Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3399

Appeal PA13-555

Ministry of Health and Long-Term Care

September 19, 2014

Summary: The only issue in this appeal is whether the ministry conducted a reasonable search for a record responsive to the appellant's request. This order finds that the ministry does not have custody or control of the responsive record and upholds its search as reasonable. The appeal is dismissed.

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

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a Small Claims Court action. The request was subsequently clarified by the appellant as follows:

1. A signed copy of April 9, 2009 Peer Medical Letter Report of [named individual], CGS, to the CPSO [College of Physicians and Surgeons of Ontario]. A copy is first attached – but with the deleted letterhead for – and signature of – said [named individual], CGA.

2. All MOH instructions directly or indirectly: given to said [named individual] (*also* including his agreed to dollar or other compensation),

for authoring said Letter Report, as all documented in their filed records, and also including as held by their legal counsel The Crown Law Office (hereinafter called "MAG").

3. All other correspondence and notes of any nature or kind, regarding said referenced Report Letter.

4. Instructions from the MOH to MAG, regarding the "scope" of their legal retainer to act for them and for their [named individual], for all of the pre-litigation and current-litigation matters, documented & noted.

5. Copies of all Reporting Letters & Invoice Billings from said counsel to the MOH and [named individual].

6. Regarding the "John Gotti Rule", all documents, notes and other items exchanged as between – MAG and the MOH & [named individual], and as well any communications between the MOH or MAG, with the CPSO or CMPA [Canadian Medical Protective Association], and their respective insurers (HIROC for the CPSO) regarding all these said matters.

7. All correspondence and notes as between [named counsel] and his senior team leader at MAG, regarding instructions for the litigation in the matter of said [named individual] Letter Report to the CPSO, and the [named individual] Defence in said litigation and in the matter of [the appellant's] filed complaint with the "Certified General Accountants of Ontario" regarding said [named individual's] conduct in writing a peer medical specialist report while being an officer manager accountant for the MOH in Kingston, ON.

8. Copies of all correspondence, notes and instructions: by and from the MOH or MAG, with OHIP and The Health Care Fraud, Anti-Rackets Branch – of the OPP, and including any responses thereto from said referenced OHIP or OPP, as same are documented and-or noted. This would also include the legal-financial arrangements as between the MOH and said Branch of the OPP controlled by the MOH.

[2] The ministry identified responsive records and issued a decision to the requester, granting him partial access to them. The ministry advised the requester that portions of the records were withheld under sections 19(a) (solicitor client privilege) and (b) (records prepared by or for Crown counsel for giving legal advice or in contemplation of or for use in litigation) of the *Act*.

[3] With respect to part 1 of the request, the ministry advised that it did not have a signed copy of the requested document in its record-holdings. In addition, the ministry advised that it does not have any information regarding the identity of the author of that letter.

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

[5] During mediation, the appellant advised the mediator that the sole issue under appeal is access to an unsevered copy of a letter written by an identified individual to the CPSO dated April 4, 2009, not April 9, 2009. The appellant also confirmed that the portions of the records denied pursuant to section 19 of the *Act* are not at issue in this appeal. As a result of the appellant's clarification regarding the date of the requested record, the mediator asked the ministry to conduct an additional search. Subsequently, the ministry advised the mediator that it conducted an additional search and that it located a letter dated April 4, 2009. The ministry advised that this letter was not initially deemed responsive to the original request as the letter was not signed and was not dated April 9, 2009. The ministry further advised that it received this letter from the appellant as an attachment to the Statement of Claim in his Small Claims Court action. The ministry confirmed that it does not have a signed, unredacted copy of the letter dated April 4, 2009.

[6] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry to the ministry, seeking its representations on whether it conducted a reasonable search for responsive records. The ministry submitted representations. I then invited the appellant to make representations in response to the Notice of Inquiry and the ministry's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*. The appellant also submitted representations.

[7] In the discussion that follows, I uphold the ministry's search as reasonable and dismiss the appeal.

DISCUSSION:

Did the ministry conduct a reasonable search for records?

[8] 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 of the *Act*.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[1] Orders P-85, P-221 and PO-1954-I.

[9] 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 made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[10] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[11] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

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

[13] In its representations, the ministry submits that it conducted a reasonable search for the record requested by the appellant. The ministry states that the appellant's original request was for "a signed copy of April 9, 2009 Peer Medical Report of [named individual] to the CPSO". At the start of mediation, the appellant advised the ministry that the letter at issue is, in fact, dated April 4, 2009. The appellant attached a copy of the requested letter in which the letterhead and signature information was deleted with his request. The ministry states that the letter accompanying the appellant's request is not a signed copy of the Peer Medical Report requested.

[14] The ministry advised that it conducted a search for a Peer Medical Letter Report authored by the individual identified in the appellant's request to the CPSO dated April 4, 2009. The ministry states that it located one record that only approximated the requested record: an unsigned letter dated April 4, 2009, addressed to a CPSO Investigator that was attached to a Statement of Claim served by the appellant to the ministry in 2010 and filed with the Small Claims Court. The ministry states that during mediation it confirmed that it does not have a signed copy of this letter.

[15] In its representations, the ministry provided some background with regard to the appellant's claim filed with the Small Claims Court against the ministry, the individual identified in his request (who was the manager of the ministry's Independent Health Facility Program at the time) and two employees of the CPSO. The ministry states that the appellant's claim appears to relate to his experiences at a licensed Independent

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

Health Facility (IHF) sleep clinic and his interactions with the ministry's IHF Program staff, including the individual identified in the appellant's request. The appellant had a complaint related to the licenced IHF sleep clinic he attended for diagnosis of a sleep disorder.

[16] The ministry explains that sleep studies are insured health services under the Ontario Health Insurance Plan (OHIP). The ministry states that OHIP covers overnight sleep studies to a maximum of two studies in a 12 month period. However, the ministry states that this maximum may be exceeded if prior written authorization is obtained from the ministry. The appellant's physician submitted a request to the ministry for a third sleep study. When that request was initially denied, the appellant began corresponding with the ministry's IHF Program staff, including the individual named in his request. In the course of that correspondence, the individual named in the appellant's request advised the appellant that his request for the funding for an additional sleep study would be reviewed by the ministry. The third sleep study was ultimately approved by the ministry.

[17] The ministry states that the appellant's claim against the CPSO appears to indicate that while the appellant was engaged with the ministry's IHF Program staff, he also initiated a complaint against the physician associated with the sleep clinic where he received his first sleep study services. That complaint was made to the CPSO. In response to the complaint, the ministry states that the CPSO retained an independent expert (not a ministry employee) to conduct a review of the physician's care of the appellant. The ministry states that, according to the materials provided to it by the appellant, that expert's opinion was conveyed to a CPSO investigator. The CPSO's expert concluded in a letter dated April 4, 2009 that the physician's care of the appellant was acceptable, and that it met the standard of practice of the profession. The ministry states that this is the record it located when it conducted its search and that this copy, which was provided to it by the appellant, is unsigned.

[18] The ministry reiterates that the unsigned letter dated April 4, 2009 was provided to the ministry by the appellant as an attachment to his Statement of Claim in his Small Claims Court Action. The ministry states that it would not have a copy of even the unsigned version if the appellant had not provided it to the ministry.

[19] The ministry states that it was not involved and had no role in the CPSO's investigation of the care the appellant received from the physician involved. As a result, the ministry states that there was no reason for the ministry to have a copy of the April 4, 2009 letter, signed or unsigned.

[20] The ministry states that the unsigned April 4, 2009 letter provided by the appellant to the ministry contains extensive and detailed personal health information about the appellant. The ministry states that under the *Personal Health Information Protection Act, 2004* (*PHIPA*), it does not have the authority to collect such personal

health information indirectly, from the CPSO or its expert, without the individual's (i.e., the appellant's) consent. Moreover, the ministry states that it does not have the authority under *PHIPA* to require the CPSO to disclose personal health information of this nature to the ministry's IHF program. Therefore, the ministry submits that if a signed version of the April 4, 2009 letter exists in its records, the ministry could only have received a copy of it directly from the appellant because it contains his personal health information.

[21] In light of the above, the ministry submits that the issue in this appeal is not whether it conducted a reasonable search for the requested record, but whether the record exists in the ministry's records or files at all. The ministry asserts that the individual identified in the appellant's request did not and could not have written the requested record because he was not a physician and, therefore, did not have the expertise to do so. Further, if an unredacted version of the requested record was signed and sent to the CPSO by the individual identified in the request, the ministry submits that only the CPSO could confirm that such a letter exists. The ministry states that it does not have custody or control of any letter written and sent by the individual identified in the appellant's request to the CPSO, and that it does not have custody or control of an unredacted and signed version of the letter dated April 4, 2009. The ministry submits that the appellant has not provided any factual basis for his belief that the ministry has custody or control over the requested record.

[22] The appellant filed representations that were supplemented by a Book of Documents that include information that the appellant submits is relevant to his appeal, including background information relating to his claim against the ministry, the individual identified in his request and the CPSO. In his representations, the appellant asserts that the ministry has an unsevered copy of the record at issue in its records. However, the appellant submits that if the copy of the original letter is not in the ministry's files, it is because the ministry has destroyed the record.

[23] In addition to arguments regarding the requested record, the appellant outlines his concerns that the ministry, the justice system, the CPSO and the individual identified in the request have engaged in a conspiracy to cover up their incompetence and contravention of their duties to the public. It appears that the appellant believes that in furtherance of this conspiracy, the ministry has improperly withheld the requested record which would confirm his allegations of misconduct and corruption.

[24] I note that the appellant has raised a number of additional issues with regard to the competence and integrity of the IPC mediator, the judicial system, the ministry and the CPSO. These issues are outside the scope of this inquiry and I will not consider them in this decision.

[25] Upon review of the parties' representations, I uphold the ministry's decision. As indicated above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, in this case, I am satisfied that the ministry has provided me with sufficient evidence to demonstrate that it does not have custody or control over the requested record. In its representations, the ministry provided a thorough explanation of the appellant's history with the CPSO and his claim against the CPSO and the individual identified in the request. The ministry has also provided a thorough explanation as to why it does not have custody or control of the requested record.

[26] As discussed above, although a requester will rarely be in a position to indicate precisely which record the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist. In my view, while it is clear that the appellant believes that the ministry has a copy of the responsive record, he has not provided a reasonable basis for this conclusion. I have reviewed the circumstances of this appeal, the parties' representations and the appellant's book of documents and background material and find that the appellant has not provided a reasonable basis for his allegation that ministry has custody or control of the responsive record. In particular, I accept the evidence of the ministry that it never received a complete, unredacted version of the record from the CPSO and that it only has a copy of the unsigned letter that was provided to it by the appellant. In this particular context, I am satisfied that the ministry does not have custody or control over the responsive record.

[27] Furthermore, although the appellant alleges that the ministry has destroyed the responsive record, he has provided no evidence to prove this allegation. In fact, I find that the ministry has provided me with sufficient evidence demonstrating that it does not have, and likely never had, custody or control over the responsive record. As such, I find that there is no reasonable basis for the appellant's allegation that the ministry had custody or control over the responsive record and destroyed it.

[28] Accordingly, based on the information provided to me, I find that the ministry's search for records responsive to the appellant's request was reasonable for the purposes of section 24 of the *Act*.

ORDER:

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

Original Signed By: September 19, 2014
Justine Wai
Adjudicator