Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3401

Appeal PA13-556

Ministry of the Attorney General

September 24, 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 the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a Small Claims Court action involving the requester. Specifically, the requester advised that records responsive to his request should include the following:

- Records containing communications between staff of the Ministry of Health and Long-Term Care (Ministry of Health) and their counsel at the Ministry of the Attorney General pertaining to the requester's Small Claims Court action

- A signed copy of a letter from a named employee of the Ministry of Health dated April 4, 2009 to the College of Physicians and Surgeons of Ontario (the CPSO)

- "All written communication from the [Ministry of Health], by themselves or via their legal counsel, in re the instructions to the OPP Health Care Fraud, Anti-Rackets Branch… not to investigate this matter of medical injury and doctor billing fraud in any way whatsoever, at any time…"

[2] The ministry issued a decision to the requester. With regard to the first part of the request, the ministry advised that it denied the requester access to the responsive records pursuant to 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 the second part of the request, the ministry advised that a signed copy of the April 4, 2009 letter does not exist in its records. Further, the ministry advised that it does not have any information regarding the author of the letter. The ministry also suggested that the requester may wish to contact the College of Physicians and Surgeons of Ontario for any further information relating to the letter.

[4] Finally, with respect to the request for written communications from the Ministry of Health and its counsel at the Ministry of the Attorney General containing instructions to the Ontario Provincial Police, the ministry advised that their information is that no such instructions were given and, therefore, no such records exist.

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

[6] During mediation, the appellant advised the mediator that the only issue under appeal is his request for access to an unsevered copy of a letter dated April 4, 2009 to the CPSO from a named employee at the Ministry of Health. As a result, the records withheld from disclosure under section 19 of the *Act* are not at issue in this appeal.

[7] 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.

[8] 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?

[9] 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.

[10] 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]

[11] 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]

[12] 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]

[13] 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]

[14] In its representations, the ministry submits that it conducted a reasonable search for responsive records and that an unsevered copy of the responsive record is not currently, and has never been, in its possession. The ministry asserts that the only version of the record in its possession is the unsigned and redacted version that was provided to it by the appellant.

---

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

[15] The ministry attached the affidavit of its legal counsel, who had sole carriage of the appellant's related Small Claims Court action and conducted the search for responsive records. In the affidavit, the ministry's legal counsel states that he is the counsel of record for Her Majesty the Queen in right of Ontario and for the employee of the Ministry of Health and Long-Term Care named in the appellant's request (the individual identified in the request), who are defendants in an action brought in the Toronto Small Claims Court by the appellant. The ministry's legal counsel states that, from reading the appellant's allegations as set out in his claim, his concerns appear to arise out of a complaint with respect to a sleep disorder clinic he attended for diagnosis of a potential sleeping disorder. The ministry's legal counsel states that the clinic is a licensed Independent Health Facility (IHF) and sleep studies are an insured health service under the Ontario Health Insurance Plan (OHIP). The ministry's legal counsel states that OHIP coverage is generally limited to funding a maximum of two overnight sleep studies in any 12 month period. However, this limit of two studies per 12 month period may be exceeded if written prior authorization is obtained from the Ministry of Health.

[16] The ministry's legal counsel states that, upon review of the documents provided from the Ministry of Health that are relevant to the appellant's claim, it appears that a request for a third sleep study was submitted on the appellant's behalf by his physician, but was initially denied. The ministry's legal counsel states that the appellant had further communications with employees of the Ministry of Health, including the individual named in the request, who was the Program Manager of the Ministry of Health's IHF Program. As a result of these communications, the individual named in the request advised the appellant that his request for funding for a third sleep study would be reviewed by the Ministry of Health. The appellant was later advised by his physician that the additional sleep study would be eligible for payment through OHIP.

[17] From reviewing the appellant's claim, the ministry's legal counsel states that it is his understanding that the appellant brought a complaint against the physician associated with the first sleep clinic where he received services to the CPSO. The ministry's legal counsel states that the appellant attached a letter dated April 4, 2009 as an exhibit to his claim. It is this record that is the subject of the request in this appeal, in an unsevered form. The ministry's legal counsel states that this letter is addressed to an Investigator in the CPSO's Investigations and Resolutions Division, and appears to be the opinion of an independent expert retained by the CPSO to review the substance of the appellant's complaint. The ministry's legal counsel states that the opinion concludes that the care provided to the appellant met the standard of practice of the profession. The ministry's legal counsel states that the copy of the letter that was attached to the appellant's claim has no signature.

[18] The ministry's legal counsel states that the appellant indicated in his Small Claims Court claim and in correspondence to the ministry that he believes that the individual identified in the request is the author of the April 4, 2009 letter. According to the

ministry, it appears that the appellant further believes that the individual identified in the request and CPSO investigators were engaged in a conspiracy to harm him. The ministry's legal counsel states that he does not know why the appellant believes this. From reviewing the correspondence between the appellant and the individual identified in the request, the ministry states that it appears that the individual identified in the request's sole involvement with the appellant's matter was to advise him that his request for funding for a third sleep study would be reviewed by the Ministry of Health after it had been denied, initially. The ministry's legal counsel submits his conclusion that the letter of April 4, 2009 was written by a third party independent expert for the purpose of assessing the merits of the appellant's complaint to the CPSO and not by someone from within the Ministry of Health, such as the individual identified in the request.

[19] With regard to the search for records responsive to the appellant's request, the ministry's legal counsel states that, as counsel of record for the Ministry of Health and the individual identified in the request, he has access to all the records within the Ministry of the Attorney General that are related to this litigation and his clients' defence. As such, it was his responsibility to search for any records within the ministry that could be responsive to the appellant's request. In conducting the search, the ministry's legal counsel states that he reviewed the complete paper and electronic files in his possession for all responsive records. In the course of his search, the ministry's legal counsel reviewed all e-mail correspondence, including emails stored on the ministry's Crown Law Office – Civil (CLOC) servers and in the Outlook local mail storage drives, the paper correspondence brad, all electronic documents stored in every subfolder devoted to this file in CLOC's servers and the entire paper file that he compiled in the course of this matter.

[20] The ministry's legal counsel states that the only copy of the letter dated April 4, 2009 that is in the custody or control of the ministry is the copy that the appellant attached as an exhibit to his Small Claims Court claim, which has the signature redacted.

[21] The ministry's legal counsel states that he requested the Ministry of Health to provide him with a copy of all relevant documents in its possession to assist in the defence against the appellant's claim. The ministry's legal counsel advises that the Ministry of Health confirmed that it does not have an unsevered copy of the requested record in its custody or control.

[22] Therefore, the ministry's legal counsel states that neither the Ministry of the Attorney General nor the Ministry of Health have a copy of an unsevered copy of the requested record in their custody or control. The ministry's legal counsel states that this is unsurprising, as the document appears to be solely related to the investigation of the CPSO into a complaint made by the appellant and appears to have been provided to the appellant by the CPSO as information relevant to his complaint to that body.

[23] In light of the above, the ministry submits that although the issue set out in the Notice of Inquiry is whether it conducted a reasonable search for records, there is a significant factual dispute between the parties regarding whether the letter dated April 4, 2009 exists in its record-holdings. The ministry submits that the appeal should be dismissed under section 50(2.1) of the *Act* as there is no reasonable basis for the appellant's conclusion that the record he requested actually exists. In the alternative, the ministry submits that the appeal ought to be dismissed on the ground that the ministry has demonstrated that it has conducted a reasonable search for an unsevered version of the letter dated April 4, 2009.

[24] In response to the ministry's representations, the appellant filed representations that were supplemented by a Book of Documents that includes information that the appellant submits is relevant to his appeal, including background information relating to his claim against the Ministry of Health, the individual identified in the request and the CPSO. The appellant asserts his belief that the individual identified in the request authored the letter dated April 4, 2009 and that it is impossible that anyone other than that individual could have written the letter. The appellant also submits that if the ministry does not have an unsevered copy of the record, it is because the ministry has destroyed the record.

[25] In addition to arguments regarding the requested record, the appellant outlines his concerns that the ministry, the Ministry of Health, the justice system, the CPSO and the individual identified in his 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 either improperly withheld or destroyed the requested record which would confirm his allegations of misconduct and corruption.

[26] I note that the appellant also raised a number of additional issues with regard to the competence and integrity of the IPC mediator, the judicial system, the ministry, the Ministry of Health and the CSPO. Having reviewed these issues, I find that they are outside the scope of this inquiry and will not consider them in this decision.

[27] 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 an unredacted copy of the letter dated April 4, 2009 does not exist in its record holdings. In its representations, the ministry and the ministry's legal counsel provided a thorough explanation of the appellant's claim against the Ministry of Health, 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. Moreover, I find that the ministry's legal counsel provided a clear and detailed

description of the search he conducted to locate records responsive to the appellant's request.

[28] While it is clear that the appellant believes that the ministry has or should have a copy of the responsive record, I find that 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 materials and find that the appellant has not provided a reasonable basis for his allegation that the ministry has a copy of the responsive record and destroyed it. 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 with his Small Claims Court claim. In this particular context, I am satisfied that the ministry does not have a copy of an unredacted version of the responsive record in its record-holdings.

[29] Furthermore, although the appellant submits that the ministry 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 to establish that it does not have 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.

[30] 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 24, 2014
Justine Wai
Adjudicator