Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3559

Appeal PA13-416

Ministry of Community Safety and Correctional Services

December 10, 2015

Summary: The ministry received a request for records relating to the appellant's son, who was the victim of a fatal motor vehicle accident. The ministry located responsive records and granted partial access to them. The appellant appealed the decision on the basis that additional responsive records should exist. Accordingly, the sole issue in this appeal is whether the ministry conducted a reasonable search for records responsive to the request. In this order, the adjudicator upholds the ministry's search and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request submitted under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the requester's son, who was the victim of a fatal motor vehicle accident.

[2] The ministry clarified with the requester that the request was for access to Ontario Provincial Police (OPP) reports and officers' notes, as well as records from the Ontario Chief Coroner (OCC) and Centre of Forensic Sciences (CFS).

[3] The ministry granted partial access to the responsive records, severing portions of them pursuant to the discretionary exemptions at sections 49(a) (discretion to refuse

a requester's own information), read in conjunction with the law enforcement exemptions at sections 14(1)(l) and 14(2)(a), and 49(b) (personal privacy) of the *Act*.

[4] The requester, now the appellant, appealed the ministry's decision.

[5] During mediation, the appellant advised that she was of the view that additional records responsive to her request should exist. The ministry conducted another search and located several additional responsive records. It issued a supplementary decision letter granting partial access to those records. Portions of them were severed pursuant to sections 49(a), read in conjunction with section 14(1)(l), and 49(b) of the *Act*.

[6] The appellant advised that she continues to believe that additional records responsive to her request should exist. The ministry conducted another search for responsive records and located further additional records. Partial access was granted to those records; portions of them were severed pursuant to sections 49(a), read in conjunction with sections 14(1)(l), and 19 (solicitor-client privilege), and 49(b) of the *Act*.

[7] The appellant advised, once again, that despite the additional search, she continues to believe that additional records relating to her son should exist with the OPP, the OCC, and the CFS, including toxicology results, urine samples and analyses, seal numbers, warrants, and records relating to the retention of cranial matter.

[8] The appellant advised that she wishes to pursue the appeal on the basis that additional records should exist. She confirmed that she is not pursuing access to the information that was severed from the records pursuant to the enumerated exemptions. Accordingly, the sole issue to be determined in this appeal is whether the ministry has conducted a reasonable search for responsive records.

[9] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from the ministry and the appellant, both of whom provided representations. The parties' representations were shared with each other in accordance with this office's *Practice Direction Number 7* and section 7 of its *Code of Procedure.*

[10] For the reasons that follow, I uphold the ministry's search for responsive records and find that its efforts to locate records containing the information sought by the appellant were reasonable. As a result, I dismiss the appeal.

DISCUSSION:

[11] The sole issue to be decided in this appeal is whether the ministry has conducted a reasonable search for records responsive to the request. The appellant claims that additional records relating to her deceased son exist, including toxicology results, urine

samples and analyses, and records relating to the retention of the deceased's cranial matter.

[12] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[13] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request.[4] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[14] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6]

Representations of the parties

[15] At the outset of the ministry's representations, ministry counsel confirmed that they were prepared on behalf of the ministry, and by extension, the OPP, the OCC and the CFS.

[16] The ministry takes the position that it has conducted reasonable searches for the records responsive to the appellant's request and that is has "fully discharged its duties under [the *Act*]." In support of its position, the ministry enclosed an affidavit sworn by the ministry's acting deputy coordinator of the Freedom of Information and Protection of Privacy Unit. The acting deputy coordinator affirms that she has worked in the ministry's Freedom of Information and Protection of Privacy Unit since 2006 and that she is knowledgeable with respect to the *Act* and the requirements and procedures for responding to access requests under that legislation.

[17] Addressing how the ministry responded to the request that gave rise to this

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

appeal, the acting deputy coordinator states:

> My duties and responsibilities, in relation to this appeal, consisted of clarifying the scope of the request with the appellant; notifying representatives of the Centre of Forensic Sciences (CFS), the Office of the Chief Coroner (OCC), and the Ontario Provincial Police (OPP) to conduct program area searches that were conducted by these program areas; searching through the entire OPP investigative file; and, disclosing responsive records that were not otherwise exempted pursuant to [the *Act*]. As a result of this role, I have knowledge of the facts as set out in this affidavit.

[18] In her affidavit, the acting deputy coordinator explains that once she received the request, she clarified with the appellant the specific documents that she sought access to and then contacted the appropriate people in the OFS, the OCC and the OPP to request that they conduct searches for responsive records in their respective program areas. The acting deputy coordinator received confirmation from the individuals who she contacted (or their replacements) that searches were conducted in various locations and that all responsive records were sent to her attention.

[19] The acting deputy coordinator advised that, as a result of conversations that occurred during mediation where the appellant provided further clarification regarding the records she was seeking, she requested that a second search be conducted of OPP records. She explains that this search was specifically conducted to locate a copy of the coroner's warrant in the possession of the OPP that the appellant indicated that she was seeking. The coroner's warrant was located, along with additional OPP notebook entries.

[20] The acting deputy coordinator submits that as mediation continued, the appellant clarified the request again to include additional records within the OPP investigative file, including hospital records. She advises that she requested that the entire OPP investigative file be sent to her so that she could search for those records herself, locating all responsive records which were subsequently disclosed to the appellant as part of a second supplemental decision.

[21] The acting deputy coordinator submits:

> As a result of these searches, I have no reason to believe that any further responsive records exist. In addition, because these are investigative records, I do not believe, based on ministry practice, that any responsive records that were created or collected, have since been destroyed.

[22] In response to the ministry's representations, and specifically the affidavit sworn by the acting deputy coordinator, the appellant submits that the particular toxicology report that was disclosed to her "was not part of the criminal investigation" into the

death of her son. She submits that it is a toxicology analysis that the Regional Coroner requested following the completion of the criminal investigation in 2008. She explains that the toxicology and other reports that she seeks and that she believes exist are those which would have been performed in response to the Office of the Chief Coroner Warrant for Post Morten Examination form completed on January 14, 2007.

[23] The appellant also submits that, based on records that were disclosed to her, CFS seal numbers indicate that 9 vials of her son's blood and urine samples were in the possession of the Kapuskasing OPP detachment. She submits that the records that were disclosed to her show that when those samples were shipped from the Kapuskasing OPP detachment, the seal numbers were changed. As a result, she states that she does not believe that the urine sample was seized under the coroner's warrant, but rather from the Kapuskasing OPP. She takes the position that the Kapuskasing OPP is retaining (or has destroyed) records and documentation relating to the urine sample that was seized when her son was unresponsive following the car accident.

[24] In addition, the appellant believes that the OCC also has responsive records that have not been disclosed to her. Specifically, she submits that records relating to the treatment of her son's cranial matter should exist.

[25] In reply, the ministry advises that it continues to take the position that it conducted a "proper search in accordance with the requirements of [the *Act*]." Nevertheless, in its representations, the ministry provided the following information that it believes might respond to some of the appellant's concerns:

- With respect to the appellant's concern that different CFS seal numbers appear on different forms, the ministry confirms that the seal numbers were indeed changed as they were originally recorded incorrectly. The ministry advises that a representative of the OPP had previously communicated this to the appellant.

- Regarding the appellant's position that the OPP has additional records relating to urine samples, the ministry submits that the OPP had originally recorded that it had seized blood and urine samples from the Kapuskasing Hospital and that it was submitting them to the CFS. However, the ministry submits that, in fact, only blood samples were seized, and no urine samples were seized or submitted by the OPP. They submit that this information was recorded in error. The ministry submits that a representative of the OPP has also previously communicated this information to the appellant.

[26] I provided the appellant with an opportunity to make representations by way of sur-reply. She states simply that OPP officer notes that were disclosed to her demonstrate that there was a CFS report and that on the copy of the OPP investigative chronology that was disclosed to her, it appears as if the reference to the existence of a CFS report was severed. She provided copies of the relevant records that she submits demonstrate the existence of additional CFS toxicology and other reports.

Analysis and findings

[27] Having carefully reviewed the evidence that is before me, I am satisfied that the search conducted by the ministry for records responsive to the appellant's request was reasonable and is in compliance with its obligations under the *Act*.

[28] As previously explained, a reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records that are reasonably related to the request. In the circumstances of this appeal, I find that the ministry has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody and control. The ministry conducted a number of searches for records responsive to the request. I accept that these searches were conducted by experienced employees who were knowledgeable in the subject matter and that they expended a reasonable effort to locate responsive records.

[29] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, she must still provide a reasonable basis for concluding that such records exist. While I acknowledge that there appear to be a number of discrepancies in the records that have been disclosed to the appellant that caused her to believe that additional records ought to exist, on my review of the evidence and the explanations provided by the ministry, I find that the searches for records were reasonable.

[30] I will address the three specific items the appellant identifies and for which she submits searches were not reasonable.

Toxicology report

[31] As noted, the appellant believes that toxicology and other reports should exist as a result of a completed Warrant for Post Mortem Examination form dated January 14, 2007. She submits that such reports should pre-date the 2009 toxicology report that was disclosed to her.

[32] The ministry does not make specific representations on this issue. However, from my review of the records that were disclosed to the appellant and that were provided to this office during the course of this appeal, three of them address this issue.

1. A letter dated November 13, 2008 from a Forensic Toxicologist at the ministry to the doctor who was directed by the above-mentioned warrant to obtain toxicology and other reports with respect to the appellant's son indicates that "no analyses for the presence of poisons and drugs, including alcohol, will be performed on passengers of motor vehicle accidents."

2. A letter of January 12, 2009 addressed to the appellant from the Regional Supervising Coroner which indicates that, upon making inquiries with respect to

such toxicology report, no testing had been conducted on the blood and urine samples taken from her son. The letter also advises that this is in accordance with a policy of the Office of the Chief Coroner whereby toxicology and other analyses of passengers in motor vehicle accidents are not done as "the testing will not advance public safety."

3. A letter of September 12, 2012 addressed to the appellant from the OCC, in which the Regional Supervising Coroner advises that initially there was some question as to whether toxicology testing would be done as it was unclear who the driver of the vehicle was. The letter discloses that when it was later determined that the deceased was a passenger, testing was not done as it is not customary to conduct toxicology analyses, except in the case of the driver of a motor vehicle.

[33] Based on my review of the records and the parties' representations, it appears that toxicology analyses and other examinations were ordered immediately following the fatal accident in which the appellant's son was involved and that initially, CFS toxicology and other reports would have been expected. However, based on my review of the records and having considered the appellant's submissions with respect to her belief that records of this nature should exist, I find that I have insufficient evidence to conclude that such analyses, other than the toxicology analysis that was undertaken later, in 2009, were actually conducted. Accordingly, I am satisfied that the ministry's search for these records was reasonable.

[34] I have also considered the appellant's sur-reply representations, where she argues that OPP officer notes that were disclosed to her demonstrate that CFS reports (toxicology and other) should exist. In my view, these notes confirm that such examinations may have been initially ordered; however, based on the information set out above, I am not satisfied that the ministry's search for these records was not reasonable.

[35] Lastly, with respect to the appellant's reference to the OPP investigative chronology that was disclosed to her and her view that it appears as if a reference to the existence of a CFS report was severed, I confirm that this is not the case. Based on my review of the record provided to me, no such reference has been severed from the portion of the chronology that she has identified.

Urine samples

[36] As noted above, in her representations, the appellant points to what appears to be some confusion regarding the CFS seal sample numbers assigned to 9 vials of blood and urine that she submits were retained by the OPP. She notes that different records identify different sample numbers, and takes the position that the OPP is retaining, or has destroyed, records relating to a particular urine sample that was taken at a particular hospital when her son was unresponsive.

[37] The ministry has provided an explanation as to the discrepancies between the CFS seal numbers. Specifically, it has confirmed that the seal numbers were originally recorded incorrectly, which is why they were subsequently changed. Similarly, the ministry confirms that the OPP did not locate any responsive records relating to urine samples taken from the deceased in the hospital when he was unresponsive. It advises that although the OPP had originally recorded that it had seized urine samples from the Sensenbrenner hospital to submit to the CFS, this information was recorded in error and no urine samples were seized or submitted by the OPP.

[38] Based on the information contained in the ministry's representations and from my review of the information contained in the records disclosed to the appellant that were provided to this office during the course of the appeal, I am satisfied that the searches conducted for urine samples were reasonable and that the ministry has provided an explanation as to why the records referred to by the appellant were not located. Although it appears that mistakes were made with respect to the cataloguing of the samples of the deceased's bodily fluids, given the explanation provided by the ministry, I am satisfied that the searches conducted for these records were reasonable.

Cranial matter

[39] As noted, the appellant takes the position that additional records relating to the retention and disposition of her son's cranial matter should exist. The ministry does not address this specific issue in its representations. However, from my review of the records disclosed to the appellant in response to her request, it is clear that she has been advised that the Forensic Pathologist obtained *verbal* permission from the Coroner to retain the deceased's brain for further examination, and that individual cremation certificates are not issued for the cremation of organs. The ministry has also confirmed that no photographs were taken during the examination.

[40] The records before me reveal that the ministry made significant efforts to respond to the appellant's inquiries with respect to the existence of records of this nature, but that no responsive records were located. In the circumstances, I find that the ministry has provided sufficient evidence to establish that it made a reasonable effort to locate responsive records. Although I acknowledge the appellant's reasonable expectation that documentation should exist concerning circumstances where the body matter of a deceased is retained, the issue before me is not whether records ought to exist or should have been created, but whether the ministry's search for responsive records was reasonable. In the circumstances of this appeal, I accept that it was.

Summary

[41] In conclusion, while I acknowledge that the appellant understandably seeks as much information as possible regarding the circumstances surrounding the tragic accident that led to her son's death and that she believes that additional information should exist, I accept that the ministry has expended a reasonable effort to locate all

records responsive to her request.

[42] Therefore, I am satisfied that the ministry has discharged its onus and has demonstrated that it has conducted a reasonable search in compliance with its obligations under the *Act*. On that basis, I uphold the ministry's search for records responsive to the appellant's request and dismiss the appeal.

ORDER:

I uphold the ministry's search for responsive records as reasonable and dismiss the appeal.

Original Signed by: December 10, 2015

Catherine Corban
Adjudicator