

INTERPRETATION BULLETIN

Records Relating to an Ongoing Prosecution

This interpretation bulletin outlines the factors for determining how to apply the exclusion for records that relate to an ongoing prosecution, under **section 65(5.2)** of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and **section 52(2.1)** of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).

Sections 65(5.2) of FIPPA and 52(2.1) of MFIPPA state:

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

Sections 65(5.2) of FIPPA and 52(2.1) of MFIPPA exclude records relating to an ongoing prosecution from the scope of the acts.

The burden of proving that the exclusion applies rests on the institution claiming the exclusion.¹

What is the rationale behind the exclusion?

The courts and the Office of the Information and Privacy Commissioner of Ontario (IPC) have found the exclusion to have the following important three purposes:

- “Protecting prosecutors from having to address access-to-information requests for records that are part of their prosecution file where the matter is ongoing.”

¹ Order **MO-3919-I**.



- Ensuring 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.”
- Ensuring “that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials.”²

What is the test for establishing whether the exclusion applies?

For the exclusion in section 65(5.2) of FIPPA and section 52(2.1) of MFIPPA to apply, the following must be established:

1. There is a prosecution;
2. There is some connection between the record and the prosecution; and
3. All the proceedings with respect to the prosecution have not been completed.³

What is meant by “prosecution”?

The term “prosecution” in sections 65(5.2) of FIPPA and 52(2.1) of MFIPPA 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 Proceedings examining allegations of employee misconduct that could lead to dismissal have been found not to meet the threshold of an offence leading to true penal consequences.⁵

The exclusion in sections 65(5.2) of FIPPA and 52(2.1) of MFIPPA is generally claimed by an institution that is the prosecuting authority.

The exclusion has been found to apply to records in the control of investigating authorities and third parties, but not to records in the control of an institution that is the subject of a prosecution.⁶

A “prosecution” within the meaning of this exclusion is one that is officially underway, that is, where a charge has been laid⁷; not one that is merely being contemplated.⁸

² *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) and Order MO-3919-I.

³ Orders PO-3784 and MO-3294-I.

⁴ Order PO-2703.

⁵ Order PO-3424-I.

⁶ Order MO-3919-I.

⁷ Order MO-3294-I.

⁸ Orders MO-3294-I and MO-4089.

What are records “relating to” a prosecution?

For the exclusion to apply, there must be “some connection” between the records and the case to be made by the prosecuting authority.⁹

The type of evidence that could establish “some connection” includes evidence that the records were prepared for the purposes of a prosecution, that the records formed part of the prosecution brief, or that they have probative value in the prosecution.¹⁰

The records requested must be connected to “proceedings in respect of the prosecution.”¹¹ For example, in one order, the exclusion was found not to apply where an appellant sought responsive records relating to the appellant’s prosecution. This was in the context of an application to the federal minister of justice for a ministerial review of the appellant’s criminal conviction under section 696.1 of the *Criminal Code*.¹² The IPC adjudicator found that the request for records was in connection with proceedings post-conviction and not in respect of the appellant’s prosecution or conviction itself. Further, an application under section 696.1 of the *Criminal Code* is not in the regular course of a prosecution, conviction and subsequent appeal. Therefore, the connection between the proceedings and the appellant’s prosecution was found not to exist.

On the other hand, the IPC found that the exclusion did apply in a case involving an appellant’s request for records relating to an ongoing death investigation by the Ontario Provincial Police (OPP).¹³ The adjudicator found that the records at issue were records of interactions between the appellants and the OPP victim liaison officers in relation to the death investigation. The adjudicator determined that the connection between the records and the prosecution was not diminished by the fact that the records may originally have been prepared by officers who played no investigatory role. What was relevant was that the Crown requested the records at issue in the appeal for the purpose of the prosecution, and the records were provided to the Crown for that purpose.

What types of records may be subject to the exclusion?

The exclusion is not limited to materials in the Crown or prosecution brief; particularly in the case of a complex prosecution, it may be difficult to accurately state what records are within or outside the brief.¹⁴ For example, in one case, the court found that ministerial briefing notes and political correspondence concerning the progress of particular charges through the justice system were covered by the prosecution exclusion.¹⁵

9 *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII); see also *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII) at para. 25, and Order **MO-3919-I**.

10 Order **MO-4283**.

11 Order **PO-3673-I**.

12 Order **PO-3673-I**.

13 Order **PO-4287**.

14 *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) and Order **MO-4283**.

15 *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) and Order **MO-3919-I**.

Moreover, documents that are not part of the Crown brief may become part of the Crown brief later, and prosecution materials may relate or become integral to the prosecution over the course of the proceedings.¹⁶

Records that are not substantially related to the prosecution, but only incidentally related, do not fall under the exclusion. For instance, an IPC adjudicator found that expense claim records describing employees' expenses and corresponding receipts for travel in relation to their attendance at court might incidentally relate to the prosecution, but were not substantially related to the prosecution.¹⁷

When have all proceedings “in respect of” a prosecution been completed?

The Supreme Court of Canada in *Markevich v. Canada* has found that the words “in respect of” have a broad scope that convey a link between two subject matters.¹⁸ Applied to this exclusion, “in respect of” means that there must be some connection or link between the proceeding and the prosecution.¹⁹

Whether a prosecution has been “completed” depends on the facts of each specific case.²⁰

If a trial has not yet taken place and charges remain in place, all proceedings have not been completed. Even after a trial has been completed, the question of a possible appeal arises.²¹ All proceedings in respect of the prosecution will only be considered completed after any relevant appeal periods have expired.

What happens once a prosecution is completed?

The exclusion under section 65(5.2) of FIPPA and section 52(2.1) of MFIPPA is a “time-limited” exclusion.²² That means that the exclusion ceases to apply when all proceedings in respect of the prosecution have been completed.²³

Furthermore, the IPC has found that the exclusion does not apply where the prosecution is completed during the IPC’s inquiry.²⁴ The adjudicator also found that it was not appropriate for the institution to require the appellant to submit another access request if the present one was being appealed and the ongoing prosecution was completed, rendering the exclusion inapplicable.

16 *Ministry of Attorney General and Toronto Star, 2010 ONSC 991* (CanLII) and Order **MO-4287**.

17 Order **PO-2791**.

18 *Markevich v. Canada, 2003 SCC 9* (CanLII).

19 *Ministry of Attorney General and Toronto Star, 2010 ONSC 991* (CanLII) at para 43.

20 Order **PO-2703**.

21 Orders **PO-2703** and **PO-2708**.

22 *Ministry of Attorney General and Toronto Star, 2010 ONSC 991* (CanLII) and Order **MO-3818**.

23 Order **PO-4287**.

24 Order **MO-4532**.