Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3309-I

Appeal PA12-114

Ministry of Community Safety and Correctional Services

February 24, 2014

Summary: The appellant requested the medical records relating to the death of his daughter held at the Office of the Chief Coroner. The ministry located responsive records and granted partial access to them, citing a number of exemptions under the *Act*. The appellant appealed the exemptions and raised the reasonableness of the ministry's search for responsive records. During the adjudication stage of the appeal, the ministry located additional hospital records which were located at the regional coroner's office and issued three supplementary decisions. In this order, the adjudicator determined that the scope of the request relates only to "medical records." She held that, based on the scope of the request as determined by her, certain records were not responsive to the appellant's request. As a result, it was not necessary for her to determine whether the exemptions claimed by the ministry for these records applied. She held further that, with one exception, the search conducted by the ministry was reasonable, and ordered a further search for specific records referred to in the Coroner's Report. The adjudicator also ordered the ministry to provide her with copies of the newly located hospital records which had been withheld from the appellant in whole or in part, and required the ministry to submit representations on the exemptions claimed for them.

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

OVERVIEW:

[1] The appellant is the father of a young girl who died in February 2011. He submitted 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 access to the following information:

> …all medical records of my 15 year old daughter, the late [named individual], held at the Office of the Chief Coroner.

[2] The ministry located responsive records and granted partial access to them with severances made to certain records in whole or in part, pursuant to sections 21(2)(f), 21(3)(a), 21(3)(d), and 49(b) (personal privacy) of the *Act*. In the decision, the ministry also indicated that some of the information was removed from the records as it was deemed to be not responsive to the request.

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

[4] During the course of mediation, the appellant advised the mediator that he is not satisfied with the ministry's search for responsive records. In particular, the appellant indicated that the coroner reviewed hospital records from two Ottawa hospitals and that these hospital records were not disclosed to him. Accordingly, the appellant believes that additional records exist.

[5] The ministry conducted a search for additional records and located the specified hospital records. Although the ministry undertook consultations with two Ottawa hospitals with respect to the possible disclosure of these records, it did not address them or issue a decision respecting access to them during the mediation stage of the appeal.

[6] The appellant advised the mediator that he would like to pursue the appeal at adjudication on the basis that additional records exist. He also seeks complete access to the withheld records, including the non-responsive portions. However, the appellant clarified that he is not seeking access to the withheld portions of the following pages of records: 64, 65, 66, 67, 68, 69, 71, 73, 74, 75, 81, 82, 85, 86, 87, 88, 97, 98, 99, 100, 107, 108, 109, 110, 116, 117, 118, 125, 127, 128, 129, 130, 131, 134, 135, 136, 141, 142, 143, 147, 153 and 154. Accordingly, these records are no longer at issue in this appeal.

[7] Further mediation could not be effected and the file was forwarded to the adjudication stage of the appeal process. As of the date of the first party Notice of Inquiry, the ministry had not issued a decision letter with respect to the hospital records that it located as a result of the search that it undertook for additional records during mediation.

[8] Prior to submitting its representations in response to the Notice of Inquiry, the ministry issued three access decisions to the appellant: November 5, 2012, January 9, 2013 and February 1, 2013. The ministry's representations were then provided to this

office, which reflect the discovery and disclosure of additional records, as well as amending the ministry's position regarding records previously disclosed.

[9] In amending its decision regarding access, the ministry added the application of the presumption at section 21(3)(b) (investigation into a possible violation of law) to certain portions of the records.

[10] I then sought representations from the appellant, and provided him with the ministry's representations, in their entirety. The appellant submitted representations in response to the notice that I sent him. After reviewing them, I decided to seek reply representations from the ministry. In doing so, I provided the ministry with a copy of the appellant's submissions, in their entirety. The ministry responded to this office indicating that it would not be making reply representations.

[11] In this interim order, I determine that the scope of the appellant's request is restricted to include "medical records" only. Consequently, I find that none of the records currently at issue in this appeal is responsive to the appellant's request as worded. Accordingly, I do not address the exemptions claimed for these records. I also find that the ministry's search for responsive records was, with one exception, reasonable and I order the ministry to conduct a further search for specific records referred to in the Coroner's Report.

RECORDS:

[12] According to the ministry, the records at issue in this order consist of the withheld portions of e-mails, correspondence and invoices contained within pages 59, 60, 61, 122, 123, 132, 139, 145 and 148.

[13] The appellant contests the ministry's interpretation of the records at issue. I will address this issue, in part, below under issue A.

[14] In his representations, the appellant also refers to the supplementary decisions issued by the ministry referred to above and notes that the ministry did not address the severances made on pages 62, 78, 98, 116, 137 and 147. I will address pages 62, 78 and 137 below. I note that pages 98, 116 and 147 are not at issue in this appeal as the appellant removed them from the scope of appeal during mediation. Accordingly, I will not deal with these three pages further.

[15] I have reviewed the records that were provided to this office and the four decision letters issued by the ministry in which decisions were made to disclose additional records in whole or in part. I agree with the appellant that the ministry's representations did not identify pages 62, 78 and 137 as remaining at issue. Accordingly, I find that the records at issue consist of the withheld portions of pages 59, 60, 61, 62, 78, 122, 123, 132, 137, 139, 144, 145 and 148 (although the ministry

misstated the number in its representations, referring to this page as 146). I will address these 13 pages in this decision.

[16] Moreover, I note that in its November 5, 2012 decision, the ministry indicated that additional records were located, and that it was granting partial access to them. The ministry did not provide these records to this office, nor did it provide an index of records. It became clear after reviewing the ministry's January 9, 2013 decision that a very large number of pages were located as a result of the additional searches that were undertaken. It appears that there may be between 1800 and 1929 additional pages, and very possibly more.

[17] As I noted above, the ministry issued its three supplementary decision letters after the file had been forwarded to the adjudication stage of the appeal and the first party Notice of Inquiry had been sent to it. Following receipt of the November 5, 2012 letter, I sought the appellant's views regarding the additional disclosures to determine whether he was satisfied with them. In my letter to the ministry of December 20, 2012, I wrote:

> After reviewing the additional disclosures resulting from the supplementary decision, the appellant contacted this office to indicate that he wished to continue his appeal of all of the exemptions claimed, and that he wishes to access the non-responsive information as well. I note that the ministry has claimed the same exemptions for the newly located records as were claimed in the initial decision. *The ministry is now being asked to submit representations in response to the Notice of Inquiry sent to it on October 18, 2012 for the records identified in the Notice as well as the newly located records.*[1]

[18] The ministry did not address the newly located records in its representations. In order to avoid any further delay in the processing of this appeal, I have decided to issue an interim order which will address only the records identified in the ministry's initial decision and modified by its supplementary decisions. I will order the ministry to provide me with a copy of the records that were withheld, in whole or in part, that it located and dealt with in its November 5, 2012 decision, and to submit representations on the exemptions that were claimed for them.

ISSUES:

A: What is the scope of the request? What records are responsive to the request?

B: Did the institution conduct a reasonable search for records?

[1] My emphasis.

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[19] The ministry claims that portions of pages 122 and 123 are not responsive to the appellant's request. The appellant disputes this claim. In addition, the appellant believes that more records exist on the basis that the ministry misconstrued his request.

[20] 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).

[21] 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.[2]

[22] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

Representations

[23] In the introduction to its submissions, the ministry states that:

> The appellant requested all medical records related to the death of his daughter. The Ministry complied with this request, and we have released

[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.

> the vast majority of the records to the appellant. The 9 remaining pages (including parts of pages) that are at issue in this appeal happen to be placed among the deceased's medical records, but do not otherwise relate to these records…

[24] The ministry indicates further that the withheld information on pages 122 and 123 contains accounts receivable invoice information about individuals other than the deceased. The ministry submits that this information is not responsive to the request as "there is no nexus between the invoicing information of third party individuals and what has actually been requested (medical records of the deceased)."

[25] With respect to the information on these pages pertaining to the deceased, the ministry notes:

> It is an open question whether even invoicing information about the deceased individual is responsive, and in particular whether it constitutes a 'medical record.'

[26] Nevertheless, I note that the ministry disclosed to the appellant the portions of these pages relating to the deceased on the basis that it "has adopted a liberal interpretation of the appellant's request."

[27] The appellant takes issue with the ministry's interpretation of his request:

> The ministry relies on and asserts in paragraph (1) of their representations that my [access request] was for 'all medical records related to the death of my daughter' and uses this alleged request to justify in paragraph (7) that invoicing information about third party individuals is not responsive to the request. However, the ministry has obviously failed to consider and/or understand my formal signed [access request] (attached as item 1) which clearly states my request to provide a complete copy of <u>all information</u> (including the medical chart) in my daughter's file. Given the ministry failed to understand my request, I am now of the opinion that the ministry has failed to conduct a full search for all information and as a result has only provided information related to the medical records.

[28] In his representations, the appellant indicates that he is seeking answers to questions he has regarding his daughter's death. Therefore, he requests that "no limits be placed on any information that is in some way related to my daughter's file..." The appellant takes the position that the information withheld from the pages at issue relates to the death of his daughter.

Analysis and findings

[29] The ministry's initial access decision has undergone numerous revisions, during mediation and once the file had moved to the adjudication stage. I have reviewed the extensive notes made by the mediator in addressing the issues that arose during mediation. I have also reviewed the written communications of the appellant, the mediator and the ministry. In determining the scope of the request, it is often necessary to review the accumulated effect of the discussions and clarifications made either at the request stage or during mediation.

[30] The initial request is an important starting point in determining the scope of the request, particularly if it is unambiguous, as it defines the parameters of the search that is initially conducted by the institution. It also serves as the focal point for subsequent discussions and clarifications and, where it is unclear as to what the ultimate intentions of the parties are, the initial request will determine the scope of the request for the purposes of determining whether records are responsive and whether the search that the institution conducted for responsive records was reasonable.

[31] In this case, the appellant's initial request[4] stated:

> I, [appellant], request all medical records of my 15 year old daughter, the late [name of daughter], held at the office of the Chief Coroner.

[32] In my view, the appellant's initial request is clear and unambiguous. He is seeking only the medical records relating to his daughter held by the Chief Coroner.

[33] Approximately two weeks after submitting his formal access request, the appellant wrote to the ministry as follows:

> Please accept this formal request of information (ROI) to provide a complete copy of all information (including the medical chart) of our daughter, [name of daughter] on a compassionate basis…

[34] It is clear that the appellant has amended his request to indicate that it is being made pursuant to the compassionate grounds provision in section 21(4)(d) of the *Act*, which was not clear from the original request. The amendment also makes it clear that the appellant wishes his daughter's medical chart to be captured by his request. In my view, the appellant's request for "all information" is somewhat ambiguous, particularly when viewed in the context of his original request. However, given his focus on "medical records", I find that it was not unreasonable for the ministry to interpret this amended request as pertaining to the same types of records as initially requested, which it clearly identified in the first paragraph of its decision letter:

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[4] The appellant's initial request was made using the standard "Request Form" for making access requests under the *Act*.

> [P]lease be advised that partial access is granted to the requested medical records from the Office of the Chief Coroner relating to your daughter.

[35] In the appellant's letter of appeal, his focus was clearly on medical records, and in particular, the medical chart relating to his daughter:

> Our ROI included the medical chart of our late daughter…Access to the medical chart was denied as outlined in the attached decision letter. This appeal can be resolved by providing us with a copy of our daughter's medical chart…

[36] In reviewing the communications between the appellant and the mediator during the mediation stage of the appeal, I note that in all communications, the appellant refers only to the medical records relating to his daughter, and this was the only type of information discussed by the mediator and the ministry. Had the appellant expected to include all records that the ministry might have pertaining to his daughter, including any records of a non-medical nature contained in his daughter's file, this could have been clarified during mediation, but the appellant did not do so during any of his discussions with this office.

[37] Based on the totality of the evidence before me, I conclude that the appellant's intention in amending his initial request was not to expand the scope of the request to all information pertaining to his daughter. Rather, his intention was to clarify that he was seeking all medical records, including the medical chart pertaining to his daughter on the basis of the compassionate grounds provisions in section 21(4)(d) of the *Act*.

[38] Accordingly, I will only consider whether the ministry's search for medical records was reasonable.

[39] Further, I agree with the ministry that the withheld information on pages 122 and 123 is not responsive to the appellant's request. Similarly, although not identified by the ministry, I find that the withheld information on page 78, which contains the name and identifying information about another unrelated individual, is also not responsive to the appellant's request as this information is unrelated to the medical records pertaining to his daughter.

[40] The ministry has claimed exemptions for a number of other pages that were contained in the files pertaining to the appellant's daughter. However, after reviewing them in light of the scope of the appellant's request as indicated above, I conclude that they do not contain, nor do they refer to or imply any information of a medical nature. Accordingly, I find that none of the withheld information on the remaining pages is responsive to the appellants request for the following reasons:

- Pages 62, 132, 144, 145 and 148 – the withheld information on these pages comprises the personal email addresses of the individuals identified in the records. Although these individuals have been identified in their professional capacities, the email exchanges were conducted using their personal email addresses. This information does not contain, nor does it relate to the medical records of the appellant's daughter.

- Pages 59 to 61 – These pages pertain to an investigation into the conduct of a named member of a profession. This record results from a complaint into the standard of care given to the appellant's daughter, and thus pertains to the daughter. However, these pages are administrative in nature and although they list typical post mortem documents, they do not contain, nor would their disclosure reveal any information that is contained in the medical records of the appellant's daughter.

- Page 137 – This page contains an email from a funeral home to the ministry relating to the appellant's daughter's remains and the actions taken by the appellant with regards to their disposition. This page does not contain, nor does it refer to information contained in the appellant's daughter's medical records.

- Page 139 – The undisclosed portion of this page contains a personal comment made by the author of the letter about herself, which has nothing to do with the medical records of the appellant's daughter.

[41] On a final note, I appreciate that the appellant is seeking answers regarding the death of his daughter and has asked that I take an expansive approach in dealing with the issues in this appeal, including the parameters of his request. I have determined that the ministry reasonably interpreted his request as pertaining only to medical records. I note that the ministry has provided the appellant with the vast majority of the records which are responsive to his request. The ministry has also disclosed the substantive portions of most of the records at issue, even though they do not actually contain or refer to the information contained in the medical records which were provided to the Coroner on the basis that they are reasonably related to the appellant's request.

[42] The above records which I have found to contain non-responsive information do not pertain to the circumstances of the appellant's daughter's death, nor would they reveal anything of a medical nature. All of these records were created as a result of the appellant's pursuit of answers following his daughter's death and the post mortem that was subsequently conducted. For all these reasons, I find that they are not reasonably related to the appellant's request for medical records. To find otherwise would significantly expand the scope of his request. Although the appellant may be disappointed with this result, he is not precluded from seeking further access to other records pertaining to his daughter in the custody or control of the ministry.

[43] As a result of my conclusions set out above, I will not determine whether any of the exemptions claimed for these pages apply in the circumstances of this appeal. The sole remaining issue is whether the ministry conducted a reasonable search for responsive records.

Issue B: Did the institution conduct a reasonable search for records?

[44] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[5] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[45] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[6] To be responsive, a record must be "reasonably related" to the request,[7]

[46] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[8]

[47] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[9]

[48] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[10]

[49] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[11]

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[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Order PO-2554.
[8] Orders M-909, PO-2469, PO-2592.
[9] Order MO-2185.
[10] Order MO-2246.
[11] Order MO-2213.

Representations

[50] The ministry provided an affidavit sworn by the Issues Manager of the Office of the Chief Coroner and the Ontario Forensic Pathology Service (the manager). The manager indicates that she is responsible for responding to all access requests made under the *Act* and that she has held this position for a number of years. The manager notes that the original search for responsive records was conducted by a former colleague and that she only became involved after the appeal was initiated.

[51] The manager explains how case files are typically handled in the office of the Chief Coroner:

> All case files are opened by one of ten regional offices around the province once we accept cases for investigation, pursuant to section 10 of the Coroners Act. Those files are then closed at the conclusion of the investigation and are forwarded to the head office of the Office of the Chief Coroner located at 26 Grenville Street, Toronto where they are retained for a period of two years at which point they are sent to the Government of Ontario's records storage facility as their final destination.

[52] The manager indicates that she spoke with her former colleague about this access request prior to her departure from the office of the Chief Coroner. The colleague provided the manager with the complete contents of the regional case file which was being held at head office. The colleague also advised the manager that she did not seek records from the investigating coroner.

[53] The manager states that she then contacted the Regional Supervising Coroner at the regional office in question and through him was able to obtain the investigating coroner's complete documentation, which consisted of the appellant's daughter's medical file. The manager confirms that she copied the entire contents of the medical file that was delivered to her and the regional case file and provided them to the Freedom of Information and Privacy office.

[54] She concludes:

> I believe that the search has been diligent and thorough because responsive records about a decedent individual in the circumstances of this situation would only be held by the Office of the Chief Coroner or the investigating coroner…

[55] In my letter to the ministry dated December 20, 2013, I noted that the appellant had identified certain specific pages of the records that he believed should exist:

> [T]he appellant notes that pages 1-157, 1928 and 1929 are missing and that there is no explanation as to why they are missing…He believes these pages exist, that they are responsive to his request, and wishes to obtain access to them.
>
> In addition, he indicates that he asked for "soft" copies of the hospital records…

[56] In its representations, the ministry confirms that pages 1-157, 1928 and 1929 were resent to the appellant (severed as indicated above). In my view, this issue has been satisfactorily resolved.

[57] With respect to the appellant's request for a copy of the hospital records in electronic format, the ministry states:

> [W]e do not have digital ('soft' copies) of hospital records, as we are not the primary record keeper. Instead, we only have the paper copies that were supplied to the [Office of the Chief Coroner].

[58] I am satisfied, based on the ministry's response, that the hospital records the appellant is seeking from the coroner's office are not available in electronic format. The appellant has indicated that he is seeking the hospital records that the coroner reviewed and which are located at the Office of the Chief Coroner. These records have been identified and have been provided to the appellant, in whole or in part.

[59] Following the November 5, 2012 decision issued by the ministry, in which it identified and disclosed the hospital records, I requested that the appellant identify specific information from the hospital records that he believed was missing from the records that were disclosed to him. Referring to the last paragraph on page 23 of the records initially identified by the ministry as being responsive to his request, the appellant states:

> [t]he pathologist refers to the clinical records from the Ottawa Hospital and states that tissue was obtained at bronchoscopy on January 24th. He further refers to the culture results from specimens obtained January 18th and 24th indicating a bronchoscopy procedure must have been performed on these dates. The clinical records referred to by the pathologist are missing…

[60] Having considered all of the representations, I am satisfied that the search was conducted by a knowledgeable employee. I am also satisfied that the only locations that would house responsive records are the head office of the Chief Coroner or the investigating coroner's office within the Coroner's Regional offices. In this case, the manager has provided a sworn affidavit in which she affirms that she obtained and copied the "complete" case files from both locations. With one exception, I accept her evidence that all records responsive to the appellant's request have been located. Accordingly, I find that, with one exception, the ministry's search for responsive records was reasonable.

[61] As I noted above, the *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. The manager indicated in her affidavit that she contacted the Regional Supervising Coroner at the regional office in question in order to obtain "the investigating coroner's complete documentation." However, the appellant has provided a reasonable basis for believing that the information he identified relating to tests or procedures conducted on specimens should exist as it was referred to in the Coroner's Report[12]. This information was provided to the ministry, yet it appears that the ministry did not go back to the regional office to confirm that the entire file had been provided to the manager from the regional office or that she had, in fact, copied the entire file. In other words, it does not appear that the manager double-checked the information she obtained to make sure that she had received and copied the entire file. If she did, this was not communicated to me as the ministry chose not to submit reply representations.

[62] As a result, I am not satisfied that the search of the hospital or investigating coroner's records for the clinical records referred to by the appellant was reasonable and I will order the ministry to conduct a further search for these records.

INTERIM ORDER:

1. The withheld portions of the records at issue are not responsive to the appellant's request as worded.

2. The ministry's search for the tests/procedures and or specimens referred to in the Coroner's Report (last paragraph on page 23 of the records) was not reasonable.

3. I order the ministry to conduct a further search for the records referred to in interim order provision 2. In particular, the ministry should conduct a search of the investigating coroner's file relating to the appellant's daughter.

[12] The reference to these tests and procedures is found on page 23 of the records.

4. After conducting the search referred to in provision 3 of this interim order, I order the ministry to provide **a decision letter** to the appellant in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request.

5. I order the ministry to provide me with copies of the pages of the newly located hospital records which were withheld in whole or in part in accordance with its **November 5, 2012** decision letter. The copies of these records should indicate the exemptions claimed for each severance.

6. I order the ministry to provide me with representations on the application of the exemptions claimed for the newly located hospital records.

7. I order the ministry to provide the records and representations referred to in interim order provisions 5 and 6 by **March 17, 2014**.

8. I remain seized of the outstanding issues in this appeal.

Original Signed By: February 24, 2014
Laurel Cropley
Adjudicator