

CITATION: James v. Ontario (IPC), 2019 ONSC 6995  
COURT FILE NO.: DC 775/17  
DATE: 20191203

ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

D.L. Corbett, Gray and Sossin JJ.

B E T W E E N: )  
)  
TASHESHA TAMARA JAMES ) *Ms James*, self-represented  
)  
Applicant )  
)  
- and - )  
)  
ONTARIO (INFORMATION AND ) *Linda H.C. Chen*, for the IPC  
PRIVACY COMMISSIONER) and )  
TORONTO POLICE SERVICES ) *Michael Sims*, for the TPSB  
BOARD )  
)  
Respondents ) **Heard at Toronto:** June 24, 2019

REASONS FOR DECISION

Sossin J.:

Overview

1. Tashesha James seeks records from the Toronto Police Services Board pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (“*MFIPPA*”). She received some records, and was refused others, in response to her request of the Board. She then proceeded before the Information and Privacy Commissioner for an order compelling the Board to provide her with the rest of the requested records. The IPC granted her request in part, but found that some of the requested records should not be ordered produced to Ms James.

James.

2. Ms James applies to this court for judicial review of the IPC's refusal to grant her some of the requested records. She argues that the IPC's decision is unreasonable in finding that certain records qualify as "personal information" under *MFIPPA*. She also argues that the adjudicator erred in failing to accommodate her as a victim of crime.

3. All of this arises in a specific context. Ms James called police in May 2007. She took the position that she was the victim of assault. She alleges that when police arrived at the hotel room where she was, instead of arresting the perpetrator of the crime against her, police assaulted and arrested her. She says that all this happened because she was a sex worker and police were predisposed to treat her as a criminal rather than a victim of crime.

### **Summary and Disposition**

4. The adjudicator concluded that Ms James rights to obtain documents under *MFIPPA* are not any greater than the rights of any other person to obtain documents under the *Act*. On this basis, the adjudicator gave short shrift to James' constitutional arguments, because they were premised on James' status as a woman, a sex worker, and an alleged victim of crime, and not her rights to information under *MFIPPA*. This interpretation is consistent with the scheme of the *Act* and is reasonable. The decision would not preclude James from obtaining documents during her criminal prosecution or during any civil proceeding she might have brought, processes that are designed to focus on her interests in receiving disclosure to enable her to make full answer and defence, and disclosure of all relevant documents producible in civil proceedings. This interpretation of the *Act* is reasonable and the Arbitrator did not deny Ms James fairness by failing to permit her to litigate fully an untenable constitutional claim.

5. On the request under *MFIPPA*, the Arbitrator's decision falls within a range of reasonable results, and is reasonable in its findings of law and fact. Therefore, for the reasons that follow, the application is dismissed.

### **Facts**

6. The requested records relate to James' arrest in May of 2007 at a North York

hotel room. The arrest stemmed from an incident involving a male hotel guest, who allegedly had stolen property and was refusing to leave the hotel room. Police had been informed that this person was holding James inside the room against her will. When police entered the room, James was lying on the bed, unresponsive.

7. When James regained consciousness, she was detained, and her property was seized and searched by police. A fight broke out between James and the male guest, and an officer who intervened was injured. Another officer was injured while restraining James, who was arrested and charged with several offences in connection with the fight and injuries to police. The male guest was also charged with a range of offences under the *Criminal Code*.

8. James was convicted in 2008; she received a criminal record suspension in March, 2016.

9. That same year, in February, 2016, James requested police records pursuant to s. 17 of the *Act*. The TPSB did not respond to the request and Ms James appealed the deemed refusal to the IPC. The IPC sent notice of the appeal to the TPSB. The TPSB then issued a decision, dated May 11, 2016, in which most requested documents were disclosed. Some, however, were withheld on the basis of law enforcement, intergovernmental relations and personal privacy exemptions in the *Act*.

10. James appealed the Board's decision to the Commissioner in June, 2016, and requested a copy of the police Index of Records. The matter was then streamed to mediation.

11. James told the mediator that she did not believe that the TPSB had conducted an adequate search for records. The police then located photographs after conducting a second search. The TPSB sent James an Index of Records along with a letter advising that the photographs would be released to her upon payment of a fee. She was not given access to third party information captured in the photographs pursuant to the personal information exemption. The mediator filed a report in November, 2016, concluding that the issues in dispute could not be fully resolved.

12. The matter was moved from mediation to adjudication in December, 2016.

13. At this point, James forwarded a Notice of Constitutional Question (the "NCQ") to the Attorneys General of Canada and Ontario.

14. IPC Adjudicator Diane Smith was assigned to the appeal. The records at issue were described by Adjudicator Smith as the following:

- a. Record of arrest and Supplementary Records of Arrest;
- b. Police and Civilian Witness Lists;
- c. Police Officers' Notes
- d. I/CAD (Computer Aided Dispatch) Event Details Report; and
- e. Photographs of the scene of the arrest

15. James and the TPSB submitted written representations on the remaining issues. James submitted the grounds of her appeal were as follows:

- a. there were discrepancies between portions of the police officers' notes provided and their testimony during her criminal trial, which might constitute perjury;
- b. access to the requested information was necessary for the enforcement of James' *Charter* rights;
- c. James required the requested information in order to re-examine the evidence at her criminal trial to determine what *Charter* remedies might be available; and
- d. it would be absurd to deny her records which she had previously received in the course of her criminal trial.

16. In its reply representations, the TPSB took the position that James was out of time to serve the NCQ. In response to James' constitutional argument, the TPSB stated that disclosure of records as part of a criminal proceeding and access to records under the *Act* are distinct. James was not identified as a victim in any of the records.

17. In her sur-reply, James stated that the police had violated her *Charter* rights, and she was requesting the information in order to assert her *Charter* rights, not as a criminal accused.

**(a) Order MO-3517**

18. In Order MO-3517, issued on November 8, 2017, Adjudicator Smith upheld the TPSB's decision to withhold portions of the records, including records containing the personal information of third parties.

19. Adjudicator Smith found that although some of the information in the records relates to individuals in an official business capacity, it still qualifies as "personal information" because it might reveal something of a personal nature about the individuals and constitute an unjustified invasion of their privacy.

20. Adjudicator Smith did not uphold the TPSB's decision to withhold records under the intergovernmental relations exemption, and ordered the TPSB to disclose those records.

21. Adjudicator Smith concluded that the "absurd result" doctrine does not apply in this case, given the differences between the requirements of disclosure in criminal proceedings and the obligations under the *Act*.

22. Finally, Adjudicator Smith determined that there was insufficient evidence of how James' *Charter* rights had been infringed.

**(b) Reconsideration Order MO-3557-R**

23. James sent a request to the Adjudicator seeking reconsideration of Order MO-3517. Reconsideration Order MO-3557-R was issued on January 23, 2018 after James commenced this application for judicial review.

24. In the reconsideration decision (Order MO-3551-R), the Adjudicator acknowledged that Order MO-3517 does not mention the public interest provisions in sections 5 or 16 of the *Act*, and stated that she declined to consider these provisions because they had no application to the appeal.

25. Adjudicator Smith also addressed the argument from James that she had failed to consider *Charter* arguments because the NCQ was received late. The Adjudicator stated that, notwithstanding late service, she did in fact consider the constitutional issues and found insufficient evidence of any breach of s.15 of the *Charter* or a basis for a remedy under s.24(1) of the *Charter*.

26. With respect to James' argument that the decision of the TPSB not to disclose descriptions of how her body was found the night of the arrest should not have been

upheld, Adjudicator Smith pointed out that the records enclosing a description of how her body was found were in fact disclosed.

27. With respect to concerns in relation to the disclosure provided by the Crown as part of the criminal proceedings, Adjudicator Smith confirmed that the appeal before her was not the appropriate venue to consider whether her rights were violated by the police or at her trial. She concluded, “[e]ven if her *Charter* rights were violated at those times, this would not alter or affect the legal analysis under *MFIPPA* of her right to access other people’s personal information.” (at para. 56)

28. Adjudicator Smith also declined to change her decision not to notify other affected parties of her request under the *Act*, as the provision relating to notice (s.39(2)) is discretionary, and the passage of nine years since the events in question led Adjudicator Smith to conclude that notice was not necessary.

### **Analysis**

29. The issues raised in this application are as follows:

(1) do the records at issue qualify as “personal information” as defined by the Act;

(2) do any of the impugned provisions relating to the requested records violate James’ rights under the *Charter*; and

(3) did the Adjudicator exercise her discretion unreasonably by not expressly ruling on James’ public interest arguments?

### **Standard of Review**

30. The parties agree, correctly, that the standard of review is reasonableness: *Barker v. Ontario (Information and Privacy Commissioner)*, 2019 ONCA 275, para. 52.

### **Issue 1: Are the Records “Personal Information” under s.2(1) of the Act?**

31. The Adjudicator found that the records at issue contained “personal information.”



32. Section 2(1) of the Act defines “personal information” as recorded information about an identifiable individual, and subsection 2(2.1) provides that personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

33. In *Dagg v. Canada*, [1997] 2 S.C.R. 403 the majority of the Court held that, pursuant to section 3(j) of the *Privacy Act* (equivalent to s. 2(2.1) of the *MFIPPA*), it was appropriate to deny access to information in a Crown Brief prepared for purposes of a criminal proceeding where the Brief contains sensitive information belonging to third parties. In other words, the fact that information was disclosed as part of the requirements of the criminal proceeding did not mean that the police were under an obligation to disclose that same information under *MFIPPA*. The Court also held that information relating to individuals in a professional capacity does not constitute “personal information” and therefore had to be disclosed.

34. In this case, Adjudicator Smith confirmed that the information in some of the withheld records constituted personal information, even where portions of the records were about individuals in their professional capacity (because those records revealed something personal about those individuals, or identified other individuals and/or personal information about those other individuals).

35. Adjudicator Smith also concluded that some of the witness statements sought did not concern James’ arrest but rather the criminal investigation of another individual and that individual’s personal information.

36. James argues that the “absurd result principle” applies in this case, as she is aware of the contents of the file in the possession of the police, because it was disclosed as part of the criminal prosecution against her. She takes the position that once it is disclosed in this context, this information is already part of the “public record.”

37. The IPC submits that the Adjudicator’s findings regarding personal information exemptions were reasonable. Although some of the information was about individuals in their professional capacity, the Adjudicator found that the disclosure would nonetheless reveal something personal about those individuals, identify an individual, or reveal another individual’s personal information.

38. The IPC and TPSB submit that Adjudicator Smith found that the personal

information of the other individuals was compiled as part of a police investigation and are therefore it is presumed that disclosure of this information would constitute an unjustified invasion of other individuals' personal privacy pursuant to s. 14(3)(b) of the *Act*. Since neither party raised arguments rebutting this presumption, and the Adjudicator's found that the parties did not raise factors in favour of disclosure, the IPC and TPSB submit that it was reasonable for the Adjudicator to find that the exemption under s. 38(b) of the Act applies, and for her to have upheld the TPSB's refusal to disclose these records.

39. In her submissions, James stated that she wishes to compare the information in the police file with that provided to her in the criminal case, in light of her belief that she was subject to discriminatory profiling. Whether records were disclosed to James, as an accused person in a criminal process, has no bearing on whether those records include "personal information." Crown disclosure in criminal proceedings does not become a matter of public record as a result of this disclosure. For that reason, James' claim that withholding these records constitutes an "absurd result" must fail.

40. For all of these reasons, the Adjudicator's determination that the records at issue in this case constituted personal information and therefore were properly withheld by the TPSB, was reasonable.

## **Issue 2: Was the Constitutional Question Considered Properly?**

41. The Supreme Court of Canada has held that administrative decision-makers must consider relevant *Charter* values within the scope of their expertise: *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395. In this case, James challenges whether Adjudicator Smith properly considered the *Charter* breaches she raised in her appeal.

42. The NCQ raised the issue of whether the application of the impugned provisions of the Act violated section 15(1) of the *Charter*. James' *Charter* argument, however, primarily concerns the disclosure of records within the Crown's possession in her criminal proceeding. For example, James submits that the police's refusal to identify her as a "victim" and to disclose to her information that is available to all victims of crime, is discriminatory and a violation of 15(1) of the *Charter*.

43. James also challenges the constitutionality of certain sections of the *Act* - ss. 14(1)(f), 14(3)(c) and 38(b) - on the grounds that the application of the impugned



provisions to the records violates sections 15(1) and 24 of the *Charter* due to the discriminatory manner in which the impugned provisions are implemented, namely to conceal errors in policing that led to the alleged violation of James' rights as a victim of crime.

44. On its face there is no basis for these constitutional arguments. *MFIPPA* is an *Act* of general application that provides access to information to any requestor of information, subject to the process and exemptions in the *Act*. It is not intended to be, and is not by its terms, a mechanism for victims of crime to obtain information or for civil litigants to obtain disclosure.

45. *Charter* arguments are easily raised. But that does not require a tribunal to complete a full-blown hearing on unfounded *Charter* claims. James' right to obtain the records under *MFIPPA* was not infringed or denied because she is a "victim of crime" or an "exploited person". There is simply no basis in the record for the *Charter* argument raised by James, and the Arbitrator reasonably declined to conduct a hearing on arguments that were bound to fail.

46. Ms James raised arguments about problems around service of the NCQ. Those problems were real and did lead to some confusion. However, I would not address those issues here, since it is clear that Ms James' constitutional arguments could not succeed in any event.

### **Issue 3: Did the Adjudicator Consider the Public Interest under s.16 of the Act?**

47. The third issue is whether Adjudicator Smith unreasonably failed to address James' public interest grounds for challenging the decision of the TPSB to withhold records.

48. Section 5(1) of the *Act* requires the disclosure of any record if the "head" of an institution has reasonable and probable grounds to believe that it is in the public interest to do so and the record reveals a "grave environmental, health or safety hazard to the public."

49. Section 16 of the *Act* provides that "a compelling public interest" may override the exemptions under which the records have been withheld, and where this threshold is met, the records must be disclosed. This determination has two steps:

first, there must be a compelling public interest in disclosure; second, this interest must clearly outweigh the purpose of the exemption.

50. James argues that the compelling public interest dimension of the records at issue relates to the criminal justice system. James asserted that a combination of factors supports a finding that a compelling public interest in disclosure of the records exists: (1) the rights of victims of crime; (2) the violation of the rights of a victim of crime and the resulting breach of section 15(1) of the *Charter*; and (3) police withholding evidence from Crown and the defence in a criminal proceeding.

51. The public interest issue was not mentioned by Adjudicator Smith in the original Order MO-3517. In her reconsideration (Order MO-3551-R), Adjudicator Smith clarified that it was not necessary to address its possible application “because of the limited reference to section 16 in this appeal” and because she believed that she was not under an obligation to address every issue raised by a party.

52. Adjudicator Smith relied on *Construction Labour Relations v. Driver Iron Inc.* 2012 SCC 65, at para. 3, in which the Court held: “[t]his Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708).”

53. In order to find that there is a compelling public interest in disclosure, previous IPC orders have stated that the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, “adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.” A public interest does not exist where the interests being advanced are essentially private in nature (*Ontario (Natural Resources) (Re)*, 2014 CanLII 34771 (ON IPC), at para. 38).

54. The IPC also has stated that “a court process provides an alternative disclosure mechanism” where the reason for the request is to obtain records for a civil or criminal proceeding” (see, for example, Information and Privacy Commissioner of Ontario, MO-1901 (26 January 2005)).

55. James submits that her interest was not in the records disclosed as part of the criminal proceeding, but in the complete timeline of events of the evening of her

arrest. She acknowledged that the records she seeks may also form part of the disclosure in the criminal proceeding, but reiterated that her interest was in comparing the two version of these records, in part to determine if important information had been withheld in the criminal proceeding. While unable to point to a specific record which she believes exists and was not disclosed, her overall claim is one of systemic discrimination and bias.


56. I understand that Ms James feels strongly about these issues. I also understand that she sees the events that took place back in 2007 as reflecting systemic issues. That does not, however, transform the interactions between herself and the police into a matter of public interest for the purposes of *MFIPPA*. It is not comparable to a “grave environmental, health or safety hazard to the public”. The IPC reasonably concluded that the public interest exemption does not arise in this case.

**Conclusion**

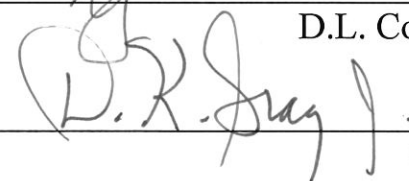
57. For these reasons, this application is dismissed. This is not a case for costs.

  
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Sossin J.

I agree:

  
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D.L. Corbett J.

I agree:

  
\_\_\_\_\_  
Gray J.

Released: ~~November~~ <sup>December 3,</sup> 2019 

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**BETWEEN:**

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**- and -**

Ontario (Information and Privacy  
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Services Board

Respondents

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**REASONS FOR DECISION**

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Sossin J.

**Released:** December 3, 2019