Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER PO-2782-I

Appeal PA-060092-1

Ministry of Community Safety and Correctional Services

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This appeal arises from a request to the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the death of an infant child (the child).

BACKGROUND:

The child was ten months old when she attended, with her mother, at an identified Toronto hospital in September of the year 2000 at approximately 9:00 pm. At approximately 12:20 am, she went into unexplained seizures, followed by respiratory and cardiac arrest. Attempts were made to resuscitate her, but she was declared dead at approximately 2:27 am.

The Coroner's Office was notified and began an investigation into her death. Her body was transferred to the Hospital for Sick Children (HSC), where an autopsy was conducted.

The parents of the child, through a representative (hereafter referred to as the appellant) identify that a number of concerns or questions were raised during the course of the Coroner's investigation.

NATURE OF THE APPEAL:

In October of 2005, the Ministry received a request under the *Act* from the appellant for the following:

> All records relating to the Coroner's file investigating the circumstances of the death of [the child]. Also, copies of all correspondence contained in the file, and any photographs, charts, or other images that may have been created during autopsy and subsequent investigations.

Following a time extension decision, the Ministry issued a decision letter on March 24, 2006 in response to the request (decision #1). In its letter, the Ministry granted partial or total access to 353 of the 373 pages contained in the requested case file held by the Office of the Chief Coroner (the OCC), and denied access to the remaining records or portions of records on the basis of the exemption in section 49(a) of the *Act* (right of access to one's own personal information) read in conjunction with section 14(1)(h) (law enforcement), and section 49(b) (personal privacy) of the *Act*.

The appellant appealed the Ministry's decision to apply the identified exemptions to the records. The appellant also indicated that she believed more records exist and wished to appeal the reasonableness of the Ministry's search.

During the mediation stage, issues regarding access to the records at issue were resolved.

Also during mediation, the appellant provided a letter listing records which she believed ought to exist, but which were not identified by the Ministry. After this letter was shared with the Ministry, the Ministry conducted a further search for records and issued a supplementary

decision letter dated August 25, 2006, disclosing additional records (decision #2). Specifically, the Ministry identified that it had conducted additional searches for records at the Centre for Forensic Sciences (CFS) and had located additional records there. Access to the 116 pages of records located at the CFS was granted. In the letter, the Ministry also addressed certain concerns raised by the appellant.

Despite the additional disclosure, the appellant maintained that further records exist. However, in correspondence to this office, in addition to identifying the ongoing concerns, the appellant noted that other avenues were being pursued, and asked that this appeal be placed on hold for a period of time, which it was.

In April of 2007 this appeal was reactivated. Mediation did not resolve all of the issues, and a Mediator's Report was sent to parties, identifying that the remaining issues in this appeal were: 1) whether the Ministry conducted a reasonable search for records and, 2) whether an identified Ministry protocol fell within the scope of the original request.

This file was then transferred to the inquiry stage of the process.

A Notice of Inquiry identifying the facts and issues was sent to the Ministry, initially, and the Ministry provided representations in response.

At the same time that the Ministry provided representations, the Ministry also sent a letter to the appellant addressing a number of issues raised in this appeal (decision #3). After summarizing its view of the circumstances of this appeal, the Ministry referred to its supplementary decision of August, 2006 (decision #2) and the appellant's letter resulting in the issuance of that decision, and stated:

> In some respects, [your] letter had the effect of broadening the scope of your request for access to the contents of [the OCC case file]. For example, question nine related to case records that would be processed by the Centre of Forensic Science (CFS) rather than the OCC. The CFS is a Ministry branch that is separate from the OCC. … Your original request did not appear to encompass the contents of the [CFS] case file. However, in the interests of possibly resolving this appeal and addressing your information requirements, the scope of the request was expanded to include the case records possessed by the CFS.

The Ministry then confirmed for the appellant that the reasonableness of the Ministry's search remained an issue in this appeal, and that it had provided this office with representations on that issue. The Ministry went on to state:

> … The second outstanding appeal issue is whether or not the [identified Ministry Protocol] should be considered within the scope of your … request. The contents of the [OCC case file] do not include a copy of this document ….

> However, in the interests of resolving the two remaining appeal issues, the Ministry … has decided to disclose the Protocol to you…

Following receipt of this letter, the appellant confirmed that the scope of the request was no longer an issue in this appeal, and that the adequacy of the Ministry's search is the sole remaining issue.

The Notice of Inquiry, with only the adequacy of the Ministry's search remaining as an issue, was then sent to the appellant, along with a copy of the Ministry's representations. The appellant provided lengthy representations in response, which were then forwarded to the Ministry, and the Ministry was invited to respond by way of reply representations. The Ministry provided reply representations to this office, and concurrently sent another decision letter (decision #4), dated February 4, 2008, to the appellant. In that decision, the Ministry stated:

> … As you are likely aware, the IPC adjudicator … has provided the Ministry with a copy of your representations …
>
> The [OCC] undertook additional records search activities that have had the effect of once again extending your original October, 2005, request under [the *Act*] beyond "… the contents of the Coroner's Office file regarding their autopsy and subsequent investigation into the cause of [the child's] death."
>
> Please be advised that the OCC has extended the records search to include administrative files maintained in relation to the Deaths Under Two Review Committee and the Paediatric Death Review Committee that may contain references relating to [the child]. This additional records search has resulted in the identification of 21 pages of additional responsive records (numbered 502 to 523). These records are not included in the originally requested coroner's investigation file relating to [the child's] death.

The Ministry identified that access to the responsive portions of those pages was granted in full, and stated:

> Following a review of your representations, on January 24, 2008, [the OCC] contacted the [HSC] and was subsequently provided with a copy of 3 pages of reports that do not appear to have been sent to the OCC and considered for the purposes of your request… These records were supplied to the OCC on January 29, 2008 by [the] Senior Staff Pathologist, HSC.
>
> According to [the Senior Staff Pathologist, HSC], the first page for all three reports is a cover page that only contains the patient's name and specimen number. The cover pages were not supplied to the OCC….

> [The Senior Staff Pathologist, HSC] also provided the OCC with a copy of [an identified form]. This is not normally a document that would be contained in the coroner's investigation file. The document has been numbered page 527.

The Ministry then addressed a number of additional matters raised in the appellant's representations, and stated:

> In addition to the foregoing, please note that the CFS case file now contains additional information from [an identified laboratory] which was not contained in the file at the time [the Ministry's initial representations] were prepared in August, 2007. …

The Ministry then stated that, in the event that the appellant is interested in obtaining this information, she should contact the Ministry.

The Ministry's reply representations were then shared with the appellant, who provided representations in surreply.

This file was subsequently transferred to me to complete the adjudication process.

DISCUSSION:

PRELIMINARY MATTERS

Scope of the appeal

The issue of the scope of this appeal has been raised on a number of occasions throughout the processing of this appeal.

As set out above, the scope of the request was an issue identified during mediation, and it related to a particular Ministry Protocol. The appellant asked the Ministry to provide a copy of the Protocol, and the Ministry took the position that the Protocol fell outside of the scope of the appellant's original request. During the processing of this appeal, the Ministry indicated that it would expand the scope of the request to include the Protocol, and provided the appellant with a copy of the Protocol. The appellant appeared to be satisfied with this response, indicating that the scope of the request was no longer at issue.

However, in the course of providing representations on the issue of the reasonableness of the Ministry's search for records, the scope of the appeal has again been raised. Both the Ministry and the appellant have provided lengthy, detailed representations on the search issue and, in doing so, also identify their positions regarding the types of records that ought to have been searched for, thereby addressing issues relating to the scope of the request.

The scope of the request is often an important issue in reasonable search appeals, as the scope determines the parameters of the search and accordingly the types of searches that ought to have been conducted.

As identified above, the request was for:

> All records relating to the Coroner's file investigating the circumstances of the death of [the child]. Also, copies of all correspondence contained in the file, and any photographs, charts, or other images that may have been created during autopsy and subsequent investigations.

In this appeal, the Ministry initially took the position that the request was for the records contained in the OCC case file only. However, in its representations and in correspondence sent to the appellant (particularly the three supplementary decision letters), the Ministry identifies that it "agreed to broaden" the scope of the request "to encompass records beyond those contained in the OCC case file", and the Ministry undertook additional searches. The appellant's response to these decisions is not positive, based on her position that the additional records were covered by the request and ought to have been produced in response to it. The appellant provides lengthy correspondence in regards to the issue of what the request was for, and what ought to have been produced in response to it.

The circumstances of this appeal confirm the importance of defining, early in the processing of an appeal, exactly what the request encompasses, and what the scope of the request is.

In this case, the Ministry initially adopted a relatively narrow interpretation of the request. The Ministry's subsequent searches and production of the protocol, as well as of records from the CFS file, the hospital and identified committees, has resulted in lengthy and complicated representations on a number of issues relating to the scope of the request. In my view, much of this confusion could have been avoided if the Ministry had clearly identified at the beginning of the process how it was interpreting the request. The *Act* provides that clarification of a request can be sought, and in this appeal, that may have been appropriate, given that the request was for records "*relating* to the Coroner's file" and not simply for the contents of the file. In addition, in initially interpreting the request fairly narrowly, the Ministry ought to have specifically identified this approach in its decision letter (see order MO-2084-I).

However, having said that, I acknowledge the efforts made by the Ministry throughout the processing of this appeal to interpret the request "more broadly", and its decision to conduct searches for additional records in various locations on a number of occasions. Although the appellant takes issue with the Ministry's approach, this approach did provide the appellant with additional records during the course of this appeal. Unfortunately, it also resulted in some subsequent confusion, as the additional searches for records were conducted many months after the original request was made, and included records which were not initially identified as responsive. Although the Ministry's effort to "read the request more broadly" during the course of this appeal is creditable, it has also resulted in complications to the processing of this file.

Analysis

The appellant provides lengthy representations identifying her frustration with the Ministry's responses, the impact the Ministry's decisions have had on this appeal, and providing many examples of additional information which she believes ought to exist, based on her detailed scrutiny of the records which were provided to her along with the various decision letters.

In interpreting the breadth and scope of the current appeal, I am satisfied that the Ministry's ultimate approach to the interpretation of the appellant's request is adequate. The Ministry has conducted searches for records in the OCC file, the CFS file, the HSC, as well as records connected to the identified review committees.

Although I acknowledge the appellant's frustration with the manner in which the Ministry dealt with this file, at this point in the process, I must determine whether the Ministry conducted a reasonable search for records responsive to the request. In doing so, I will review the representations on the reasonableness of the Ministry search based on their final, "expanded" view of the request. I will not, however, consider further the lengthy representations on what ought to have been covered by the request in the first place.

In addition, some of the records now identified as responsive to the request were provided to the appellant at the same time that the Ministry provided its reply representations. In her surreply representations, the appellant refers to these additionally disclosed records and to information contained in them which suggest that other records exist. Although the Ministry has not been provided with a copy of the surreply representations, given the extensive history of this appeal and the many representations provided, in the interest of bringing some closure to some of these issues, I have included a review of those issues in this interim order, and indicated in this decision those areas, if any, that require further information from the Ministry.

Additional preliminary matters

Issues in this appeal

As set out above, the appellant identified that a number of concerns or questions were raised during the course of the OCC investigation into the child's death. The OCC investigation began in September of 2000, and the request resulting in this appeal was made in 2005. Subsequent decisions on access to the records were made by the Ministry in 2006, 2007 and 2008. In some instances, the appellant identifies that she had made certain requests to the OCC during the course of the investigation and prior to the request resulting in this appeal, and the appellant's representations refer to responses that she believes ought to have been provided by the OCC during the years of the investigation. Her representations also identify numerous concerns she has regarding the actual investigation conducted by the OCC. This appeal and my review of the issues raised is confined to a review of the reasonableness of the search for responsive records, and is not a review of the OCC investigation or the OCC's earlier responses to questions asked

by the appellant. Unless information provided by the parties relates to the search issues, I will not consider it in this order.

Certain records located at the laboratoire de sciences judiciaire et de medecine legale

In its reply representations the Ministry states:

> Following the review of the case file as a result of the appellant's appeal, the CFS Toxicology Section requested and received a copy of all records of [an identified assay] conducted by the Laboratoire de sciences judiciaire et de medecine legale. Previously only six pages of work notes had been provided to the CFS. These six pages were contained in the case file and were disclosed to [the appellant] ….
>
> The records from Laboratoire de sciences judiciaire et de medecine legale (except for the original six pages) were not in the possession of the CFS in 2006 nor at the time [the Policy and Program Analyst for the CFS] swore her affidavit on August 15, 2007. [The affiant] only became aware that these records are now contained in the CFS case file on January 17, 2008, when the case file was retrieved and reviewed in order to respond to issues raised in the appellant's representations.
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> As per the Ministry's [decision letter #4], should the appellant wish to pursue access to these records, a consultation with the Laboratoire de sciences judiciaire et de medecine legale will be undertaken and a [decision under the *Act*] will be released to the appellant at the conclusion of the consultation.

In the circumstances, questions regarding access to these records are not at issue in this appeal, which deals only with the reasonableness of the Ministry's search for records.

Certain X-rays records

In her representations, the appellant identifies certain x-rays which were neither provided to her nor listed in any of the records. In response, the Ministry states:

> With respect to the matter of x-ray results, [one of the records at issue] is the report prepared by [an identified HSC Radiologist]. [The Regional Supervising Coroner] has recently consulted with the HSC Department of Diagnostic Imaging [and he] was advised that the x-ray films relating to [the child] are hard copy records that are subject to a retention schedule of 18 to 20 years. [The Regional Supervising Coroner] advised that the appellant may wish to request that a CD image of the skeletal survey x-ray be prepared. The usual fee for reproduction on a CD would apply. Upon the appellant's request, the OCC will authorize the HSC Diagnostic Imaging Department to prepare a digital copy of the x-rays. The HSC would liaise with the appellant to arrange for the payment of services. Upon payment, the materials would be released directly by the HSC.

Again, in the circumstances, questions regarding access to these records are not at issue in this appeal.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

General Analysis and Summary

In response to the request for records, 373 pages of responsive records were initially identified. As a result of the further searches conducted, an additional 150 pages were located, and access was granted to them. The responsive records include doctor’s notations, computer printouts,

laboratory results, charts, requisitions, emails, nursing and hospital records and other documents and correspondence, most of them dating to the year 2000. The request resulting in this appeal was made in October of 2005, and the access decisions made by the Ministry were made in 2006, 2007 and 2008.

The Ministry has taken the position that "extraordinary resources" have been expended to respond to this appeal. It points to the willingness it has had to work with the appellant to ensure that access is given to "any records to which they are legally entitled" and that a "significant amount of additional time has recently been expended in preparing a response to the appellant's representations, including lengthy consultations/meetings … with [OCC] staff (including a 6 hour meeting with both the Associate Deputy Chief Coroner of Ontario and the Manager of Coroners Information Systems), senior Centre of Forensic Sciences (CFS) staff and staff from the Hospital for Sick Children (HSC)."

The appellant on a number of occasions points out that the number of records located does not determine whether a reasonable search was conducted. I fully agree with the appellant's position on that point. Whether an institution locates five records or 500 records is not, in itself, determinative of whether a reasonable search was conducted.

It is clear from the representations of both parties that they have spent considerable time and effort addressing the issue of whether the searches conducted by the Ministry for records responsive to the appellant's request were reasonable. I have set out below in some detail the nature of the searches conducted by the Ministry, and the representations of the parties. I have also carefully reviewed all of the appellant's representations on the issue of the reasonableness of the Ministry's searches.

As I noted above, a reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

I adopt the approach taken in the above orders for the purposes of the present appeal.

As the current appeal proceeded, the Ministry conducted extensive searches for records responsive to the appellant's request. The Ministry has also specifically responded to the points made in the appellant's letter provided during the mediation process, which itemized 11 specific areas of concern, and addressed each of those points in some detail. The Ministry also responded

to the appellant's representations by providing specific evidence in response to a number of the items raised. In addition, in its representations, the Ministry provided affidavit evidence from two individuals who conducted searches for responsive records, which included information about the nature of the searches conducted and the individuals who were contacted in conducting the searches. The Ministry's representations and affidavits confirm that numerous individuals were involved in searching for responsive records, and significant follow-up was done by the Ministry in response to the appellant's concerns.

Based on my review of the information contained in this file and the representations of the parties, I am generally satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances. There are, however, some exceptions to this finding, and they are identified in the discussion below. In addition, as noted earlier, some newly located records have identified additional questions about the nature of the searches conducted, and they are also set out below.

Because of the extensive and detailed nature of the representations of the parties, I will address a number of them in the categories set out below.

Representations and Findings

The Ministry's initial representations

In its initial representations on the issue of whether the searches conducted for responsive records was reasonable, the Ministry begins by reviewing the mandate of the Office of the Chief Coroner. The Ministry states:

> The Office of the Chief Coroner (the OCC) is a part of the Ministry. The OCC is responsible for the administration of the *Coroners Act*. The *Coroners Act* provides coroners with the legal authority to investigate sudden and unexpected deaths occurring in the province. During an investigation, a coroner seeks to establish:
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> 1) the identity of the deceased;
> 2) when the death occurred;
> 3) where the death occurred;
> 4) how the death occurred, i.e. the medical cause of death; and
> 5) by what means the death occurred, i.e. the circumstances surrounding it.
>
> Coroners classify the means of death as natural, accidental, suicide, homicide or undetermined. Section 18(2) of the *Coroners Act* expressly authorizes the release of information to specified family members and the personal representative of the deceased individual in circumstances where an inquest has been determined to be unnecessary. Section 18(2) of the *Coroners Act* states:

> Every coroner shall keep a record of the cases reported in which an inquest has been determined to be unnecessary, showing for each case the identity of the deceased and the coroner's findings of the facts as to how, when, where and by what means the deceased came to his or her death, including the relevant findings of the post mortem examination and of any other examinations or analyses of the body carried out, and such information shall be available to the spouse, parents, children, brothers and sisters of the deceased and to his or her personal representative, upon request.

The Ministry then reviews the background of the request and the appeal and states that, after receiving the request, the OCC was contacted and asked to conduct a search for responsive records. The Ministry states:

> A total of 373 pages of responsive records were contained within OCC [identified file number]. …. the appellant was provided with total or partial access to 353 of the 373 pages contained in the requested OCC case file. Certain information was exempted from disclosure in accordance with [identified exemptions].
>
> … During the mediation stage of the appeal, [the appellant] sent a detailed letter … outlining 11 issues relating to the identified responsive records and records that [the appellant] believed should exist.
>
> The Ministry ultimately agreed to broaden the scope of the appellant's request to encompass records beyond those contained in the OCC case file and undertook additional record searches. In particular … [the Ministry extended] the records search activities to include case records that would be possessed by the Centre of Forensic Science (CFS) rather than the OCC. The CFS is a Ministry branch that is separate and distinct from the OCC. The CFS provides independent scientific laboratory services that support the administration of justice and public safety programs across the province.
>
> … the Ministry issued a supplemental decision letter to [the appellant] providing … detailed responses to the 11 issues raised in [the letter]. The Ministry's supplemental decision letter included the disclosure of additional records consisting a pathologist's records obtained by the OCC for the purpose of the request/appeal (numbered pages 374 to 381), the missing pages of [an identified hospital's] biochemistry report (pages 382 to 384) and the contents of [a numbered CFS case file] obtained by the OCC for the purposes of the request/appeal (pages 385 to 501)….

Regarding the issue of whether the Ministry conducted a reasonable search for records, the Ministry submits that "the OCC and the CFS have conducted a reasonable search for records in the circumstances of the appellant's request". The Ministry states that "experienced OCC and

CFS staff have conducted comprehensive records searches in order to identify records responsive to the appellant's … request." The Ministry maintains that it has interpreted the appellant's request "broadly", and also provides two affidavits relating to the nature of the searches conducted for responsive records.

The first affidavit is sworn by the Manager of the OCC's Information System. This individual identifies that she has been with the OCC for a number of years, and she briefly describes her duties with that office. She then confirms that she was contacted by the Ministry's Freedom of Information office and asked to conduct a search for the complete OCC file relating to the deceased individual. The affiant then states that the OCC file is "the primary source of information relating to coroners' investigations" and lists the most common records found in a decedent's file. Regarding the nature of the searches she conducted, she states:

> I … identified OCC [identified file number] as the OCC file containing information relating to [the deceased]. I located the requested file. It contained a very large number of records including coroner's records, medical records, correspondence, handwritten notes and newsclippings. I noted that [a named doctor] was the responsible investigating coroner and that [another named doctor] was the Regional Supervising Coroner.

The affiant then identifies that she was aware that the files were forwarded to the Freedom of Information office, and that numerous records were disclosed to the appellant. She also confirms that she was subsequently advised that the appellant had filed an appeal, and she was provided with a copy of the appellant's letter which set out 11 detailed questions relating to additional records that the appellant believed existed and would be responsive to the original request. She then states:

> In order to address the 11 different issues raised in the … correspondence, I conducted an extensive search for additional responsive records. The supplemental records search extended beyond the contents of the requested OCC case file.
>
> I also directly consulted with the following physicians whom I identified as being involved with the case to ascertain if any additional responsive records existed: [the Deputy Chief Coroner, Investigations; the Regional Supervising Coroner; and the Senior Staff Pathologist at an identified hospital].
>
> [Subsequently] I received from [the Senior Staff Pathologist at an identified hospital] 8 pages of records and a CD containing digitalized photographs taken during the autopsy examination and microphotographs of tissue sections. These records were not included among the contents of the OCC file. The pages were subsequently numbered pages 374 to 381.

> With respect to [the appellant's] question in regard to the missing first page of [a hospital] biochemistry report, [the hospital] was contacted and supplied the OCC with a copy of the complete report. The report was numbered pages 382 to 385.
>
> I was not able to contact the other [named] involved physician … as he was by that time deceased. [This doctor], a neuropathology specialist, was asked to provide an expert opinion on [an identified examination], [and to] prepare a report … and submit it to the OCC [see identified pages of released responsive records]. I am not aware of the existence of any additional responsive records held by either the [the hospital] or the OCC.
>
> … I sent a detailed response to [the] Senior Program Analyst at the Freedom of Information and Privacy Office, addressing all 11 issues raised by [the appellant] and enclosed the materials obtained as a result of my supplemental search for responsive records.
>
> I understand that … the Ministry sent a supplemental decision letter to [the appellant] responding to the 11 issues raised in [the appellant's] letter.
>
> I understand that the appellant continues to believe that additional responsive OCC records exist. The appellant's … request has been interpreted broadly and encompasses records obtained from my additional searches that are not located in the OCC case file that was originally requested. A careful perusal of the content of the identified responsive records reveals that the records reflect virtually all aspects of the OCC investigation into the circumstances of [the deceased's] death.
>
> Following multiple searches, I am not aware of the existence of any additional responsive records held by the OCC or by any other institution or person with any involvement in the OCC investigation of [the deceased's] death. To the best of my knowledge, all responsive records in the possession of or accessible to the OCC have been identified and considered.

The affiant then states that, in her view, the search for records was "diligent and thorough" and she states:

- multiple searches were conducted of OCC record holdings to ensure that all documents were located,
- OCC personnel involved in the death investigation have been contacted and involved in the multiple searches; and
- records from other sources have been provided that would not normally be contained within the OCC case file.

The second affidavit provided by the Ministry is sworn by the Policy and Program Analyst for the CFS. She reviews the searches conducted for responsive records and states:

> [In response to the request] … I undertook a search for any responsive records in the custody and control of the [CFS] that would be deemed responsive to the appellant's request …. for access to the [CFSs'] Toxicology case file [identified file number] in relation to the OCC's investigation into the death of [the child].
>
> … I ordered the case file to be retrieved from storage in the Ontario Government Records Centre. Once retrieved, the entire case file was photocopied and a detailed listing of the contents was made by me and provided, with the photocopied file, to the Ministry's Freedom of Information and Protection of Privacy Services. I sent the detailed listing by fax on August 3, 2006 and the copy of the case file by courier to Freedom of Information and Protection of Privacy Services on August 4, 2006. I understand that the records provided by me constituted pages 385-501 of the Ministry's response to the … request. The [CFS] case file includes all the documentation pertaining to this particular case and comprises the information received from the submitter and that generated in the laboratory, organized in a file folder. In some instances, material related to the file is stored centrally (e.g., chain of custody information, instrument calibration records, preparation of drug standards). However, the file itself contains all the information necessary for a manager, peer or other competent examiner to evaluate the work done, interpret the data and confirm the conclusions.
>
> As there was a reference in the case file to a potential problem with an [an assay for an identified drug], on August 7, 2007 I met with the case scientist and Toxicology Section managers to determine whether any documents associated with the work performed to resolve the problem with the [assay] were available. Between August 7 and August 9, 2007 a search of Section records, both paper and electronic, was conducted by the case scientist and managers of the Toxicology Section. The technologist who performed the work to resolve the problem with the assay was also [questioned] with regard to the existence of records of the work she had performed. Not unexpectedly, no such records were found, as the problem with the assay had been identified and resolved in 2000 and there was no requirement for records of this nature to be kept for several years after the problem was resolved.

The appellant's representations, the Ministry's reply representations, the appellant's surreply representations, and findings

As I indicated above, the Ministry's representations including the affidavits were shared with the appellant, and the newly-located records were provided to her. The appellant provided representations in response. The Ministry was then given the opportunity to respond to the

appellant's reply representations, and it did so. The appellant responded to the Ministry's reply representations with surreply representations. In addition, additional records were located during the exchange of these representations.

A number of the positions taken by the parties in their representations are addressed by the responding party. In some instances the issues are addressed to the satisfaction of the other party, and in some instances they are not. Some of the issues raised and addressed in the representations have only peripheral relevance to the issue in this appeal, and concern issues such as the appropriateness of certain responses, the methods used by the parties in providing information, and the format and nature of some of the information provided.

In the circumstances, and given the volume and detail of the representations from the parties, I will only review issues directly related to the issue in this appeal – that is – whether the searches conducted by the Ministry were reasonable. I will review the search issues and the representations of the parties under certain identified categories, as set out below.

1) Matters in Relation to the Affidavit by the Manager of the OCC's Information System

The appellant takes issue with a number of matters addressed by the Manager of the OCC's Information System in her affidavit.

a) Medical Certificate of Death and Coroner's Investigation Statement

The appellant notes that no "Medical Certificate of Death" was provided to her, and also notes that, although several versions of the "Coroner's Investigation Statement" were provided to her, a final "Coroner's Investigation Statement" was not.

In reply, the Ministry states that there is no Medical Certificate of Death contained in the coroner's investigation file at the OCC relating to the appellant's clients' child, and refers her to the Office of the Registrar General to see if their records include a Medical Certificate of Death. With respect to the Coroner's Investigation Statement, the Ministry states that one of the versions provided to the appellant (pages 359-360), is the most current Coroner's Investigation Statement relating to the case.

In surreply, the appellant states that "any medical Certificate of Death requires the signature of either a physician or a physician acting as a Coroner". The appellant also provides a copy of a medical certificate of death (for another individual) which was prepared by the coroner investigating the death. The appellant notes that no such certificate is included in the records from the hospital contained within the coroner's investigation file.

Regarding the Coroner's Investigation Statement, the appellant notes that the copy of the Coroner's Investigation statement specifically reads: "Note: This case is still pending further investigation by the Paediatric Death Review Committee (PDRC) as per [an identified doctor and date]". The appellant states:

> On the understanding that PDRC refers to the Paediatric Death Review Committee, if you check the minutes of the PDRC committee; the last set of minutes provided are dated September 9; 2003, and also refer to further follow-up on the matter. There are no further documents provided from the PDRC meeting minutes and it remains an open question whether a "further investigation" was ever put to the committee. Alternatively, minutes have not been provided that are relevant to this matter.

Finding

On my review of the information provided by the parties, I am satisfied that the Ministry conducted a reasonable search for the Medical Certificate of Death and Coroner's Investigation Statement, and have provided a reasonable explanation as to why these records were not located. Issues relating to records identified in the PDRC committee records are addressed below.

b) Notification of Identified Doctors

i) An identified coroner

The appellant notes that the affidavit identifies a particular named doctor who "was the responsible investigating coroner"; however, the appellant states that this doctor is not identified by the affiant as one of the ones who was involved and consulted "to ascertain if any additional responsive records existed." Although the appellant acknowledges that this doctor is no longer with the Coroner's Office, the appellant believes he ought to have been contacted regarding his involvement in this case.

The Ministry responds by stating that the identified doctor ceased to be a coroner in February of 2001, and that it is the Ministry's understanding that the records this doctor supplied to the OCC at the conclusion of his services as a coroner would have been reviewed and integrated with the coroner's investigation file, that any exact duplicates of records already contained in the coroner's file would have been destroyed, as there is no requirement to keep duplicate records. The Ministry also states that, at the present time, the OCC does not have contact information for this identified doctor, but that if contact information is obtained in the future, this doctor will be contacted and asked whether he currently possess any information relating to the case in question.

In surreply, the appellant takes issues with the Ministry's submissions that any records prepared by the doctor would have been integrated into the file, and argues that no attempt has been made to ascertain from the identified doctor if and where such documents may have been kept. The

appellant also states that the second doctor became involved in this matter from an early stage, and that first doctor's involvement in this file "becomes essentially nil by September 16, 2000". The appellant also refers to sections 17(1) and (4) of the *Coroner's Act*, and argues that there is no indication as to the reason the second doctor took over the investigation, and also states:

> … It is a legislated requirement that the transfer from Coroner to Coroner, which presumably took place in this instance, requires a signed statement outlining what information has been gathered to date by the initial coroner. Either the [the first doctor] conducted the initial investigation into [the child's death] and there has been no compliance with this legislated mandate at the time this file was passed over to [the second doctor], or [the second doctor] was involved in the investigation from the very beginning, and should be able to provide the details … about the initial investigation….

Finding

On my review of this issue, I am satisfied that the search conducted by the Ministry for records of the identified coroner (the "first doctor") was reasonable. Although the Ministry's response that it "does not have contact information for the doctor" would not be sufficient if I was satisfied that there existed sufficient evidence to suggest that he was in possession of additional responsive records, in the circumstances, I am satisfied that the searches conducted by the Ministry were reasonable.

ii) A doctor at the Hospital for Sick Children (HSC)

The appellant takes the position that an identified doctor at the Hospital for Sick Children (HSC) who provided "clinical information", ought to have been contacted, and records ought to have been produced. The appellant also refers to records it received from the CFS which she believes support the view that the doctor at the HSC ought to have been contacted.

The Ministry responds to this by stating that the identified doctor is a Pediatric Intensive Care specialist at the HSC, who was not contacted by the Manager of the OCC's Information System Manager, as references to this doctor were contained in the CFS case file. The Ministry then states that this doctor was recently contacted by [the] Associate Deputy Chief Coroner, and that this doctor advised that he "has no clear recollection of where the reference to 'clinical information' came from". The Ministry then states that this doctor "recalls being requested by a [named] Senior Staff Pathologist with the HSC, to review the file. He returned the file when he had reviewed it". The doctor reviews some details of the child's history, and provides some suggestions as to what the Senior Staff Pathologist may have done. The Ministry states that the doctor "has no personal notes or file pertaining to this case. None was ever generated. [This doctor] reviewed other documents [as noted], and then returned them to [the Senior Staff Pathologist]".

In surreply the appellant states:

> The submissions by the Ministry on this point only underscore the inadequacy of the information provided to date. The Ministry tries to suggest that [the doctor at the HSC's] involvement in this case is limited to a single reference in a document for the Centre for Forensic Sciences. It goes on to state that Associate Deputy Chief Coroner spoke to him specifically about this matter, and the response given was that he recalls a request from the Senior Staff Pathologist to review the file, but made no notes regarding the 'new information' he is noted as identified.
>
> [I have determined that the doctor at the HSC] was a sitting member of the PDRC for almost every one of the meetings that considered this case - including October 10, 2000 (page 507), November 7, 2000 (page 513), May 13, 2003 (page 517), September 9, 2003. … these documents were only provided at the same time as the Ministry's [reply submissions] were provided … so the names of the members of the PDRC were not made available to our office until very recently. It is our respectful submission that the information in the documents provided, showing [the doctor at the HSC's] repeated presence during discussions regarding this case is inconsistent with the Ministry's response that the only involvement of [this doctor] with this case is a discussion with [the Associate Chief Coroner]… We submit that this is completely inconsistent with the fact that he apparently claims to not have any recollections regarding his role as a sitting member of the very Committee reviewing the case.

Finding

In my view, the searches conducted by the Ministry for records held by the doctor at the HSC are reasonable. The Ministry contacted this doctor based on the earlier representations of the appellant, and this doctor provided information regarding his recollection of his dealings with this file, his subsequent return of it, and his additional suggestions. He also stated that he has no personal notes or file pertaining to this case, and that none were generated. I am satisfied that these inquiries resulted in a reasonable search for his records, notwithstanding his possible involvement on a committee.

iii) A deceased doctor

The appellant refers to paragraph 16 of the affidavit in which the affiant states that she was not able to contact one of the involved physicians because he was by that time deceased, and she "was not aware of the existence of any additional responsive records held by either the HSC or the OCC". The appellant argues that this physician did not work alone, and that if he had had a file regarding this case, or further information, it would have been kept at the HSC. The appellant argues that there is no indication of any steps taken by the affiant to ascertain the existence of any further records of this physician, and that "The fact that [he] is deceased hardly ends the issue of determining what information he may have had in his files or in his computer".

In response, the Ministry refers to the affiant's statement that she consulted with the Senior Staff Pathologist who provided her with a copy of records that were not contained in the coroner's investigation file relating to the child. The Ministry then states:

> It is the Ministry's understanding that [the Senior Staff Pathologist] advised that … [the] now deceased neuropathologist, would not have kept a separate file on the case. [This neuropathologist] would have [conducted an examination] and dictated a report. It is the Ministry's understanding that any records he possessed would have been placed in the master pathology file that was held by [the Senior Staff Pathologist]. [The Regional Supervising Coroner] contacted [the Senior Staff Pathologist] again on January 24, 2008, and requested that the file be reviewed once again to confirm that there was no separate file or records generated by [the neuropathologist], other than the report he completed and delivered to [the Senior Staff Pathologist]. This was again confirmed, as any and all records are contained in [the Senior Staff Pathologist's] master file.

Findings

In the circumstances, I am satisfied that the search for records which may have been created by the doctor who is now deceased, was reasonable.

c) Other issues

The appellant also argues that there are additional records and samples missing. I review these issues below.

2) Matters in relation to the Affidavit sworn by the Policy and Program Analyst for the Centre of Forensic Sciences (CFS).

The appellant makes extensive representations in response to the affidavit sworn by the Policy and Program Analyst for the CFS. They can be summarized as follows:

- there is a lack of continuity when it comes to determining the location of the specimens relating to the investigation into the death of the child. The main areas concern:

- numerous samples which were taken and/or submitted to the CFS, and are referred to in correspondence (or emails) but no longer exist;
- a reference to a particular test which was considered, but could not be done because there was not enough blood left in the samples left;
- a concern that the CFS did not "hold all samples and not discard them" as requested by the appellant on an earlier occasion;
- questions about where certain samples have gone;

- questions about the efforts made by the affiant to contact individuals involved regarding the problems with identified testing;
- questions about the affiant's statements that she had met with several people "to determine whether any documents associated with the work performed to resolve the problem with [the assay] were available", that no such records were found as the problem with the assay had been identified and resolved in 2000, and that there was no requirement of records of this nature to be kept after the problem was resolved (the appellant claims that the problem was not resolved until 2001);
- the absence of records of certain phone calls referred to in correspondence;
- the absence of records relating to certain test results referenced in two specific documents;
- the absence of an identified January 15, 2001 report by a named doctor;
- the CFS was put on notice in January of 2004 that the investigation into the death of the child was continuing, and was contacted by the appellant in 2005 (referenced in the disclosed records), and that as a result certain records ought to have been kept.

The Ministry provides lengthy representations in reply, addressing a number of the appellant's arguments.

With respect to the "chain of custody" of items submitted to the CFS, the Ministry indicates that this chain of custody is tracked electronically, and then states:

> To facilitate an understanding of the disposition of the items in question, a chain of custody report has been created expressly for the purposes of this appeal, to supplement the information in the CFS case file that was released to [the appellant] on August 25, 2006. The newly prepared chain of custody report was released to the appellant on February 4, 2008.

The Ministry's remaining reply representations can be summarized as follows:

- the records do refer to why certain samples were destroyed (certain records were to be kept for 5 years, others were to be destroyed 6 months from the date of an identified report);
- the appellant's request to the CFS in 2005 to retain samples was made more than four years after the date of the report, and more than six months had elapsed;
- the affidavit confirms that the Policy and Program Analyst for the CFS met with various individuals involved in the matter, and not only were records within the Toxicology section searched, but records in storage at the Ontario Government Records Centre were also retrieved and searched, on the possibility that the records might have been sent for storage. No records were found, either at the CFS, or among the records retrieved from the Records Centre.
- the affiant acknowledges and apologizes for an inadvertent typographical error in her affidavit, in which she stated that the issue regarding the assay was resolved in 2000 when, in fact, it was resolved in 2001;

- the affiant submits that all searches for the records of the work done to resolve the problem with the assay were unsuccessful, that the records no longer exist, and that the assay has not been performed at the CFS since August 2005;
- the appellant's representations concerning two "missing" assays and results, "misrepresent the situation with respect to these supposedly missing records". The appellant was provided access to the CFS case file which included five pages of work notes pertaining to the assay, which show not only that the analysis was conducted but also the results of that assay and six pages of notes pertaining to the analysis performed by the Laboratoire de sciences judiciaire et de medecine legale at the request of the CFS;
- the appellant's statement that after July 2001 there is no information in the CFS case file with respect to the assay is because that aspect of the case closed on July 27, 2001, by the CFS, per normal practices, as the involvement of the CFS in this aspect of the investigation of the death of the child had ended. The issue of whether [an identified drug] was present in the sample from the child had been resolved through the analysis conducted by the Laboratoire de sciences judiciaire et de medecine legale.
- with respect to the appellant's comments that a January 15, 2001 report is missing, [a named toxicologist] drafted a report on January 15, 2001, which was a draft report pending the outcome of testing being performed by the Laboratoire de sciences judiciaire et de medecine legale, which ultimately confirmed that there was in fact no [identified drug] in the sample. The policy of the CFS is to destroy drafts of case reports once a final version has been authorized. Only the final authorized version of a report is kept. Consequently, the original draft report dated January 15, 2001, (which contained erroneous results) was destroyed and a new authorized report dated July 23, 2001 was prepared. As noted previously, this report has been disclosed to the appellant.
- with respect to the matter of "Missing Samples and Missing Records" raised by the appellant on page 13 of her representations, the Ministry refers the appellant to the content of the chain of custody report that the CFS has produced as a result of the appeal;
- with respect to the reference on page 16 of missing records of telephone calls made between April 24, 2001 and July 5, 2001, the affiant has confirmed that there are no logs of any calls. The affiant conferred with [an identified individual] who advised that he has no records of these calls and that, per CFS policy, if he had made a log of these calls it would have been contained in the case file

The issues raised by the appellant in her surreply representations can be summarized as follows:

- concerns that several blood specimens were destroyed by the CFS years before the Coroner's investigation could be considered concluded;
- questions regarding why the CFS would destroy some samples and save others;
- the lack of documentation as to why particular specimens were destroyed;
- questions regarding what authority the CFS had to destroy specimens being held during an investigation;
- concerns about how the CFS responded to the appellant's earlier request for it to retain samples, and the relationship between the CFS and the OCC;

- the fact that the child's family was not contacted in 2001 regarding the destruction of certain specimens;
- concerns that the investigation was not considered closed, and questions about why samples were destroyed;
- although the affiant indicates in her affidavit that she met with the case scientist, Toxicology section managers, and the technologist who performed the assay, and could not locate any further records, there are at least a few individuals who were "important enough at the time … to be made aware with the problems in the testing", but who were not contacted;
- with respect to the draft report that was destroyed, the appellant takes the position that, in her review and interpretation of the policies, this draft ought not to have been destroyed;
- with respect to records relating to testing methodology, the appellant states that the records ought not to have been destroyed, and "should be sent to an Ontario government records centre to reduce storage costs, transferred to the Archives of Ontario for preservation, or destroyed";
- concerns that the Ministry has not responded appropriately to explain when, how and what documents were destroyed, nor have they identified the protocols in place that permitted them to destroy these documents, and did not produce a schedule of the destruction of the documents.
- concerns that various sample requisitions, which were not located, were not addressed by the Ministry's "bald assertion" that lab requisitions for tests are destroyed within one year, unsupported by documentation.

With regard to the appellant's concerns raised as a result of her review of the "chain of custody" document, she states that these reports do not include the following:

- an explanation as to why the hospital blood samples were in the possession of an identified doctor prior to their transfer to the CFS (rather than the OCC, based on documents referenced on page 94 of the records). The appellant also requests additional record searches be conducted as a result of these samples being in this doctor's possession.
- information about who received the samples and when they were received
- additional confirmation that this is all of the laboratory testing results (and she refers to additional searches that might provide additional confirmation)

Findings

On my review of the representations of the parties regarding the information contained at the CFS and the affidavit sworn by the Policy and Program Analyst for CFS, I note that the parties have provided detailed representations on a number of issues. The appellant's surreply representations focus on 1) concerns about why samples or records were destroyed, and the lack of documentation for such destruction; 2) concerns about how information was communicated to the appellant and/or the family; 3) concerns that the CFS did not respond to the appellant's representations with sufficient detail, and 4) concerns that a number of other individuals

mentioned in the records ought to have been contacted and asked about the existence of additional records.

In the circumstances and based on the representations of the parties, I am satisfied that the searches conducted for records with the CFS and arising from the affidavit were reasonable. The affidavit of the Policy and Program Analyst for CFS is detailed, and the reply representations of the Ministry respond to the issues raised by the appellant in considerable detail and with explanations and answers that I find to be sufficient to satisfy me that the searches for responsive records were reasonable. I also note that the issues identified by the appellant in surreply largely relate to concerns the appellant has about the actions of the CFS, but do not directly address issues regarding the adequacy of the searches.

Accordingly, I am satisfied that the search conducted for records at the CFS was reasonable.

3) Matters relating to various samples and results

The parties address a number of questions regarding the searches for certain samples and other specific records. The appellant refers to these as "missing samples and missing records" and provides detailed representations regarding a number of these types of documents which she believes ought to exist, but are not referenced in the records. The Ministry responds to many of these specific questions.

a) Certain specific identified fluid samples

The appellant refers to pages 375 (Autopsy Data Sheet), 377 (second page of the Report of Post Mortem Examination) and 185 (final page of the Final Report of Post Mortem Examination), which refer to certain samples. She then states:

> Although these samples appear to have been collected and measured, and listed at page 185 in the listing of "Summary of Abnormal Findings", we have never been provided with any reports, letters, documents, etc., which identify the location of these autopsy samples.

The Ministry responds:

> … the appellant refers to [identified] samples referenced on pages 185, 375 and 377 of the records and asks about the existence of additional records in relation to the "location" of these samples. [The Regional Supervising Coroner] advises that these fluids that were collected at autopsy in accordance with normal procedures would be measured for volume and then discarded. They would not have been retained for any testing.

The appellant states in surreply:

> It is unusual indeed to get [the Ministry's response]. I am not certain which "normal procedures" [the Regional Supervising Coroner] is referencing. I have enclosed pages from a laboratory testing manual which not only identifies that these samples are to be tested, but the references ranges one can expect with testing, as well as disease states and other conditions which can be revealed by analysis of these fluids.
>
> In any event, rather than the bald statement contained in the Ministry's submissions, if there are "normal procedures" set out in policies or protocols at the Coroner's Office, the Ministry ought to provide these documents.

In my view, the Ministry's search and explanation for the failure to locate these records is reasonable in the circumstances of this appeal. Furthermore, although providing a copy of the policies and protocols may have been helpful, I find that it is not required in these circumstances.

b) Various laboratory results

The appellant identifies a number of tests that were conducted (based on her review of pages 184 and 185), and she identifies that she has not been provided with any of these test results from the laboratories which actually conducted these tests.

In response in its reply representations, the Ministry states:

> With respect to the matter of HSC lab reports, [the Associate Deputy Chief Coroner] recently contacted [the Senior Staff Pathologist] and asked that he provide the OCC a copy of all lab results reports relating to [the child]. [The Senior Staff Pathologist] subsequently provided the OCC with a copy of the following records that do not appear to have been previously supplied: [three identified laboratory results].
>
> In addition, [the Senior Staff Pathologist] also provided the OCC with a copy of a Neuropathology Sectioning Form. This is not normally a document that would be contained in the coroner's investigation file. The document has been numbered page 527.
>
> … the appellant was provided with total access to pages 524 to 527.

In the appellant's surreply representations, she indicates that she has not received one of the records regarding one of the identified tests.

Finding

The appellant has provided information, based on pages of the records, that certain laboratory tests were conducted. As a result, a number of the test results were provided to the appellant, however, one of them was not. In the circumstances, although the Ministry's representations refer to the fact that the Senior Staff Pathologist was asked to provide the OCC with a copy of all lab results reports, in the absence of an explanation as to why this lab result was not located, I will require the Ministry to conduct further searches for this lab result.

c) Vitreous Sample

The appellant states:

> At page 304, there is a reference to a vitreous sample [a sample of eye fluid] run at HSC. However, there is no listing of this sample as being held, or who is currently holding that sample. The Biochemistry results of the vitreous sample, found at page 304, are also listed as being the "Cumulative Summary (Patient Chart Copy)". However, there are usually other copies (other than the "cumulative summary") of the patient results. We have not been given anything other than the "cumulative summary". The record, found at page 304, was printed on September 18, 2003 (see bottom of page). However, the result of the potassium level obtained on the vitreous sample was available to [the Associate Deputy Chief Coroner] much earlier than that, as can be seen by a reference to this result, made at page 129 in notes dated … This means that this laboratory result was run and printed out prior to October 12, 2000. There is no sign of the report of laboratory results, printed out prior to October 12, 2000.

The appellant's representative then states that, as a previous medical laboratory technologist, she can advise that it is not possible that this sort of record does not exist. She states that at the time the results are run, which shows on page 304 as being done on September 28, 2000, there would be a print out of the results from the analytical instrument used in Biochemistry, to run these tests.

The appellant also states:

> There is also no requisition for these tests to be run on the vitreous sample - something which precedes the running of any samples in the laboratory.
>
> Moreover, we did not file [an access request under the *Act*] in this case until October of 2005. It is therefore unclear why a Cumulative Report was printed out on September 18, 2003. Who requested this result at that time? Where did the report go? Who has a copy of this report, printed at that time? None of the records shed light on this issue

In response, the Ministry states:

> With respect to the appellant's comments concerning a vitreous sample that was taken at the HSC, it is the Ministry's understanding that lab requisitions for tests are kept for one year only. As a result, it would appear that the requisition would not exist at the time the appellant's [request under the *Act*] was submitted. With respect to the matter of the biochemistry report being printed on September 18, 2003, it may have been printed as a result of inquiries that … former Deputy Chief Coroner of Ontario, agreed to undertake at the September 9, 2003 meeting of the PDRC Meeting (see page 522).

Findings

In the circumstances, I am satisfied that the searches conducted for the vitreous sample, and the explanations for the failure to locate responsive records, is reasonable. I will address the issue regarding the reference to information discussed at an identified PDRC meeting below.

4) Records of Death Under Two Committee and Paediatric Death Review Committee Meetings

The appellant's initial representations identify a number of additional documents she believes ought to exist.

With respect to the Death Under Two Committee, the appellant states that she has received no information about or from this Committee, including who was on this Committee.

Regarding the Paediatric Death Review Committee (PDRC), the appellant's concerns can be summarized as follows:

- although one of the responsive records is a Report from the PDRC (p.188), she was not provided with a breakdown of the documents reviewed by this Committee, nor a listing of which laboratory results were before the Committee;
- the appellant was not provided with a list of who was on this Committee;
- the PDRC report states, in its summary, that a meeting should be held between two individuals to "review the investigation protocol for sudden and unexpected deaths in children under two years to ensure a better quality of investigation and reporting in these types of deaths in the future"; there is no reference in the records to details or documents relating to such a meeting ever having taken place;
- page 363 of the records refers to a discussion between two individuals to attempt to locate the original or copies of the ECG strips "taken during ER admission". There are no records dealing with this discussion, or to one of those individual's involvement in this file.
- a memo on page 206 (dated in February, 2002) references information given to the appellant's representative at that time regarding paediatric death investigation protocol, and about general information which would be the subject of "the next Regional

> Coroners' meeting". The appellant states that there are no records dealing with minutes, or agendas from the Regional Coroners' Meetings regarding issues like this one, which intersect with this case, and/or with any minutes or agenda items from these meetings, dealing with this case.
> - although there are references in an email (page 423 - dated July, 2001) to a number of phone calls, there is no reference to these phone calls in the file.

The Ministry in reply states:

> The OCC has now extended the records search to include administrative records maintained in relation to the Deaths Under Two Review Committee and the Paediatric Death Review Committee that may contain references relating to [the child]. This records search has resulted in the identification of 21 pages of additional responsive records (numbered pages 502 to 523). These records are not included in the coroner's investigation file relating to [the child's death]. On February 4, 2008, the appellant was provided with total access to the parts of these records concerning the death of the child. The appellant was also provided with information such as the dates of the meetings and the names of the individuals in attendance.
>
> With respect to the appellant's comments on page 16 in regard to page 206, [the Regional Supervising Coroner] has confirmed that the existing records relating to Regional Supervising Coroners' meeting of March 1, 2001, do not contain specific references to a discussion in relation to the paediatric death investigation protocol. Such a discussion may have occurred as part of a discussion of general investigation issues, but specific topics of discussion are generally not minuted unless a specific follow-up action is identified.

In surreply, the appellant refers to the Ministry's submissions that there is no indication of any inquiry which was made into whether there was a discussion and resulting notes or records of this case or issues raised by this case or which overlapped with this case, at any Regional Coroners' Meetings, particularly in regard to the paediatric death investigation protocol which was in place as a result of a previous inquest. The appellant then states:

> … the Ministry ought to produce documents dealing with this subject, whether or not they deal with it in a "specific" way, or more generally. I would also point out that the memo at page 206 is dated February … 2002, and references a discussion at a future meeting of the Regional Coroners. The fact that this topic may not have been raised at the meeting directly following this email is not a sufficient response. If subsequent meetings of the Regional Coroners dealt with this case or general issues shared by this case, then it is our submission that the Ministry ought to produce those documents and minutes.

Finding

I have carefully reviewed the representations of the parties and the records at issue relating to the Committee meetings. The portions of the identified responsive records which were released to the appellant deal directly with the child's death and questions or follow-up actions to be taken relating to this. The Ministry has also disclosed the lists of the individuals who were on these committees.

However, although at the reply representations stage the search was extended to include administrative records maintained in relation to these two committees that "may contain references relating to the child", and 21 pages of additional responsive records were located, the Ministry has not provided information regarding the nature of the searches that were conducted to locate these records. Although I acknowledge that the Ministry was not provided with the surreply representations of the appellant, as identified above, given the history of this appeal and in the interest of bringing some closure to some of these issues, I will include in the order provisions a direction to the Ministry to provide information regarding the nature of the searches conducted for Records of the Death Under Two Committee and PDRC meetings.

In addition, in her surreply representations the appellant raises an issue regarding a reference in the September 9, 2003 Minutes of the PDRC concerning a follow-up on a vitreous sample that was to be done by an identified doctor. She states:

> This is the first indication … that [an identified doctor] was to "follow-up" on the vitreous sample result …. There are no notes, records or any thing else about why the follow-up was deemed necessary; if the follow-up was ever done, what was done, and if any information arose from the "follow-up". [The Ministry's representations] even reference the fact of a "follow-up" … but at no time answers what the results were ….

Again, although the Ministry has not had to opportunity to address this issue raised in the surreply representations, I will include in the order provisions a direction to the Ministry to provide information regarding the nature of the searches conducted for records relating to this "follow-up" reference in the PDRC minutes.

Finally, with respect to the appellant's concerns about information (including discussions and resulting notes or records) raised at any Regional Coroners' Meetings, I do not accept the appellant's position that the searches conducted ought to include any records dealing with the paediatric death investigation protocol, whether or not they deal with it in a "specific" way, or more generally. In my view, the appellant's position that her request ought to include all information relating not only to the child's death specifically but also "general issues shared by this case" is not accurate. In that regard, I am satisfied that the Ministry's search for records relating to the Regional Supervising Coroners' meeting was reasonable.

5) Email Records and Related Maters

The appellant identifies in her representations that there are email records found at numerous pages of the records. She then identifies that the messages were printed from the computers of identified individuals, and that the email records are "significantly incomplete". She reviews the individuals whose names are on or connected with the emails, and indicates that, for most of these individuals, there are no email records, and that for numerous others, there are many email records "missing". She also indicates the positions that a number of these individuals held, and why she believes email records exist (based either on the nature of the position held by these individuals, or the references to them and their involvement in the circumstances based on the information in the records which were released to her). She refers to approximately 43 individuals who ought to have additional records (some at the Coroner's office, others at an identified hospital) and then states:

> Clearly, all these individuals were involved in the investigation in some capacity, as they were copied on emails, or emails were directed to or from them, or they are referred to in other correspondence. Despite this, we do not know who the vast majority of these people are, as they appear nowhere else in the records. Moreover, they have not been asked to provide their files, including any emails they may have…

The Ministry in reply states:

> The Ministry has provided the appellant with access to available e-mail correspondence relating to the death of [the child]. Affidavits have been supplied detailing the records search activities undertaken by both the OCC and the CFS. The appellant's … request was received by the Ministry on October 25, 2005. The scope of the request has been significantly expanded as a result of the appeal process.
>
> The Ministry is of the view that both [individuals who swore the affidavits] have consulted with appropriate staff who might reasonably be expected to have knowledge of records relating to the case, including any existing e-mail records.
>
> Both the OCC and the CFS have a practice of printing e-mails of long-term value and placing them in their case files. As a separate records schedule does not presently exist for e-mail records, both the OCC and the CFS are guided by the provisions of their existing records schedules for the retention of case file information. Attached is a copy of the current authorized records schedules for coroner's investigation files and CFS case files (note: the CFS schedule is in the progress of being redrafted.) The format of the record (paper or electronic) does not determine retention but rather the information in the record. OCC and CFS are also guided by the attached Archives of Ontario fact sheet in regard to the retention of transitory records.

> There is no requirement that e-mails must be retained by all recipients. If an e-mail has been sent to a staff member on a "for your information" basis or if no action is required to be taken by the recipient, it is possible that the e-mail will not be retained. Programs areas are required to pay for the storage of records at the Ontario Government Records Centre on a volume basis …. Having multiple, duplicate copies of the same e-mail, or any document for that matter, in a case file would be a tremendously wasteful of resources.
>
> With respect to the e-mail contained on page 98 that was sent to a large number of individuals, [the] former Manager of Issues in the Ministry's Communications Branch, the author of the e-mail in question, has confirmed that the e-mail was distributed on an informational basis only to ensure that staff were informed about the news conference she had attended on [an identified date]…. There would be no business need or expectation that these individuals, many of whom were employed in the Communications Branch, and most of whom are either no longer employed by the Ministry or working in a different capacity, would have created and retained any records relating to the coroner's investigation of the … child's death.

In surreply, the appellant simply states that there is no indication of any inquiry into missing emails from all of the various sources listed in her earlier submissions.

Finding

In the circumstances and based on my review of the representations and the records, I am satisfied that the searches conducted by the Ministry for responsive records, in relation to the emails, were reasonable. The Ministry has clearly identified the searches conducted in the various files for responsive records, and has also provided an explanation regarding the nature of the involvement of a number of individuals identified in the emails (which were sent a number of years prior to the request being made), and why these records would no longer exist. Furthermore, the affidavits provided by individuals who conducted the searches are clear, and these individuals also had subsequent follow-up discussions with individuals who had direct knowledge of and involvement with the requested records. While it is true that the Ministry has not contacted every one of the individuals who had received a copy of the emails to determine whether a record of any sort existed with those individuals, in my view a reasonable search, in the circumstances of this appeal, does not require such action.

6) Involvement of the former Director of the Paediatric Forensic Pathology Unit at the HSC

The appellant's representations state:

> In reviewing the … materials provided by the Ministry, there is not a single mention or suggestion that [an identified doctor-Dr. C] was involved in the investigation into the death of [the child].
>
> [In June, 2007], we entirely unexpectedly received a letter from [defence counsel involved in the civil action resulting from the child's death]. In that letter, [defence counsel] indicates that a box containing a "wet tissue list for autopsy re [the child]" had been found [in Dr. C's office], and that he believed that the box "may contain wet tissue autopsy blocks".
>
> Not surprisingly, we were shocked by this development. We had been asking for listings of all samples taken either before or after [the child's] death. We had made these requests to the Coroner's Office and to the CFS. The Coroner's Office, having assigned the Hospital for Sick Children to participate in the investigation into [the child's death], was clearly in control of the entire investigation …. Obviously, we also undertook a Freedom of Information Inquiry to ferret out all the remaining information which we believed existed, and which we had not been provided by the Coroner's Office. [Seven years after the child's death] … we learn … of the involvement of [Dr. C]….
>
> We respectfully submit that the [absence] of any reference to the involvement of [Dr. C], into the investigation into the death of [the child], [illustrates the] inadequacy of the search done by the Ministry for responsive records….
>
> It is simply impossible to believe that there is not a single email, letter, memo, hand-written note, report, telephone message, etc., exists to show that [Dr. C] was involved in this case, and what his involvement entailed. Moreover, in neither of the Affidavits provided by the Ministry, was any mention made of investigations to determine what information [Dr. C] has about this case, and what his involvement was.

The Ministry in reply states:

> [Dr. C], former Director of the Paediatric Forensic Pathology Unit, was a member of the Deaths Under Two Review Committee and the Paediatric Death Review Committee. The administrative records of these committees confirm that he was a participant at meetings during which [the child] was discussed. With respect to the finding of case materials in his office at the Hospital for Sick Children, the OCC can offer no explanation, other than it has been speculated that perhaps in his capacity as Director of the Paediatric Forensic Pathology Unit he accessed

> materials in order to respond to an inquiry. As far as the OCC is aware, his involvement in the case would have been solely in his capacity as a member of the Death Under Two Review Committee and the Paediatric Death Review Committee, and as Director of the Paediatric Forensic Pathology Unit. The coroner's investigation file does not appear to contain any references to his direct involvement in the case.

The appellant states as follows in surreply:

> Seven years after [the child's] death, we learned for the first time that [Dr. C] was involved in her case. A significant number of [the child's] samples and slides were found in his office, during the Inquiry into the actions of [Dr. C]…. We also learned for the first time that he was the only paediatric pathologist who sat on the Paediatric Death Review Committee, at the time it considered the investigation into the death of [the child] …
>
> … [Dr. C] sat on two committees reviewing [the child's] case, presumably to provide a paediatric pathology opinion, yet there remains no indication of any inquiry into correspondence or discussions with [Dr. C] in this matter. Moreover, he was the only paediatric pathologist and the only forensic pathologist on these committees….
>
> ... How did … [the child's] samples end up in [Dr. C's] office and what was his role in the death investigation. (The Ministry attempts to suggest that there is no evidence of his involvement, but … the new documents provided suggest otherwise: (Pages 502; 507, 511, 513, show he attended many of the Paediatric Review Committee meetings where [the child's] death was considered and decisions were made as to what was to be put into the PDRC reports and responses to the family's concerns; Page 505 which shows that from an early date … [Dr. C] had involvement in being in possession or being in a position to obtain medical records - neuropathology and x-ray - on the file). …

Findings

As was the situation regarding the records of the Death Under Two Committee and Paediatric Death Review Committee Meetings, above, it is the appellant's surreply representations which raise a number of questions regarding the nature of the searches conducted for records regarding the involvement of the former Director of the Paediatric Forensic Pathology Unit at the HSC. Although this issue was raised earlier, and addressed in the Ministry's reply representations, the questions raised in surreply identify additional matters that, in my view, ought to be addressed. Again, I acknowledge that the Ministry was not provided with the surreply representations of the appellant. However, given the history of this appeal and in the interest of bringing some closure to some of these issues, I will include in the order provisions direction to the Ministry to provide information regarding the nature of the searches conducted for records regarding the involvement

of the former Director of the Paediatric Forensic Pathology Unit at the HSC, and records which may have been in his possession. Specifically, this additional information ought to include information about inquires made regarding records relating to the child which the former director may have had in his possession, and the results of these inquiries, including who was contacted and the locations searched.

7) Additional issues and concerns

In her surreply representations, the appellant provides lengthy additional material regarding information and records which she believes ought to exist, and which were not received by her. As well as restating a number of the concerns identified above, the additional records sought include:

- the investigating Coroner's initial report or notes (how he learned of the case, what he did, and how he obtained certain information);
- notations regarding what was done at the hospital, initial conversations with the hospital and the Coroner's Office, and instructions regarding the retention of various items;
- a notation of the written transfer of the file from one coroner to the other;
- records regarding arrangements made to transfer the body;
- documentation explaining the timing of the seizure of certain hospital records and specimens;
- a record indicating the request for a specimen identified at page 218 of the records;
- documentation relating to any follow-up by the Coroner's Office for certain "missing" material;
- documentation regarding the basis of certain statements made to the media or appearing in certain records, determinations and notations.

In my view, the concerns raised by the appellant and the questions about the existence of additional records are adequately addressed by the material provided by the Ministry. As set out above, in determining whether the Ministry conducted a reasonable search for records, the *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. In my view, although the additional issues and concerns raised by the appellant identify questions raised about the existence of records and explanations for why certain records were not located, these are not sufficient to satisfy me that the Ministry's search for these records was not reasonable.

Summary

In summary, based on my review of the information contained in this file and the representations of the parties, I am generally satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances. However, as identified above, there are some exceptions to this finding. As well, some newly located records have raised additional questions

which the Ministry is asked to address. These matters are identified in the order provisions below.

ORDER:

1) I order the Ministry to conduct further searches for one of the lab results referenced on page 184 of the records.

2) I order the Ministry to provide additional information regarding:

   - the nature of the searches conducted for Records of the Death Under Two Committee and Paediatric Death Review Committee Meetings; and
   - the nature of the searches conducted for records relating to the "follow-up" reference in the September 9, 2003 PDRC minutes.

3) I order the Ministry to provide additional information regarding:

   - the nature of the searches conducted for records regarding the involvement of the former Director of the Paediatric Forensic Pathology Unit at the HSC, and records which may have been in his possession. This additional information ought to include information about inquires made regarding records relating to the child which this former director may have had in his possession, and the results of these inquiries, including who was contacted and the locations searched.

4) I order the Ministry to provide me with the additional information regarding the nature of the searches conducted within 30 days of the date of this Interim Order. This information should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The information provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

5) If, as a result of the further searches, the Ministry identifies any additional records responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

6) With regard to the other matters raised in this appeal, I find that the Ministry has conducted a reasonable search for records responsive to the request,

7) I remain seized of this matter.

April 30, 2009

Frank DeVries
Adjudicator