Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3296

Appeal PA11-160

Ministry of Community Safety and Correctional Services

January 20, 2014

Summary: The appellant made a request to the ministry for information from the Office of the Chief Coroner [the OCC] about her deceased father. Access was granted to numerous records, but access to certain records or portions of records was denied on the basis of the exemptions in sections 21(1) and 49(b) (personal privacy), 13 (advice and recommendations), 19 (solicitor-client privilege), 14(1)(l) (facilitate commission of an unlawful act) and 49(a) (discretion to deny requester's own information). The issue of whether the ministry's search for responsive records was reasonable was also raised. In this order, some of the withheld records are ordered disclosed, and other records or portions of records are found to be exempt on the basis of the exemptions claimed. The ministry's search for responsive records is upheld as reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 13(1), 14(1)(l), 19(1), 24, 49(a) and 49(b).

Orders and Investigation Reports Considered: Order M-352.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information from the Office of the Chief Coroner for Ontario [the OCC] about the requester's late father, who died in 2005. The request specified that it was for all documentation, notes, conversations, audio tapes, journals, autopsy tapes, photos,

coroner's involvement, a copy of a warrant and "any evidence or documentation relating in any way to my father from the period commencing January 10, 2005 until [the date of the request]."

[2] In response to the request, the ministry issued two decision letters (an initial decision and a supplementary decision). In those decisions, the ministry stated that partial access was granted to the responsive records, and that access was denied to certain records or portions of records on the basis of the exemptions in sections 21(1) and 49(b) (personal privacy) and section 49(a) (discretion to deny requester's own information), in conjunction with section 14(1)(l) (facilitate commission of an unlawful act). The ministry also confirmed that it had considered the appellant's request under the "compassionate grounds" provision in section 21(4)(d) of the *Act,* which permits disclosure of a deceased individual's personal information to a family member on compassionate grounds.

[3] The appellant appealed the ministry's decision.

[4] During mediation, the ministry issued two additional supplementary decisions. In its first supplementary decision, the ministry stated that it was now also claiming that the exemptions in sections 13 (advice and recommendations) and 19 (solicitor-client privilege) of the *Act* applied to certain records. The ministry later confirmed that section 13 was being claimed for pages 49, 50 and 54, and that section 19 was being claimed for a portion of page 49.

[5] In its second supplementary decision, the ministry granted access to certain additional records.

[6] Also during mediation, the appellant confirmed that she was seeking access to all of the withheld records, and that she believes additional responsive records exist. As a result, the issue of whether the ministry's search for responsive records was reasonable is an issue in this appeal. Furthermore, because the ministry claimed the application of sections 13 and 19 late in the process, the issue of the late raising of these additional discretionary exemptions was raised as an issue in this appeal. In addition, the responsiveness of a portion of one page of a record (page 1004) is also an issue in this appeal.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the ministry, initially.

[8] In response to the Notice of Inquiry and after conducting further searches for responsive records, the ministry identified five additional pages of responsive records, and provided the appellant with access to them. The ministry also indicated that it was granting access to certain audio recordings.

[9] The ministry provided representations to this office, addressing the issues identified in the Notice of Inquiry.

[10] I then sent the Notice of Inquiry, along with a complete copy of the representations of the ministry, to the appellant. The appellant also provided representations in response.

[11] I note that, as a result of the five different decisions issued by the ministry, the appellant has been granted full access to hundreds of pages of responsive records, many of which contain detailed medical information about the appellant's deceased father. In addition, as set out below, most of the information remaining at issue in this appeal consists of brief portions of records relating to individuals other than the appellant or her deceased father.

[12] In this order, I find that certain records do not qualify for exemption under the claimed exemptions and I order that they be disclosed. I also find that many of the withheld records or portions of records are exempt on the basis of the exemptions claimed. In addition, I find that the ministry's search for responsive records was reasonable.

RECORDS:

[13] The records remaining at issue include correspondence, documents, emails, memoranda, Emergency Medical Services (EMS) records, an affidavit, various records from healthcare providers, and audio recordings of Toronto EMS telephone calls contained on a compact disc (CD).

[14] The pages or portions of pages of records remaining at issue are pages 48-50, 54-81, 87, 155-156, 165, 167, 200-203, 227, 256-257, 260, 272-273, 313, 328, 357, 377-378, 384-386, 392-395, 402-403, 458-459, 641, 708, 721-722, 725, 727, 734, 736, 742, 746-747, 751-752, 754-756, 759-760, 762-763, 766-768, 774, 777, 801, 808, 814-815, 827, 831, 839, 858-859, 864-865, 869-870, 875, 879, 881, 887-888, 894, 899-900, 908, 912, 915, 974, 977, 1004, 1017, 1019 and 1021-1022, as well as two remaining recordings of Toronto EMS telephone calls contained on a CD.

ISSUES:

A. Is the undisclosed portion of page 1004 responsive to the request?

B. Should the ministry be permitted to raise the discretionary exemption at sections 13 and 19 after the date permitted for claiming new exemptions?

C. Do the records contain "personal information" as defined in section 2(1)?

D. Does the mandatory exemption at section 21(1) or the discretionary exemption in section 49(b) apply to the records?

E. Does the discretionary exemption at section 19(a) apply to two lines on page 49?

F. Does the discretionary exemption at section 13(1) apply to the portions of pages 49, 50 and 54 remaining at issue?

G. Does the discretionary exemption at section 14(1)(l) apply to the information for which it is claimed?

H. Did the ministry properly exercise its discretion under sections 13(1), 14, 19, 49(a) and/or 49(b)?

I. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A. Is the undisclosed portion of page 1004 responsive to the request?

[15] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[16] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[1] Orders P-134 and P-880.

[17] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[18] The ministry takes the position that the four words severed from part of page 1004 are not responsive to the request, as they refer to an employee's vacation leave. The appellant does not address this in her representations.

[19] In the circumstances, I am satisfied that the four words severed from page 1004 are not responsive to the appellant's request. As the remaining portions of page 1004 were disclosed to the appellant, I will not consider this page further in this order.

Issue B. Should the ministry be permitted to raise the discretionary exemption at sections 13 and 19 after the date permitted for claiming new exemptions?

[20] As indicated above, the ministry claimed the discretionary exemptions in section 13 and 19 for pages 49, 50 and 54 later in the process.

[21] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[22] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[3]

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[2] Orders P-880 and PO-2661.

[3] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[23] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the ministry and to the appellant.[4] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[5]

[24] In the Notice of Inquiry that I sent to the parties, I asked them to respond to the following questions:

> 1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions.
>
> 2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal.
>
> 3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process been compromised in any way?

[25] In support of its position that it ought to be able to raise the discretionary exemptions the ministry states:

> The affected records relate to parts of three pages of records out of a total of over 1000 pages. …
>
> The Ministry is extremely careful when applying exemptions, but occasionally there are oversights. …
>
> In this instance, the oversight has not prejudiced the appellant in any way. The late raising of exemptions occurred during mediation and not afterwards. It is clear that the late raising of the exemptions did not affect the outcome of mediation, especially given the small number of records being claimed and the fact that mediation did not resolve other more fundamental aspects of the dispute between the appellant and the Ministry.
>
> The Ministry submits it would be prejudiced if it were not allowed to claim these exemptions because it would be unjustly penalized for a mistake on its part, which affects a tiny percentage of records. …

[4] Order PO-1832.
[5] Orders PO-2113 and PO-2331.

[26] The appellant briefly addresses this issue in her representations, stating that she disagrees with the ministry's late raising of these discretionary exemptions. She refers to the background to this file and her concerns that the ministry improperly took additional time to process this file "contrary to the legislation."

Analysis and Findings

[27] This office has the power to control the manner in which the inquiry process is undertaken.[6] This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter.[7] Nevertheless, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

[28] I am required to weigh and compare the overall prejudice to the parties. In doing so, I must consider any delay or unfairness that could harm the interests of the appellant, as against harm to the institution's interests that may be caused if the exemption claim is not allowed to proceed. In order to assess possible prejudice, the importance of an exemption claim and the interests the exemption seeks to protect in the circumstances of the particular appeal can be an important factor.

[29] I note that although the ministry raised the discretionary exemptions after the 35-day time period, it raised them in the mediation stage of the process, and these issues were addressed by the parties in their representations. As a result, I find that the late raising of the discretionary exemptions by the ministry did not result in any delays to the adjudication process. I also note that, at a number of points in time throughout the processing of this file, the ministry disclosed additional records to the appellant. In the circumstances, I find that there have not been any delays that have unduly prejudiced the position of the appellant.

[30] On my review of the circumstances of this appeal, I am satisfied that the integrity of the adjudication process will not be compromised if I permit the ministry to raise the application of the discretionary exemptions in sections 13 and 19 to the three pages of records for which they are claimed.

Issue C. Do the records contain "personal information" as defined in section 2(1)?

[31] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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[6] Orders P-345 and P-537.

[7] The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg,* (*supra*). See also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.).

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[32] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[8]

[8] Order 11.

[33] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[34] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[9]

[35] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[10]

[36] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[11]

Representations

[37] The ministry identifies that most of the remaining records have been withheld on the basis that they contain personal information belonging to affected third parties. It refers to certain considerations it took into account when reviewing the information, and then submits that the majority of the withheld information contains the following personal information:

- personal correspondence between the ministry and identified affected third parties containing personal information about the affected third parties or others,
- personal information captured in clinical notes, mostly about a few affected third parties,
- personal information contained in an incoming phone call from an affected third party to Toronto Emergency Management Services (EMS), which is [audio recorded] on CD, and

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[9] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[10] Orders P-1409, R-980015, PO-2225 and MO-2344.
[11] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

- discrete personal information contained in other records, such as telephone numbers.

[38] The ministry also states that the withheld information is not the information of affected third parties acting in a professional or business capacity. It states:

> … the affected third parties were patients or the close relatives or friends of patients. The Ministry submits that the release of personal information could be expected to identify affected parties, based on the fact that the appellant either knows the affected third party or the disclosure of personal information such as the disclosure of the name would, in effect, identify them.

[39] The appellant does not directly address this issue. Her representations focus more on the circumstances surrounding the death of her father and her interest in this information.

Analysis and findings

[40] I have reviewed each of the records or portions of records remaining at issue in this appeal. I note that many of the approximately 1025 pages of records responsive to this request have been provided to the appellant. Of the approximately 118 pages or portions of pages remaining at issue, the large majority of these pages have been substantially disclosed, with severances to small portions of a number of these pages. Some of the responsive pages have been withheld in full; however, I note that these pages predominantly relate to correspondence or dealings other identifiable individuals have had with the ministry or the coroner's office, and do not relate to the appellant or her late father.

[41] I also note that the appellant has been provided with substantially all of the information relating to her or her late father. To the extent that any of the information remaining at issue relates to her or her late father, it also relates to other identifiable individuals.

[42] With respect to the records or portions of records remaining at issue, I make the following findings:

[43] *Pages or portions of pages 49, 50, 54 and 167-168*

> These pages do not do not contain the personal information of any identifiable individual. Pages 49, 50 and 54 relate to general information about proposed communications from the Minister, and pages 167-168 are a Toronto EMS log sheet. None of these records contain personal information for the purpose of section 2(1) of the *Act*.

[44] *Pages or portions of pages 48, 55 and 56-81*

These records relate to investigations or complaints about individuals other than the appellant's late father. They include information about treatments received or concerns about these treatments, and include the information of the patients as well as their family members. I find that these withheld pages or portions of pages clearly contain the personal information of these other individuals as they contain their medical or psychiatric history [paragraph(a)] or other personal information relating to them [paragraph (h)].

[45] *The withheld portions of page 87*

The withheld portions of page 87 (memo) is to the name of an identified individual. This person's profession is also identified, and was disclosed to the appellant. In the circumstances, and given the age of the record and the uncertainty regarding the capacity in which this individual was involved in this matter, I accept the ministry's position that the name of this individual constitutes his personal information.

[46] *Pages 155-156*

These two pages consist of two emails from an identified individual to a media outlet containing this individual's personal views on the treatment of the deceased as noted in media coverage, as well as this individual's recitation of circumstances involving the death of this individual's relative a number of years prior to the date of the email. I find that these pages contain the personal information of the named individual as it contains this individual's personal opinions or views [paragraph (e)]. It also contains the personal information of the named individual's relative, as it contains that person's medical or psychiatric history [paragraph (a)].

[47] *The withheld portion of page 165*

The withheld portion of this page contains the cell phone number of an individual, and I find that it constitutes this individual's personal information under paragraph (d) of the definition.

[48] *The small, withheld portions of pages 200-203, 227, 256-257, 260, 272-273, 313, 328, 357, 378, 384-386, 392-393, 395, 402-403, 458-459, 641, 708, 721-722, 725, 727, 734, 746-747, 751, 755-756, 759-760, 768, 774, 780, 827, 831, 839, 858-859, 864, 870, 875, 879, 881, 887-888, 908, 974, 977 and 1017*

These pages consist primarily of nurses' narrative notes, admission sheets, hospital notes, etc. and have largely been disclosed to the appellant. The small withheld portions of these pages contain only the names or other identifying information of identifiable individuals other than the appellant or her father (ie: their telephone numbers, or their relationship with the deceased). Some of these withheld portions contain a brief summary of the actions taken by these individuals (ie: that they visited or asked a question about the deceased). I am satisfied that these withheld portions of pages contain the personal information of these identifiable individuals as they reveal personal information relating to them [paragraph (h)]. They also, necessarily, contain the personal information of the deceased.

[49] *The withheld portions of pages 377, 394, 736, 742, 752, 754, 762-763, 766-767, 777, 801, 808, 814, 815, 865, 869, 894, 899-900, 912 and 915*

These pages also consist primarily of nurses' narrative notes, admission sheets, hospital notes, etc. and have largely been disclosed to the appellant. The withheld portions of these pages also contain the names or other identifying information of identifiable individuals other than the appellant or her father (ie: their telephone numbers, or their relationship with the deceased). In addition, these withheld portions also contain a brief summary of the interactions these individuals had with hospital staff, including questions they may have asked about the deceased, responses provided to them, or other interactions they had with hospital staff about the care of the deceased. I am satisfied that these withheld portions of pages contain the personal information of these identifiable individuals as they reveal personal information relating to them [paragraph (h)]. They also, necessarily, contain the personal information of the deceased.

[50] *The withheld portions of pages 1019 and 1021-1022*

These pages consist of the withheld portions of a Power of Attorney and the affidavit of a subscribing witness. The withheld portions relate to identifiable individuals other than the appellant, and I find that these withheld portions of pages contain the personal information of these identifiable individuals as they reveal personal information relating to them [paragraph (h)].

[51] *The two withheld audio recordings of Toronto EMS telephone calls (calls 1 and 17):*

These two withheld audio recordings of telephone calls made to Toronto EMS were made by a lawyer and a doctor, respectively.

Call #1 is a telephone call made by the lawyer representing the appellant and her late father. In it, the caller indicates that she is making the telephone call in

her professional capacity, and on behalf of her client(s). In the circumstances, with one exception, I find that this recording does not contain the personal information of the lawyer. It does, however, contain the personal information of the appellant's late father.

The one exception is a cellular telephone number mentioned in the conversation. It is not clear whether this number is the lawyer's business or personal number and, in the circumstances, given the age of the record and the fact that the lawyer has not been notified, I will consider this number to be the lawyer's personal information under paragraph (d) of the definition.

Call #17 is a telephone call made by a doctor to the Toronto EMS. The recorded conversation relates to various protocols in place. In the circumstances, I find that this telephone conversation does not contain the personal information of the caller, as the doctor is clearly contacting the Toronto EMS in a professional capacity. Accordingly, I find that this recording does not contain the personal information of the doctor, nor does it contain the personal information of any other identifiable individual.

As I have found that call #17 does not contain the personal information of any identifiable individual, it cannot qualify for exemption under section 21(1). As no other exemption claim has been made for this record, I will order that it be disclosed to the appellant.

[52] I also find that a number of the records remaining at issue which contain the personal information of other identifiable individuals also contain the personal information of the appellant, as her name or other identifying information appears in these records. Although the portions of these records which relate to the appellant were largely provided to her, applying the record-by-record[12] approach to these records, I find that a number of the records contain the personal information both the appellant as well as the other identifiable individuals.

[53] I note that the ministry has claimed the application of several exemptions to a number of the records or portions of records remaining at issue. I will review these exemptions below; however, if I find that an exemption claim applies to a record, I will not consider it under the alternate exemption claims made for the same record.

Issue D. Does the mandatory exemption in section 21(1) or the discretionary exemption in section 49(b) apply to the records?

[54] I have found that some of the records contain the personal information of identifiable individuals other than the appellant, and that other records contain the

[12] See Order M-352.

personal information of both the appellant as well as other individuals. With respect to the records that contain only the personal information of other identifiable individuals, I will review the possible application of section 21(1) to this information. Regarding the records that contain both the personal information of the appellant and other identifiable individuals, I will consider whether the discretionary exemption in section 49(b) applies.

[55] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[56] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Section 49(b) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy

[57] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[58] Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy". Section 21(1)(f) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[59] In both section 49(b) and 21 situations, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the individual's personal privacy. Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an

unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy.

Representations

[60] In support of its position that the disclosure of the withheld personal information would constitute an unjustified invasion of personal privacy, the ministry states that the presumption in section 21(3)(a) applies to a number of the records, and that the factor favouring privacy protection in section 21(2)(f) applies to all of the withheld portions of records. The appellant identifies a number of concerns she has, and indirectly raises the application of the factor favouring disclosure in section 21(2)(a). In addition, the ministry states that it considered the application of section 21(4)(d), and determined that it did not apply to the records or portions of records remaining at issue. These sections read:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > (d) discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

The presumption in section 21(3)(a)

[61] The ministry takes the position that this presumption applies to some of the information at issue. It states:

> The Ministry has claimed the mandatory presumption in section 21(3)(a) for personal correspondence to or from or about affected third parties, and either a politician or the OCC. In all cases, the correspondence concerned the medical condition of close family relatives of the affected third parties.
>
> For those records consisting of correspondence between affected third parties and a politician, the records contain descriptions of the medical conditions of the affected parties' close relatives. The affected third parties wrote to the politician, but there is no suggestion that the affected third parties provided any consent for their or their close relative's personal information to be subsequently disclosed either in the context of an … access request such as this, or otherwise.

[62] The ministry then identifies the nature and scope of the medical information contained in the referenced records, and states that much of this information identifies discussions between affected third parties and medical practitioners relating to the medical condition of these individuals. It then states:

> Those records consisting of correspondence between affected third parties and the OCC relate to investigations or examinations that a member of the OCC undertook to determine the cause of death. Some of these records are known as "Coroners Investigation Summaries" or "Reports of Post-Mortem Examinations", and they contain detailed medical information of deceased individuals, specifically relating to how they died, and their medical status prior to the time of death. Coroners are medical practitioners and the Ministry submits these records fall squarely within the mandatory presumption in section 21(3)(a).
>
> The Ministry also notes that pages 76 and 77 relate to correspondence between the Coroner and another medical practitioner at another medical institution. The pages include hand-written notes [in the margins], but it's not clear who created these notes. In any event, the Ministry submits this record, about a deceased patient's medical condition, clearly falls within the scope of section 21(3)(a).

The factors in sections 21(2)(a) and (f)

[63] With respect to the factor in section 21(2)(f), the ministry states that all of the withheld personal information fits within this factor. It states:

> … the personal information in the records is "highly sensitive." Past … orders have held that for this exemption to be applied in order to withhold access to records, the disclosure of the records must be "expected to cause excessive personal distress to the subject individuals."
>
> The Ministry contends that the disclosure of the responsive records would cause excessive personal distress to affected third parties for the following reasons:
>
> > (a) The affected third parties have not consented to the disclosure of their personal information. They also may not know that it is subject to disclosure.
> >
> > (b) Affected third parties have an expectation that their personal information would not be disclosed. For one thing, much of it is contained in clinical notes created as a result of the treatment of the deceased individual. The Ministry submits that the affected third parties would likely not have expected personal information to be collected about themselves in clinical records when they were not the ones being treated. It stands to reason that they also, in general, would not expect personal information in clinical records to be disclosed.
> >
> > (c) … much of the personal information was created in trying personal circumstances, when people were interacting with medical practitioners about the care of ailing loved ones, or close relatives who were deceased. The Ministry submits that this context is key in making its decision that the records fit within section 21(2)(f).
> >
> > (d) These records are from 7 to 9 years old. Any disclosure at this point without consent or knowledge could be expected to distress affected third parties who have been moving on with their lives.

[64] With respect to the factor in section 21(2)(a), as noted above, the appellant has raised a number of concerns which indirectly raise the possible application of this factor. The appellant's representations focus on her concerns about a number of matters, and

indicate that she is pursuing access to the information to find the answers to questions about her father's death. She identifies a number of specific concerns and questions including:

- that her father's death was not a matter for the coroner, and the coroner should not have been involved;
- that the family of her deceased father had indicated that it wished to arrange a private autopsy, but that this was not possible because the coroner got involved;
- questions about the authority of the OCC to take the actions it did;
- concerns about the actions of the OCC;
- questions about why this matter was not further investigated;
- questions about how and when information was communicated to her and other family members;
- questions about the care her deceased father had received earlier; and
- concerns about the actions of various administrators and government officials relating to her deceased father.

[65] Based on these concerns, the appellant takes the position that:

> … any and all Coroner Office records, files, etc. are to be provided to me … due to the fact that the Coroner had no legal right to take [the deceased's body], and their actions actually prevented the independent autopsy as the family requested. …

[66] The appellant also indicates that she requires the information to conduct her own investigation.

Section 21(4)(d) - compassionate Disclosure

[67] The ministry takes the position that the compassionate disclosure provision in section 21(4)(d) does not apply to the remaining records at issue. It states:

> The purpose of section 21(4)(d) is to ensure that close relatives, as that term is defined in [the *Act*], are well informed about the circumstances surrounding the death of a loved one. In the context of this appeal, the standards of compassionate disclosure have been met, and indeed exceeded, given the large volume of records that have been disclosed containing details around the death of the deceased individual.
>
> The Ministry submits that the personal information that has been withheld relates primarily to other individuals, and would not reveal significantly any more information about the circumstances surrounding the death of the deceased individual were it to be disclosed.

> The Ministry notes that section 21(4)(d) requires the Ministry to be "satisfied" that in the "circumstances" disclosure is desirable for compassionate reasons. The Ministry is not satisfied that the disclosure of personal information belonging to affected third parties is desirable given the reasons it has listed in this submission for withholding this personal information.

[68] I will review the records remaining at issue, in light of the positions taken by the parties set out above.

[69] Because of the number of records or portions of records remaining at issue, I have categorized them below, and I review the application of the exemptions in sections 21(1) and 49(b) to the various categories of records as follows:

[70] *Pages or portions of pages 48, 55, 56-81 and 155-156*

> These records relate to investigations or complaints made that concern individuals other than the appellant's late father, including information about treatments received or concerns about these treatments. They contain the personal information of other patients, as well as their family members. I find that much of this information fits within the presumption in section 21(3)(a) as it relates to the medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation of the patients. I also find that the information of the family members is highly sensitive personal information, and that the factor in section 21(2)(f) applies. Furthermore, I find that the factor in section 21(2)(a) does not apply to this highly sensitive personal information. As a result, I find that this information qualifies of exemption under section 21(1) of the *Act*.

[71] *The withheld portions of page 87*

> The withheld portions of page 87 (memo) is to the name of an identified individual. I have found above that, given the age of the record and the uncertainty regarding the capacity in which this individual was involved in this matter, this individual's name constitutes his personal information. I find that none of the presumptions in section 21(3) nor any of the factors in section 21(2) apply to this individual's name. As a result, I find that it qualifies for exemption under section 49(b) of the *Act*.

[72] *Pages 155-156*

> These two pages consist of two emails from an identified individual to a media outlet containing this individual's personal views on the treatment of the deceased as noted in media coverage, as well as this individual's recitation of circumstances involving the death of this individual's relative a number of years

prior to the date of the email. I find that the information about the individual's relative fits within the presumption in section 21(3)(a) as it relates to this individual's medical history, condition or treatment. I also find that the personal information of the author of the email is highly sensitive personal information, and that the factor in section 21(2)(f) applies. Furthermore, I find that the factor in section 21(2)(a) does not apply to the information in these emails. As a result, I find that this information qualifies for exemption under section 49(b) of the *Act*.

[73] *The withheld portion of page 165*

The withheld portion of this page contains the cell phone number of an individual. I find that none of the presumptions in section 21(3) nor any of the factors in section 21(2) apply to this information, and that it qualifies for exemption under section 49(b) of the *Act*.

[74] *The small, withheld portions of pages 200-203, 227, 256-257, 260, 272-273, 313, 328, 357, 378, 384-386, 392-393, 395, 402-403, 458-459, 641, 708, 721-722, 725, 727, 734, 746-747, 751, 755-756, 759-760, 768, 774, 780, 827, 831, 839, 858-859, 864, 870, 875, 879, 881, 887-888, 908, 974, 977 and 1017*

As noted above, these pages consist primarily of nurses' narrative notes, admission sheets, hospital notes, etc. and have largely been disclosed to the appellant. The small withheld portions of these pages contain only the names or other identifying information of identifiable individuals (ie: their telephone numbers, or their relationship with the deceased). Some of these withheld portions contain a brief summary of the actions taken by these individuals (ie: that they visited or asked a question about the deceased). I have found that the withheld portions of these pages contain the personal information of these identifiable individuals and the deceased.

On my review of these identifiers, phone numbers, and other brief severances, I find that none of the presumptions in section 21(3) apply, and that none of the factors in section 21(2) apply to them. As a result, I find that these brief severances qualify for exemption under sections 21(1) and/or 49(b) of the *Act*.

[75] *The withheld portions of pages 377, 394, 736, 742, 752, 754, 762-763, 766-767, 777, 801, 808, 814, 815, 865, 869, 894, 899-900, 912 and 915*

As noted, these pages also consist primarily of nurses' narrative notes, admission sheets, hospital notes, etc. and have largely been disclosed to the appellant. The withheld portions of these pages also contain the names or other identifying information of identifiable individuals, as well as brief summaries of the interactions these individuals had with hospital staff. These include questions

they may have asked about the deceased, responses provided to them, or other interactions they had with hospital staff about the care of the deceased.

Given the nature of the interactions between these individuals and hospital staff, I find that the factor in section 21(2)(f) applies to this information. I am also not satisfied that the factor in section 21(2)(a) applies to this information. As a result, I find that these severances qualify for exemption under sections 21(1) and/or 49(b) of the *Act*.

[76] *The withheld portions of pages 1019 and 1021-1022*

These pages consist of the withheld portions of a Power of Attorney and the affidavit of a subscribing witness. On my review of these pages, I find that none of the presumptions in section 21(3) apply, and that none of the factors in section 21(2) apply to them. As a result, I find that the withheld portions of these pages qualify for exemption under section 49(b) of the *Act*, subject to my review of the absurd result principle, below.

[77] *The withheld audio recording of a Toronto EMS telephone call (call #1):*

As noted above, call #1 is a telephone call made by the lawyer representing the appellant and her late father. In it, the caller indicates that she is making the telephone call in her professional capacity, and on behalf of her client(s). I found that only the cellular telephone number mentioned in the conversation is the lawyer's personal information, and that the record contains the personal information of the appellant's late father. I also find that it contains the personal information of the appellant.

With respect to the cell phone number mentioned in the call, I find that none of the presumptions in section 21(3) nor any of the factors in section 21(2) apply to this information. As a result, I find that it qualifies for exemption under section 49(b) of the *Act*.

Regarding the remaining portion of this recording, I find that it clearly contains the medical information of the deceased, and that the presumption in section 21(3)(a) applies to this information. As a result, I find that it qualifies for exemption under section 49(b) of the *Act*, subject to my review of the absurd result principle, below.

Absurd Result

[78] Previous orders have determined that, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found

not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[13]

[79] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[14]
- the requester was present when the information was provided to the institution[15]
- the information is clearly within the requester's knowledge[16]

[80] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[17]

[81] The ministry takes the position that the absurd result principle does not apply because "it does not appear that the responsive records contain the appellant's personal information or that the appellant is even aware of what is in the responsive records." The appellant does not address this issue.

[82] Based on my review of the withheld information, I find that the absurd result principle does not apply to the records or portions of records withheld under section 21(1), and I accept the ministry's position that the appellant would not be aware of what is in some of these records. I also find that, with two exceptions, even though the appellant may be aware of some of the information contained in some of the severances made to the records, in the absence of additional information, the absurd result principle does not apply to these severances made to the records.

[83] The two exceptions are the telephone call made to Toronto EMS by the appellant's lawyer, and the withheld portion of page 1019.

[84] The telephone call made to Toronto EMS by the appellant's lawyer (call #1) contains the personal information of the appellant and the appellant's father. I am satisfied based on the information provided in the records that the appellant was clearly aware of the information relating to her father contained in this record. It also appears from the recording of the telephone conversation that the appellant was present when the telephone call was made. In these circumstances I am satisfied that, with the exception of the cellular telephone number of the lawyer, the remaining portions of this telephone call ought to be disclosed to the appellant.

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[13] Orders M-444 and MO-1323.
[14] Orders M-444 and M-451.
[15] Orders M-444 and P-1414.
[16] Orders MO-1196, PO-1679 and MO-1755.
[17] Orders M-757, MO-1323 and MO-1378.

[85] Pages 1019 and 1021-1022 consist of a Power of Attorney and the affidavit of a subscribing witness. Portions of the Power of Attorney were disclosed to the appellant, as she is one of the individuals named in it. Page 1019 relates to the identity of the individuals who were given the Power of Attorney, one of whom is the appellant, and she was clearly aware of the information severed from this page. As a result, I find that withholding the remaining portion of page 1019 from the appellant, which contains information that is clearly within her knowledge as it involved her, would lead to an absurd result.

[86] As noted, with respect to the other information contained in the records, in the circumstances of this appeal, I find that the principle of "absurd result" is not applicable, as I am not satisfied that these portions of records contain information of which the appellant is clearly aware. Consequently, I find that the absurd result principle does not apply to the remaining portions of the records.

Issue E. Does the discretionary exemption at section 19(a) apply to two lines on page 49?

[87] The ministry relies on the solicitor-client privilege in section 19 to deny access to the withheld information contained in two lines on page 49. Section 19 reads:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[88] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution or hospital, from section 19(c). The institution must establish that at least one branch applies. The ministry takes the position that the solicitor-client communication privilege in branch 1 of section 19 applies to the withheld information.

Branch 1: common law privilege

[89] Branch 1 of the section 19 exemption encompasses two heads of privilege, as

derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[18]

Solicitor-client communication privilege

[90] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[19]

[91] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[20]

[92] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[21]

[93] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[22]

[94] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[23]

Representations and findings

[95] In support of its position that the solicitor-client communication privilege aspect of branch 1 of section 19 applies, the ministry states:

> … the Ministry has claimed this exemption for two lines on page 49, and specifically with respect to the first branch of solicitor-client privilege, which is solicitor-client communication privilege. …

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[18] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[19] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[20] Orders PO-2441, MO-2166 and MO-1925.
[21] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[22] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[23] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

> The Ministry has claimed this exemption because part of page 49 contains privileged communications between legal counsel and a Ministry client. The legal [counsel's] advice is set out clearly in these two lines, and is delineated from the remainder of the record.
>
> The Ministry notes that solicitor-client communication privilege … includes advice about what should be done legally and practically, and need not relate to particular proceedings. The Ministry submits that the legal advice contained in the two lines meets the threshold requirements of section 19.

[96] The ministry also states that there is no indication that the solicitor-client communication privilege has been waived.

[97] The appellant does not directly address this issue.

[98] On my review of the two lines on page 49 of the records, I find that the information refers directly to advice provided by ministry counsel to staff relating to a specific matter. As a result, I am satisfied that these two lines reveal direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice, and that it qualifies for exemption under branch 1 of section 19 of the *Act*, subject to my review of the ministry's exercise of discretion, below.

Issue F. Does the discretionary exemption at section 13(1) apply to the portions of pages 49, 50 and 54 remaining at issue?

[99] The ministry takes the position that the discretionary exemption at section 13(1) applies to pages 49, 50 and 54. I have found that two lines on page 49 qualify for exemption under section 19. I will review the application of section 13 to the remaining information on these pages.

[100] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[101] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption

also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[24]

[102] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[25]

[103] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.[26]

[104] Advice or recommendations may be revealed in two ways:[27]

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations

[105] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[28]

[106] There is no requirement under section 13(1) that the institution be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.[29]

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[24] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).
[25] See Order PO-2681.
[26] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[27] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).
[28] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).
[29] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

Representations

[107] The ministry states that it applied the section 13(1) exemption to the three pages because these pages relate to "the preparation of correspondence for the Minister's signature, and suggestions as to how the correspondence was to be completed." The ministry states that it applied the exemption for the following reasons:

- The records relate to a suggested course of action with respect to the Minister responding to a third party.
- The records reflect communications between different public servants within the Ministry, who worked collaboratively in preparing the correspondence for the Minister's signature.
- Unlike the final correspondence that was issued under the Minister's signature and that has been released, these parts of the records were not intended to be disseminated outside of the Ministry. Instead, they were part of an internal process for arriving at a suggested approach for preparing a written correspondence.

[108] The ministry also submits that these records reveal ministry employees working together to advise one another in developing an appropriate response for the Minister's signature. It states that the disclosure of these sorts of records would inhibit this type of free-flowing collaboration. In addition, the ministry states that none of the exceptions in section 13(2) apply to the records.

[109] The appellant states that she should have access to any advice or recommendations of all individuals employed in the public service because they are paid by taxpayers and accountable to the public for their decisions.

Analysis and findings

[110] On my review of pages 49, 50 and 54, I note that pages 49 and 50 are a two-page document summarizing the issue to be addressed in correspondence by the Minister, and identifying by name the individuals involved in advising the Minister, and summarizing the advice given or the actions taken. On my review of this two-page document, I am satisfied that the information in this record relates specifically to a suggested course of action by staff advising the Minister, and contains the recommended course of action. Accordingly, I find that this record qualifies under section 13(1) of the *Act*.

[111] Page 54 consists of a brief email chain between two individuals regarding the proposed correspondence to be sent by the Minister. One of the emails contains a request for specific advice, but also summarizes advice given. The responding email identifies the response to the request for advice. On my review this email chain, I am satisfied that the information in this record also relates specifically to a suggested

course of action by staff advising the Minister, and contains a recommended course of action. Accordingly, I find that this record also qualifies for exemption under section 13(1) of the *Act*.

Issue G: Does the discretionary exemption at section 14(1)(l) apply to the information for which it is claimed?

[112] The ministry has relied on section 14(1)(l) to deny access to certain undisclosed portions of the record (the 10 codes). The ministry claims that section 14(1)(l) applies to this information. Section 14(1)(l) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

[113] The ministry states:

> Section 14(1)(l) … authorizes the Ministry to refuse to disclose a record "where the disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime."
>
> The Ministry has withheld this information for ten codes that appear on pages 167 and 168 and in the CD from Toronto EMS.
>
> The Ministry submits that these are the same ten codes that are used by police, when responding to emergency calls. A long line of … orders has upheld withholding these codes on the basis that their disclosure would disclose specific information to others regarding policing operations.[30]
>
> The Ministry submits that this same reasoning ought to be applied even when the records originate with Toronto EMS. Both Toronto EMS and the police work together as emergency responders, and they both use the same codes. The disclosure of ten codes in that originated with Toronto EMS would have the same negative impact as if the disclosure had originated with a police service.

[114] The appellant does not address this issue.

[115] Previous orders have established that the disclosure of police codes and police patrol zone information could reasonably be expected to facilitate the commission of an

[30] The ministry specifically refers to Order PO-2571 as an example of this.

unlawful act or hamper the control of crime.[31] Based on the representations of the ministry and in keeping with the findings made in those previous orders, I find that the 10 code information which was severed from the records is properly exempt under section 14(1)(l).

Issue H. Did the ministry properly exercise its discretion under sections 13(1), 14, 19, 49(a) and/or 49(b)?

[116] The section 13, 14, 19 and 49 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[117] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[118] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[32] This office may not, however, substitute its own discretion for that of the institution.[33]

Relevant considerations

[119] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[34]

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

[31] See, for example, Orders M-781, PO-1665 and MO-2065.
[32] Order MO-1573.
[33] Section 43(2)
[34] Orders P-344, MO-1573.

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations and findings

[120] In the ministry's representations in support of its position that it properly exercised its discretion to apply the exemptions in this case, it states that it exercised its discretion "fairly by carefully severing the records and releasing the vast majority of all of the records to the appellant." It also states that it exercised its discretion in a manner that is consistent with past IPC orders. In addition, the ministry states that it properly severed the records:

> … by providing the appellant with as much information as possible, while severing out personal information related to affected third parties individuals, and selected other information for which exemptions have been claimed. As a result, the appellant has been provided with the vast majority of the responsive records.

Although the appellant is clearly not satisfied with the ministry's decision, she does not specifically address the ministry's exercise of discretion in her representations.

Findings

[121] I note that the ministry identified over 1000 pages of responsive records, and that access was granted to many of these pages. Many of these pages consist of handwritten notations (by nurses, hospital staff, etc.), and the ministry has considered each page line-by-line, and disclosed much of the information to the appellant. Furthermore, although the appellant is clearly unhappy with the actions of the ministry

relating to her specific concerns, I am not satisfied that the appellant's concerns about the ministry's actions impact the decision to apply the exemptions in this appeal.

[122] As a result, on my review of all the circumstances in this appeal, I am satisfied that the ministry has not erred in exercising its discretion not to disclose the portions of the records at issue, as it has not done so in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. Accordingly, I find that the ministry properly exercised its discretion to apply the exemptions in sections 13, 14, 19, 49(a) and 49(b) to the information at issue in this appeal.

Issue I. Did the ministry conduct a reasonable search for records?

[123] 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 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.

[124] A number of previous orders have identified the requirements in reasonable search appeals.[35] 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).

[125] I agree with Acting-Adjudicator Jiwan's statement.

[126] 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.

[35] See Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

[127] 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.

Representations

The ministry's representations

[128] The ministry begins by identifying the nature of the records at issue. It states:

> This appeal is for all records in the custody of the OCC about a deceased individual, who passed away in 2005 at a hospital.
>
> There are over 1000 pages of responsive records and the Ministry disclosed most of these records in whole or in part. The records were collected by the OCC, as part of its statutory duties under the *Coroners Act* to investigate causes of death which occur in certain situations. Most of the records were created by health practitioners at the hospital. There is also a CD containing incoming phone calls recorded by Toronto Emergency Management Services (EMS).

[129] In its representations the ministry also confirms that, in the course of conducting additional searches, it located additional responsive records, and that these pages were disclosed to the appellant.

[130] In regards to the reasonableness of the ministry's searches for responsive records, the ministry begins by identifying the three specific areas of concern raised by the appellant in the course of this appeal, and addresses these areas in turn. It states:

> [The appellant] specifically believes the following additional records exist:
>
> (a) A phone call or fax or other communication indicating who ordered the OCC to take the body of the deceased individual to perform an autopsy, take the deceased person's medical records and obtain a warrant to bury his body.
>
> (b) Record(s) indicating who inserted the catheter in the deceased individual's neck at the hospital …
>
> (c) Record(s) regarding the Coroner destroying evidence relating to the intubation tube and catheter.

[131] The ministry addresses each of these concerns as follows:

> (a) A coroner has the authority in sections 15 and 16 of the *Coroners Act* to issue warrants, and take possession of bodies. A coroner can also obtain a warrant to bury the body of a deceased person in accordance with section 21(6) of the *Vital Statistics Act*. In response to [the appellant's concern identified in paragraph (a)], a Coroner would not be "ordered" to do any of the things listed in that paragraph. The authority of the Coroner to act is prescribed by statute.
>
> (b) Information regarding the insertion of the catheter is set out on pages 89 and 90. These pages have been released to the appellant.
>
> (c) Paragraphs 2-4 of page 88 indicate the Coroner attempted to retrieve the intubation tube and catheter but was unable to do so. The OCC's ongoing position is that there was no destruction of evidence, and this is set out on the last paragraph of page 29. These pages have already been released to the appellant.

[132] Regarding the nature of the general searches conducted for responsive records, the ministry states:

> The Ministry's position is that it has conducted two searches for all responsive records. As a result of the searches, over 1000 pages of records have been produced, most of which have been released to the appellant.
>
> The first search was conducted by a former employee of the OCC, who is now retired. She searched through the Coroner's case file, which is where records are kept on death investigations that are used by the Coroner to conduct an investigation.
>
> At the time of this appeal, an additional, more comprehensive search was conducted by a current employee of the OCC. … the current employee searched again through the Coroner's case file. In addition, she also conducted the following additional searches in the OCC:
>
> > (a) She searched through a file of records contained in the Ontario Forensic Pathology Service branch, which is responsible for conducting autopsies. She found duplicates of records that were already produced.
> >
> > (b) She searched in the Dispatch office of the OCC. This is the part of the OCC that is responsible for dispatching Coroners to

> conduct investigations. She did not locate any responsive records from this office.
>
> (c) Finally, she requested and reviewed the Coroner's working file, where she identified five hand-written pages of notes belonging to the investigating Coroner that were responsive to the request, but that had not been previously produced. The information in these five pages had been incorporated into other typed records, which have been released to the appellant, and so there is no new information that the appellant has not already seen.

[133] The ministry summarizes its position by stating that it believes that a comprehensive search has now been conducted of all responsive records, and that all responsive records have been identified and produced. It also states that it does not believe that any responsive records have been destroyed.

The appellant's representations

[134] The appellant's representations focus primarily on her concerns about the actions of various individuals and institutions as they dealt with her late father. With respect to the issue of whether additional records exist or whether the ministry's search for responsive records was reasonable, the appellant identifies the following issues:

- Her concern that a record exists which identifies who contacted the Coroner's Office and ordered the Coroner to be involved in this matter.
- Her concern that the Coroners Office "overstepped its legal jurisdiction under the *Coroners Act* to seize [her late father's body] because they failed to specify the reasons under section 10 of [the *Coroner's Act*] to do so."
- Her interest in any communications that took place regarding this matter. She states: "It is important to know the communications that took place between the Coroners Office and the Health Minister, Premier, Police, [certain named individuals] and [certain] staff during and after the death of [my father]."
- Her interest in an additional form. She states "… [a named doctor] agreed to provide me with the Form 3 preliminary report and I believe that I have not received this yet."
- Records subpoenaed from an identified hospital. The appellant states: "[Another named doctor states that he] subpoenaed [a named hospital] medical records immediately …, and I want to see these documents." The appellant provides additional evidence in support of her position.

[135] The appellant also provides some additional information, as part of her representations, which she refers to in support of her position that these additional records exist, and that the searches were not reasonable.

Analysis and Findings

[136] As a preliminary matter, I note that the issue of the reasonableness of the searches for responsive records relates to whether additional responsive records exist. In response to the request for records, over 1000 pages of responsive records, as well as certain audio recordings, were identified. Almost all of those were provided to the appellant. The remaining documents to which access was denied are addressed in this order. As a result of the further searches conducted, additional responsive records were located, and access was granted to them.

[137] It is clear from the representations that both parties 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.

[138] As set out above, in appeals involving a claim that additional responsive records exist, 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*. In this appeal, if I am satisfied that the ministry's search for responsive records was reasonable in the circumstances, the ministry's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[139] 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.[36] 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.

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

[141] In this appeal, the ministry initially searched for records responsive to the appellants' request, and located many records. It also conducted a further, additional search later in the appeal process, and also responded to the specific concerns raised by the appellant in the course of this appeal, and addressed each of those points in

[36] Order M-909.

some detail. Based on the information provided, I am satisfied that the ministry's search for records responsive to the request was reasonable in the circumstances.

[142] I have also considered the appellant's concerns about the possible existence of additional records, raised in her representations, and find as follows:

- Regarding the appellant's concern that a record exists which identifies who contacted the Coroner's Office and ordered the Coroner to be involved in this matter, the ministry specifically addresses this question in its representations, referring to the statutory authority of the Coroner under the *Coroner's Act*. I also note that the ministry identified that, as part of its additional, subsequent search, it searched in the dispatch office of the OCC, which is responsible for dispatching Coroners to conduct investigations, and did not locate any responsive records. The appellant does not appear to agree with the ministry. She also provides me with some evidence to suggest that a hospital staff person may have notified the Coroner's office about the death. Based on the ministry's representations, this would not have been an "order" to the Coroner. Furthermore, given the nature of this possible communication, the age of this matter, and the specific searches conducted by the ministry in the dispatch office, this evidence of a possible contact is not sufficient to find that the searches conducted for responsive records were not reasonable.

- Regarding the appellant's concern that the Coroners Office "overstepped its legal jurisdiction" and failed to specify certain information as required by section 10 of [the *Coroner's Act*], I am not satisfied that this concern supports the position that the ministry's searches were not reasonable.

- Regarding the appellant's interest in any communications that took place regarding this matter, including communications between the Coroners Office and the Health Minister, Premier, Police, and other individuals, I note that some of the responsive records consist of communications of this nature. I am not satisfied that the appellant has provided sufficient information about other possible responsive communications to find that the ministry's search was not reasonable.

- Regarding the appellant's interest in a specific, additional form (Form 3), after reviewing the additional information provided by the appellant, I accept that this evidence supports the appellant's position that a named doctor advised her of the existence of Form 3; however, I also note that one of the records disclosed by the ministry is identified as "Form 3" (pages 89-90). Although the appellant states that she believes she has "not received this yet," this is not sufficient for me to order the ministry to conduct further searches.

- With respect to records subpoenaed from an identified hospital. The appellant states: "[Another named doctor states that he] subpoenaed [certain] medical records immediately …, and I want to see these documents." In the absence of any additional information about these records, I am not satisfied that this is sufficient evidence to support a finding that the ministry's search was not reasonable. Based on the ministry's specific evidence of the nature of the searches conducted for records, the results of these searches, and the records which were disclosed to the appellant which appear to relate to the identified hospital, I am not satisfied that the appellant's information is sufficient to find that the searches conducted by the ministry were not reasonable.

[143] Accordingly, based on all of the evidence provided to me, and as particularized above, I am satisfied that the ministry's searches conducted for responsive records were reasonable, and I dismiss this aspect of the appeal.

ORDER:

1. I order the ministry to disclose to the appellant by **February 25, 2014** but not before **February 19, 2014** the following information:

    - the withheld audio recording of a Toronto EMS telephone call from a doctor (call #17);
    - the withheld audio recording of a Toronto EMS telephone call from a lawyer (call #1), except for a reference in that recording to a particular cellular telephone number, which ought to be withheld;
    - the withheld portion of page 1019.

2. I uphold the ministry's decision to withhold the remaining information in the records.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant.

Original Signed By: January 20, 2014
Frank DeVries
Adjudicator