The word "conveyance" is defined at section 320.11 of the *Criminal Code* to mean a motor vehicle, a vessel, an aircraft or railway equipment.

conclusive proof of their blood alcohol concentration at the relevant time.[4]

[21] The ministry relies on sections 320.34 and 320.36 of the *Criminal Code* to support its federal paramountcy argument. Section 320.34 sets out the prosecution's disclosure obligations to an accused:

> 320.14 (1) In proceedings in respect of an offence under section 320.14, the prosecutor shall disclose to the accused, with respect to any samples of breath that the accused provided under section 320.28, information sufficient to determine whether the conditions set out in paragraphs 320.31(1)(a) to (c) have been met, namely:
>
> (a) the results of the system blank tests;
>
> (b) the results of the system calibration checks;
>
> (c) any error or exception messages produced by the approved instrument at the time the samples were taken;
>
> (d) the results of the analysis of the accused's breath samples; and
>
> (e) a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument.
>
> (2) The accused may apply to the court for a hearing to determine whether further information should be disclosed.
>
> (3) The application shall be in writing and set out detailed particulars of the information that the accused seeks to have disclosed and the likely relevance of that information to determining whether the approved instrument was in proper working order. A copy of the application shall be given to the prosecutor at least 30 days before the day on which the application is to be heard.
>
> (4) The hearing of the application shall be held at least 30 days before the day on which the trial is to be held.
>
> (5) For greater certainty, nothing in this section limits the disclosure to which the accused may otherwise be entitled.

[22] The results of the "system blank tests" and "system calibration checks" referred to at subparagraphs (a) and (b) of section 320.34(1) refer to the tests and checks that a qualified technician is required by 320.31(1) to perform on breathalyzer equipment before

[4] If the results of the breath analyses are not the same, the lowest result is used.

each sample of breath is taken from a person. For clarity, the appellant does not seek access to any subject-specific control tests referred to in those provisions. The appellant only seeks records "resulting from standalone, non-subject calibration checks" using a standard alcohol solution, and not the results of any bodily substance.

[23] Section 320.36 of the *Criminal Code* prohibits the use or disclosure of a bodily substance or the results of a bodily substance test, subject to specific exceptions for law enforcement purposes, for statistical or research purposes (if anonymized), or if disclosure is to the person to whom the results relate.

> 320.36 (1) No person shall use a bodily substance obtained under this Part for any purpose other than for an analysis under this Part.
>
> (2) No person shall use, disclose or allow the disclosure of the results obtained under this Part of any evaluation, physical coordination test or analysis of a bodily substance, except for the purpose of the administration or enforcement of a federal or provincial Act related to drugs and/or alcohol and/or to the operation of a motor vehicle, vessel, aircraft or railway equipment.
>
> (3) The results of an evaluation, test or analysis referred to in subsection (2) may be disclosed to the person to whom they relate, and may be disclosed to any other person if the results are made anonymous and the disclosure is made for statistical or research purposes.
>
> (4) Everyone who contravenes subsection (1) or (2) commits an offence punishable on summary conviction.

[24] The provisions of section 320.36 are designed to protect the privacy interests of individuals, including in respect of their breath samples and the results of the analyses of those samples. The prohibitions against the unauthorized disclosure and use of this information are reinforced by the possibility of prosecution under subsection (4).

The doctrine of federal paramountcy

[25] The ministry submits that the constitutional doctrine of federal paramountcy dictates that requests for disclosure of calibration test results may only be made to a criminal court of competent jurisdiction and not through the *Act*. It argues that the *Criminal Code* sets out a comprehensive code for disclosure of the contents of calibration test results the appellant seeks. More specifically, the ministry claims that an application for further disclosure of records, including calibration test results, can only be made to a criminal court judge under section 320.34(2) of the *Criminal Code* in compliance with the "likely relevance" criterion at section 320.34(3).

[26] The ministry explains that the doctrine of federal paramountcy applies where there is an incompatibility between validly enacted but overlapping provincial and federal

legislation, which renders the provincial legislation inoperative to the extent of the inconsistency. The ministry also describes the two branches of the test for federal paramountcy recognized by the courts – actual operational conflict between the federal and provincial legislation, and circumstances where the application of provincial legislation would frustrate Parliament's legislative intent.

First branch – operational conflict

[27] The ministry cites the seminal decision in *Multiple Access Ltd. v. McCutcheon*, where the Supreme Court Canada defined the concept of operational conflict under the first branch of the federal paramountcy doctrine, as follows:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.[5]

[28] The ministry's argument under the first branch is set out as follows:

> With respect to the Appellant's present request for calibration result records, the *Criminal Code* makes it clear that the presumption is that "no" you may not have calibration records and if you do wish to acquire them, you will have to convince a court of competent jurisdiction as to why they are relevant and should be released. In contrast, the provincial law purports to authorize disclosure in certain circumstances. It says, potentially "yes". Accordingly, there may be circumstances where it is impossible to comply with both. The federal "no" is paramount.

[29] In my view, there is no merit to this argument.

[30] I agree with many of the appellant's submissions explaining why the first branch of the doctrine does not apply. Unlike section 320.36 of the *Criminal Code* that prohibits the use or disclosure of results of analyses of bodily substances, section 320.34 does not prohibit the use or disclosure of standalone calibration records. Rather, section 320.34 establishes a disclosure regime which on its face applies only in the context of a criminal prosecution of an accused. It does not provide that calibration records are accessible only by order of a court, nor does it preclude other lawful means for someone to obtain access to those records, such as *FIPPA*. Even if a court were to deny an application brought by an accused under section 320.34, that would only be a ruling that the prosecutor did not have an obligation to disclose the records to the accused in the context of a criminal prosecution under Part VIII.1, not that the records could never be disclosed in any other circumstances.

---

[5] [1982] 2 S.C.R. 161, at 191.

[31] Finally, the ministry's submissions under the first branch of the federal paramountcy doctrine do not account for the exclusion of records relating to an ongoing prosecution at section 65(5.2) of the *Act.* Given the presence of this clear statutory exclusion, I find that an accused could not use the *Act* to gain access to calibration records related to a prosecution as long as the prosecution or any related proceedings have not been completed. Consequently, I find that there is no discernable risk that an accused would be given access to calibration records under the *Act* for use in a prosecution where a judge has denied a request for the same information under the *Criminal Code.*

[32] In short, I find there is no direct conflict in the operation of the two statutes under the first branch of the paramountcy doctrine.

Second Branch – Frustrating Parliament's intent

[33] Citing the Supreme Court of Canada's decision in *Bank of Montreal v. Hall*,[6] the ministry submits that the second branch of the paramountcy doctrine examines whether the operation of the provincial law will frustrate the purpose of the federal law such that Parliament's "legislative intent" stands to be "displaced."

[34] The thrust of the ministry's arguments under the second branch of the paramountcy doctrine is that the *Criminal Code* comprises a complete code which "safeguards" the records at issue and that "individuals cannot seek to remove those safeguards by attempting to obtain that protected information through *FIPPA*." The ministry's arguments focus, in particular, on safeguarding bodily substances and test results and protecting the privacy interests of individuals:

> Allowing someone to use the *FIPPA* process for this purpose creates the possibility that an individual could obtain a different result in seeking such information/records than they would by applying to a court of criminal jurisdiction, thereby circumventing *the protections given to this information* in the *Criminal Code.*
>
> ….
>
> Disclosing records created in an Operation While Impaired situation without an inquiry into the manner in which the information is to be used frustrates the purpose of s. 320.34, *which is to safeguard that very information*.
>
> Sections 320.34 and 320.36 of the *Criminal Code* constitute a complete code preventing the *unauthorized use of bodily substances and the results of tests* that have been obtained by peace officers investigating an individual for Operation While Impaired. The purpose of sections 320.34 and 320.36 is to *protect the privacy interest of the individuals from whom samples were seized* by establishing a presumption against the disclosure and use of both

[6] [1990] 1 S.C.R. 121, at paras. 55, 61.

> *the samples and the results of the analyses of these samples* for any purpose other than a prosecution under the *Criminal Code*, subject to the exceptions set out. (Emphasis added)

[35] Concerning the second branch of the paramountcy doctrine, the appellant submits, and I accept, that the records he is seeking do not relate to any person's bodily substance and thereby do not engage any privacy interests:

> As standalone, non-subject, calibration records, which do not result from the analysis of samples of any individual (and do not engage the privacy interests of any individual), the records sought are not captured by the prohibition of disclosure set out in s. 320.36 of the *Criminal Code*. … Further, … the records at issue do not engage the privacy interests which the respondent asserts that the s. 320.34 and 320.36 provisions are meant to protect. As a result, disclosure of the records at issue does not frustrate the purpose of s. 320.34 (or s. 320.36) of the *Criminal Code*.

[36] It is apparent from the ministry's submissions, reproduced above, that it is conflating the distinct purposes of sections 320.34 and 320.36 of the *Criminal Code*. Section 320.34 does not pertain to "safeguarding" any information or protecting the privacy interests of individuals with respect to their bodily substances, breath samples, or the results of analyses of those samples. Section 320.34 sets out the prosecution's obligation to disclose certain information to an accused person and establishes rules governing the disclosure of further information in the context of a criminal prosecution under section 320.14 of the *Criminal Code*. Nothing in this provision can be construed as a prohibition against the disclosure or misuse of information or engages concerns with respect to privacy interests as against the world.

[37] Conversely, section 320.36 is directed at safeguarding individuals' privacy and protecting against the misuse of bodily substances, including breath samples and breath sample test results. The protections afforded at section 320.36 have no relevance to the kinds of non-personal, stand-alone calibration test results sought by the appellant. Nor do they have any discernable bearing on the prosecution's disclosure obligations or the mechanisms for further disclosure to an accused person for the purposes of trial under section 320.34.

[38] Consequently, if the ministry's argument regarding the second branch of the federal paramountcy doctrine is to succeed, it must demonstrate that the *Act* frustrates the legislative intent of section 320.34, standing alone. I examine that question below.

Case law explains the legislative intent of section 320.34

[39] The relevant provisions in PART VIII.1 of the *Criminal Code,* entitled Offences Relating to Conveyances, were enacted on June 18, 2018, and came into force on December 18, 2018. These replaced earlier provisions of the *Criminal Code* dealing with

alcohol and drug offences in the operation of a conveyance. Section 320.34 was newly enacted to address the Crown's disclosure obligations to an accused person in the context of a criminal trial. The legislative intent underlying section 320.34 is explained by developments in the jurisprudence which the parties referred me to.

[40] As the ministry points out, prior to the enactment of section 320.34, there was uncertainty in the courts regarding what information the prosecutor was required to disclose to the accused regarding the breathalyzer equipment used. Prior to the amendments, the prosecutor's disclosure obligations to an accused were governed by the common law rule in *R. v. Stinchcombe*.[7] That rule requires the prosecutor to disclose to an accused any non-privileged material in the Crown brief, including "the fruits" of the police investigation, which consists of all material gathered by the police in their investigation of the accused, whether inculpatory or exculpatory. The police have a corresponding duty to disclose to the prosecutor the fruits of their investigation, as well as any other information that is "obviously relevant" to an accused's case. However, they do not have a duty to disclose general operational records or background information to the prosecutor, which generally would not find their way into the Crown brief.[8]

[41] A different rule governs the production of records in the possession of third parties, which includes any records in the possession of the police that are not part of the Crown brief. The rule for third-party production places the onus on an accused to satisfy the judge that the information is "likely relevant" to an issue at trial and requires a formal application supported by an affidavit setting out the specific grounds for production. The relevant jurisprudence confirms that the third-party production regime is the common law precursor of sections 320.34(2) and (3) of the *Criminal Code* and assists in explaining the legislative intent of these provisions.

[42] In its 2015 decision in *R. v. Jackson*,[9] cited by the appellant, the Ontario Court of Appeal was asked to decide whether the *Stinchcombe* rule should apply to what it called "historical" control tests performed on breathalyzer equipment. The Court cited expert evidence in a Report of the Alcohol Test Committee of the Canadian Society for Forensic Science[10] affirming that the information the prosecutor was obliged to disclose to an accused under the *Stinchcombe* rule,[11] coupled with the proper operation of the breathalyzer, is conclusive evidence of a person's blood alcohol concentration at the time of testing. In the absence of persuasive evidence to the contrary, the Court quashed the lower court's order for production of the historical control tests, finding their relevance to

---

[7] [1991] 3 S.C.R. 326.

[8] *R. v. Gubbins*, [2018] S.C.J. 44, paras. 20-23. The Court explained that the "fruits of the investigation" refers to all material pertaining to the investigation of the accused, that is, the police's investigative files, as opposed to operational records or background information, such as maintenance records.

[9] 2015 ONCA 832.

[10] This Committee is charged with ensuring that all breath-testing equipment in Canada meets rigid specifications.

[11] Essentially the same information section 320.34(1) of the *Criminal Code* now requires the prosecutor to disclose.

any issue at trial to be speculative at best. The Court explained its reasons:

> It is critical for the efficient operation of trial courts, especially those in which alcohol-driving offences occupy a prominent place on the docket, that they be able to control their process.[12]

[43] The Court observed that the high bar established by the "likely relevant" test for the production of historical control tests by the police would "discourage unmeritorious third-party records applications that devour limited resources" – in other words, "fishing expeditions."[13]

[44] Similarly, in its 2018 decision in *R. v. Gubbins*,[14] cited by the ministry, the Supreme Court of Canada held that breathalyzer "maintenance records" that are in the possession of the police and are not investigative in nature should have to meet the "likely relevant" test for third-party disclosure. The Court explained the purpose of the heightened test for third party disclosure in essentially the same terms articulated in *R. v. Jackson*:

> The reason that the relevance threshold is "significant" is to allow the courts to act as gatekeepers, preventing "speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming" requests for production.[15]

[45] By requiring a formal application for disclosure of further information only if it is "likely relevant" to a determination of whether the breathalyzer was in proper working order, sections 320.34(2) and (3) appear to have been enacted for the purpose expressed in the relevant case law. That is, to ensure judicial efficiency in the context of criminal trials relating to driving under the influence of alcohol or drugs, and not to safeguard the information.

[46] The ministry goes on to submit:

> The manifest legislative purpose behind Part VIII.I of the *Criminal Code* is to have a court of competent jurisdiction serve as a gatekeeper controlling the access to calibration result records pursuant to s. 320.34(2). The court retains the authority to determine whether such records ... may be relevant.
>
> The rationale for this tightly regulated legislative regime is threefold: (i) to establish a presumption that the approved instrument is valid and conclusive when conducted in accordance with prescribed procedures; (ii) to prevent frivolous requests for data where no foundation exists that

[12] 2015 ONCA 832, at para. 139.
[13] 2015 ONCA 832, at paras. 135, 139.
[14] [2018] S.C.J. No. 44
[15] [2018] S.C.J. No. 44, at para. 26.

> serves to undermine the accuracy and reliability of the instrument; and (iii) to enable the court to control its own processes.

[47] Accepting the ministry's statement of the legislative intent, I am not persuaded that those purposes are in any way frustrated by the access regime under the *Act*. The presumption of the conclusiveness of test results is expressly enshrined in the *Criminal Code* and is unaffected by the *Act*. Moreover, the court remains in full control of its own processes to deny an accused's requests for the disclosure of calibration records in the context of a prosecution, and to refuse to admit into evidence any records obtained through other means unless it is satisfied that they are relevant to an issue at trial.[16]

[48] This does not mean that the *Act* will somehow become a mechanism for circumventing the processes set out in section 320.34 or otherwise displace or frustrate its purpose. By virtue of the exclusion at section 65(5.2), an accused facing prosecution for an offence to which the calibration records relate, or who is involved in proceedings arising out of that prosecution, will be unable to access the records under the *Act* as long as that prosecution and any related proceedings have not been completed.

[49] In its reply representations, the ministry raises the spectre that prospective appellants in completed criminal trials will use the *Act* to get access to calibration records as fresh evidence in applications for extensions of the time for appealing convictions. In my view, this argument is speculative and, in any event, can be addressed on a case-by-case basis by the institution making appropriate inquiries at the request stage or the IPC, making those inquiries in the event of an appeal. If there is reason to believe that is the purpose of the request, then the institution or the IPC would be in a position to consider whether, based on the facts,[17] all proceedings in respect of the prosecution have *actually* been completed and not only "*ostensibly*" so.

[50] Finally, the rationale for the ministry's federal paramountcy submissions does not address situations where a requester is seeking calibration records for other legitimate uses *unrelated* to the prosecution of an accused. For example, a researcher assembling information about the accuracy and proper maintenance of breathalyzer equipment, or a competitor seeking the information to market different or improved breathalyzer equipment or materials used in the equipment. It is difficult to conceive how the *Act* would frustrate the legislative intent of the *Criminal Code* in such cases.

The presumption in favour of disclosure under FIPPA

[51] The ministry goes on to make submissions contrasting the disclosure mechanisms under section 320.34 with the access provisions of the *Act*, which I find to be repetitive of its arguments above. It submits that, unlike section 320.34, the *Act* "creates a presumption in favour of disclosure" of the requested information without regard to its

---

[16] The test of admissibility is *actual* relevance, not likely relevance.

[17] In an appropriate case, the institution or the IPC may require an affidavit from the requester/appellant affirming that the request is not for the purpose of applying for an extension of the time to appeal.

relevance at trial. It further submits that the IPC is not equipped to assess relevance and that the application of the *Act* could produce a different result than could be obtained from the court. In this way, the ministry repeats it claim that someone could use *FIPPA* to circumvent the "protection" of this information and avoid prosecution for its "misuse." More specifically, the ministry submits:

> To allow individuals to circumvent the protections of the scheme established in the *Criminal Code* by making requests for this very information through *FIPPA* would preclude the requisite inquiry into *the intended use of the samples or test results, allowing individuals to avoid prosecution for misuse* – the very mischief that Parliament intended to prevent…

[52] Here, again, the ministry conflates the distinct purposes of sections 320.34 and 320.36. Section 320.34 establishes a limited disclosure regime and rules that govern disclosure of further information for the purposes of efficiency at trial, not to protect the information or prevent its misuse. Section 320.36, on the other hand, provides "protection" for information by prohibiting the disclosure and misuse of a person's bodily substances, including breath sample test results, which do not apply to the non-subject calibration test results at issue in this appeal.

[53] The ministry submits that it is possible, if not likely, that no exemptions under the *Act* are available to protect the requested information from disclosure. The ministry contrasts this case with Order PO-3851 dealing with wiretap records. In that case, the adjudicator found the exemptions for law enforcement at section 14 and personal information at section 21 provided "sufficient safeguards … to ensure that the purposes and interests of the *Act* and the *Criminal Code* are balanced," thereby eliminating any conflict between the two statutes. The ministry argues that this appeal gives rise to the "real, and dangerous, risk that calibration records could be disclosed under *FIPPA*" because no applicable exemptions would seem to apply here. It suggests, for example, that the section 14 exemption for interference with a law enforcement matter would likely not be applicable, particularly where the matter "has ostensibly been completed." The ministry then states: "This same logic applies to s. 65(5.2), as that section will not apply in circumstances where all criminal proceedings have completed."

[54] While this "logic" may be true, it is also consistent with the legislative intent of both regimes which, taken together, are entirely coherent. By virtue of the exclusion at section 65(5.2), an accused facing prosecution for an offence to which the calibration records relate, or who continues to be involved in other proceedings arising out of that prosecution, will be ousted from the application of the *Act* altogether, irrespective of any other exemption that may or may not apply. As I explained above, whether the prosecution or any related proceeding is still ongoing, including any prospective application for an extension of time for an appeal, should be assessed on a case-by-case basis, at the request stage by the institution and at the appeal stage by the IPC. The purpose of such inquiry would be to ensure by way of affidavit or other sworn statement that all such proceedings have actually been completed.

[55] In conclusion, I cannot agree with the ministry that there is any incompatibility between the federal and provincial legislation, or that the latter frustrates the legislative intent of the former. I find the second branch of the doctrine of federal paramountcy does not apply.

[56] As the ministry's federal paramountcy argument fails, I will proceed to consider whether the records are nonetheless excluded from the scope of the *Act* by reason of section 65(5.2).

Issue B: Does the section 65(5.2) exclusion for records relating to a prosecution apply to the records?

[57] Section 65(5.2) of *FIPPA* provides as follows:

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

[58] In *Ontario (Attorney General) v. Toronto Star*, Ontario's Divisional Court held that the purposes of section 65(5.2) 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.[18]

[59] The Court's ruling in that case also affirmed that the phrases "relating to" and "in respect of" are words of "the widest possible scope" and are intended to convey "some connection" between two related subject matters. Accordingly, the words "relating to" in section 65(5.2) require some connection between a record and a prosecution;" and the words "in respect of" require some connection between a proceeding and a prosecution.

[60] Previous decisions of my office have held that proceedings in respect of a prosecution are only completed after the expiry of any appeal period, which turns on the facts of each case.[19] Further, while the institution bears the burden of proving that the exclusion applies, evidence supporting that determination can include the parties' representations, the circumstances of the appeal, and the records themselves.[20]

The section 65(5.2) exclusion applies

[61] In my view, there can be no doubt that the appellant was seeking calibration records related to a specific prosecution of one of his clients that was ongoing at the time of his request and appeal.

[62] The appellant submits the records do not "relate to" a prosecution within the

---

[18] *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991.
[19] Order PO-2703.
[20] Orders MO-3139-I and MO-2439.

meaning of section 65(5.2) because, according to the Court of Appeal judgment in *R. v. Jackson,*[21] they are not relevant to the prosecution.

[63] As noted above, relevance is not the test. The records need only have "some connection" with a prosecution. In *Ontario (Attorney General) v. Toronto Star*, the Court found that records not contained in the Crown brief were excluded where there was some prospect they may later become part of the Crown brief.[22] In my view, similar reasoning applies to records that have been requested for some purpose connected with a prosecution, whether or not they are "relevant" or will ultimately be used for that purpose.

[64] The request in this case was for calibration records for a specific breathalyzer identified by a serial number for a specific period of time. In his initial communications with this office, the appellant disclosed that there was an ongoing prosecution to which the records related, and that he had not advised the ministry of this fact. In his later communications with the mediator, the appellant referred to a specific prosecution of a criminal matter in a specific municipality, along with the date a guilty plea was entered and the date the relevant appeal period expired. This information was in turn communicated by the mediator to the ministry with the appellant's authorization.

[65] The ministry's first set of representations only assumed a possible connection with a prosecution. This seems to confirm that the appellant did not tell the ministry about the actual prosecution that was ongoing at the time of his request. This may also explain why the ministry did not initially raise the section 65(5.2) exclusion.

[66] It is important to bear in mind that the exclusion at section 65(5.2) is jurisdictional in nature. By stating that "the Act does not apply" to the records, section 65(5.2) removes the right of access; and the IPC has no jurisdiction to inquire into the issues raised by any appeal.[23] Given that principles of administrative law require every tribunal to consider and determine its jurisdiction before embarking on an inquiry, the IPC was obliged to consider the exclusion and raise the issue in the Notices of Inquiry to the parties before it could consider their other arguments.

[67] Decisions of my office have established that the IPC's jurisdiction to entertain an access appeal is to be determined based on the facts and law existing at the point in time when the institution issues a decision which may subsequently be appealed.[24] Moreover, the Divisional Court has held that the IPC only "*acquires jurisdiction* over a record relating to a prosecution once all proceedings in respect of the prosecution have been completed

---

[21] 2015 ONCA 832.
[22] 2010 ONSC 991, at para. 43, 56.
[23] Section 65(5.2) does not eliminate the right of appeal to my office on the question of whether it applies.
[24] Declining jurisdiction: *OMERS Administration Corporation* (*Re*), 2011 CanLII 60329 (ON IPC) (Order PO-2991), at para. 58: The right of appeal had not yet vested when the access decision was made after a regulation removing OMERS from the scope of *FIPPA* came into force; Assuming jurisdiction: *Hydro One* (*Re*), 2016 CanLII 31959 (ON IPC) (Order PO-3607), at paras. 22-29: The right of appeal vested when the request and access decision were made before legislation removing Hydro One from the scope of *FIPPA* came into force.

(emphasis added)."[25]

[68] Given that the records at issue clearly had "some connection" with a specific prosecution that was ongoing when the institution issued the decision which is subject to this appeal, the section 65(5.2) exclusion applied to the records at that time and the IPC did not have jurisdiction over the matter.

[69] The appellant appears to take the position that, because the prosecution in which he was involved and any related proceedings have been completed, the exclusion no longer applies, and the IPC should be able to assume jurisdiction. This is not a proposition I can accept. The IPC either has jurisdiction to embark on an inquiry at the outset of an appeal, or it does not. The appellant cannot rely on a change in facts or circumstances in the course of an appeal to call on the IPC to assume jurisdiction it did not have from the outset. In my view, such an outcome would be wholly inconsistent with the jurisdictional principles cited above.

[70] The appellant indicates in his reply representations that, if his appeal is dismissed, he would be required to submit a request for the records again, which would delay a determination on the substance of the issues. Any issues arising out of that position are not before me, though any new request may give rise to considerations mentioned above concerning potential applications to extend appeal periods.

[71] In my view, the application of the exclusion in the circumstances of this appeal serves two important purposes of section 65(5.2) mentioned by the Divisional Court: maintaining the integrity of the criminal justice system and ensuring that the right of the accused and the Crown to a fair trial is not infringed. Given these purposes for the exclusion, the *Act* cannot be used to circumvent the disclosure mechanisms at section 320.34 of the *Criminal Code* or to frustrate the legislative intent of ensuring judicial efficiency by preventing unmeritorious proceedings.

[72] In conclusion, I find that the records at issue have "some connection" to a prosecution that was ongoing at the outset of the appeal and for that reason the records were, and for the purposes of this Order remain, excluded from the *Act*.

Concerns raised by this appeal

[73] The history of this appeal raises concerns about the responsibilities of requesters and appellants when exercising their rights of access and invoking the processes of institutions and my office under the *Act* and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act*. Just as institutions are expected to faithfully and expeditiously respond to access requests and avoid actions and inaction that disrupt or impinge on the due exercise of the right of access, so too are requesters and appellants expected to be forthright and to act responsibly in exercising their rights

[25] 2010 ONSC 991, at para. 31.

under the legislation.

[74] In this appeal, it should have been apparent to the appellant that the ministry's questions regarding his possible involvement in a prosecution were highly relevant to a determination of his right of access to the requested records. Unfortunately, the appellant was not forthcoming in responding to those questions, leaving the ministry to make assumptions on how to deal with the request and identify the issues in the appeal. Had the appellant answered those questions at the request stage, his request would almost certainly have resulted in the same outcome this order has produced.[26]

[75] With a complete answer in hand, it is possible, if not likely, that the ministry would not have considered it necessary to raise or pursue the federal paramountcy argument. As the ministry stated in its reply representations, "the decision should be upheld on the basis of section 65(5.2) … there is therefore no need to consider the doctrine of paramountcy." While I cannot speculate beyond that how this matter would have progressed, I note that considerable time, energy, and resources have been devoted to addressing the issues in this appeal which possibly could have been avoided altogether or at least reduced considerably.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: February 24, 2025
Patricia Kosseim
Commissioner

[26] See Order MO-3670.