

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3674

Appeal PA14-583

Ministry of Community Safety and Correctional Services

December 7, 2016

Summary: The ministry received a request for all photographs relating to a fatal motor vehicle accident involving the requester's son. The ministry located records responsive to the request and granted access to them. The requester appealed the decision on the basis that additional photographs should exist. Accordingly, the sole issue to be decided in this appeal is whether the ministry conducted a reasonable search for records responsive to the request. In this order, the adjudicator upholds the ministry's search as reasonable and dismisses the appeal.

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

Orders and Investigation Reports Considered: Order PO-3559.

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 access to all photographs related to a fatal motor vehicle accident involving the requester's son. Specifically, the requester sought access to photographs including those taken at the scene of the accident, photographs of all Centre for Forensic Science (CFS) seal numbers, photographs of all specimens or samples taken, and all autopsy photographs.

[2] The ministry granted partial access to the responsive records. Portions of the records were denied pursuant to the discretionary personal privacy exemptions at

section 49(a), read in conjunction with the law enforcement exemption at section 14(1)(l), and section 49(b) of the *Act*. The ministry advised that in reaching its decision, it considered section 21(4)(d) of the *Act* which allows for the disclosure of personal information belonging to a deceased individual, to a close relative, where it is desirable for compassionate reasons.

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

[4] During mediation, the appellant advised that she does not dispute the exemptions claimed but is of the view that additional photographs should exist. Specifically, the appellant takes the position that photographs of her son's brain and other specific specimens or samples assigned with CFS seal numbers should exist.

[5] The ministry advised that it had provided all of the responsive records to the appellant and that no additional records exist.

[6] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage for an adjudicator to conduct an inquiry. During the course of my inquiry into this appeal, representations were sought and received by both parties. The parties' representations were shared pursuant to the principles set out in *Practice Direction 7*.

[7] The sole issue to be determined in this appeal is whether the ministry has conducted a reasonable search for responsive records. In this order, I uphold the ministry's search for responsive records. My reasons follow.

DISCUSSION:

Did the ministry conduct a reasonable search for responsive records?

[8] The ministry asserts that it has located all records that are responsive to the request. The appellant takes the position that additional responsive records should exist. 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 24.¹ 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.

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

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

[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 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

[11] 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

Representations

[12] The ministry submits that it has conducted a reasonable search for the records responsive to the appeal, and that it has fully discharged its duties under the *Act*. To support its position, it has enclosed an affidavit sworn by the ministry's Manager of the Freedom of Information and Protection of Privacy Unit (the manager) attesting to the efforts undertaken by her, on behalf of the ministry, to locate records responsive to the request.

[13] The manager submits that when she received the request for photographic records (as set out above) she determined that as the request was clear she did not need to seek additional clarification from the appellant.

[14] She submits that she began her search for responsive records by examining the Ontario Provincial Police (OPP) investigative file, which was already in her possession as a result of a previous request and appeal, related to the same incident and involving the same appellant. She submits that as a result of the previous request, she is familiar with the investigative file and was able to locate all photographs taken by the OPP.

[15] She submits that she then contacted individuals with the Centre of Forensic Sciences (CFS) and the Office of the Chief Coroner (OCC) inquiring as to whether they could locate additional photographs responsive to the request. She submits that both individuals, who are responsible for responding to Freedom of Information requests within their respective program areas, advised her that it is not within the regular business practice of either the CFS or the OCC to take photographs. As a result, she submits that she determined that the only responsive photographs that exist would be those that were taken by the responsive police service, the OPP.

[16] The manager submits that she has, in her possession, the entire OPP investigative file related to the incident and that she has located all of the responsive records contained within it. She submits that no additional responsive records exist. She further submits that given that the requested records relate to a relatively recent OPP investigation, she is satisfied based on existing practice and procedure that any

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

responsive records that were created have not been destroyed.

[17] She concludes her affidavit with the statement:

I believe that my search for records has been diligent and thorough, in that I have thoroughly examined the OPP investigative file, and contacted personnel from the OCC and the CFS to confirm that they do not have responsive records.

[18] Together with her representations, the appellant enclosed a number of records that have already been disclosed to her, in full or in part, by the ministry as well as information that was communicated to her by OPP officer in response to her queries about the file. In her representations she identifies a number of CFS seal numbers on samples of biological fluids for which photographs are missing. That is, photographs that were not among those which were disclosed to her by the ministry.

[19] The appellant refers primarily to two documents to support her view that additional photographs should exist. First, she refers to a CFS Case Submission form which lists a number of CFS seal numbers and identifies the samples to which they relate. This form identifies CFS seal numbers 2J72626 and 2J72627 as sealing the Styrofoam box containing biological samples. The second document is an email chain of an exchange that she had with an officer at the Kapuskasing OPP detachment in October, 2013. In that email chain, the officer confirms from OPP files that samples were contained in a styrofoam box sealed with CFS seal numbers 2G03868 and 2G03869 and that among those samples was a vial of blood taken from the post-mortem examination sealed with CFS seal number 2G03873. The appellant submits that photographs of all those CFS seal numbers, 2J72626, 2J72627, 2G03868, 2G03869 and 2G03873 are missing from the photographs that were disclosed to her and it is her belief that they should exist. She also references other documents, such as police notes, which refer to some of these CFS seal numbers.

[20] Additionally, with respect to the biological sample that is under CFS seal number 2G03872, the appellant reproduced the two photographs taken of that sample that were disclosed to her by the ministry. The first photograph is of a blue box presumably containing a sample and the last part of the seal number which is wrapped around the box is visible. The second photograph is of another side of the blue box which presumably contains the sample without any portion of the label or other specific identification visible. The appellant submits that she believes that the police are "deliberately refusing to release the photograph(s) of the entire CFS seal number 2G03872 section that wrapped around the bottom of the package which should identify the date, time, name of deceased, type of samples seized and the name of agent who seized the samples."

[21] The appellant submits that coincidentally, all of the CFS seal numbers which were not photographed 2G03873, 2G03868, 2G03869 and CFS seal number 2G03872 which was photographed online in part, are all related to the "first issued warrant for post-mortem examination." She submits that the police, the CFS and the coroner all

deny the existence of this first warrant and she believes that this is why the police are either refusing to release the photographs of these seals or they have already been destroyed "because they knew upon the first issued warrant for post-mortem examination that [her] son was a passenger and not the driver."

[22] The appellant also submits that she believes that there are additional photographs relating to her son's cranial matter that did not form part of the photographs that were disclosed to her. She submits that photographs of her son's brain injuries and skull taken during the post-mortem examination were filed in court. However, she submits that none of those photographs figured among the photographs contained on the DVD containing the photographs that were disclosed to her by the ministry. She submits that following the post-mortem examination her son's brain was retained without her knowledge and that the police have stated that they were not aware of this fact. She submits that the police were aware that her son's brain was removed during the autopsy but that they did not inform her and she believes that this is why the ministry is "refusing to release the remaining photographs from [her] son's post-mortem examination."

[23] In reply, the ministry submits that it is of the view that they have already explained why there is a discrepancy in the CFS seal numbers that were used which was outlined in their representations for the appeal that gave rise to Order PO-3559 and set out in paragraph 25 of that order. To paraphrase its submissions set out in that paragraph, the ministry confirmed that the seal numbers had been changed as they were originally recorded incorrectly. In its representations in the current appeal, the ministry submits that the "same explanation would explain why a similar discrepancy would exist with respect to the photographs of the CFS seal numbers."

[24] In response to the appellant's allegations that photographs of her son's brain injuries and skull were taken during the post-mortem examination should exist, the ministry submits that, as it previously submitted for the purposes of the appeal that gave rise to Order PO-3559, no photographs were taken during the examination.

Analysis and findings

[25] Having carefully reviewed the evidence that is before me, I am satisfied that the search conducted by the ministry for records responsive to the appellant's request was reasonable and is in compliance with its obligations under the *Act*.

[26] As previously explained, 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 that are reasonably related to the request. In the circumstances of this appeal, I find that the ministry has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody or control. I accept that the searches were conducted by an experienced employee, who was knowledgeable in the subject matter and consulted with other individuals to confirm the accuracy of her findings. I accept that the effort that she expended to locate responsive records was reasonable and in accordance with the

ministry's obligations under the *Act*.

[27] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, she must still provide a reasonable basis for concluding such records exist. I recognize that the appellant is of the view that additional photographs of certain CFS seal numbers are missing and that she believes that photographs of these seal numbers should exist. In my view, I have not been provided with a reasonable basis to support a conclusion that additional photographs of the specific CFS seals that she has identified should exist. It is possible that for one reason or another the police did not photograph the specific CFS seal numbers for which photographs are missing or that photographs were not taken when they should have been. Furthermore, even if additional records exist or were to have existed at one point in time, I reiterate the principle outlined above that the *Act* does not require the ministry to prove with absolute certainty that further records do not exist. Rather, the ministry's obligation under the *Act* is contained to being required to demonstrate that it has made a reasonable effort to identify and locate responsive records. In the circumstances of photographs relating to CFS seals, I accept that it has done so.

[28] I acknowledge that the appellant alleges that two autopsy photographs of the appellant's son's cranial injuries and/or brain that the appellant submits were presented in court appear to be missing from those that were disclosed to her. Although the ministry does not make any specific submissions in response to the appellant's allegations with respect to the existence of any such photographs, the issue before me is not whether the ministry has proven with absolutely certainty that all records responsive to the request have been located but whether its search for responsive records was reasonable. As I have found that the efforts undertaken by the ministry to locate records responsive to the request were reasonable, I uphold its search with respect to photographs, including those that might relate to the deceased's cranial matter.

[29] In conclusion, in the circumstances of this appeal, I am of the view that the ministry has discharged its onus and has provided sufficient evidence to support its position that it has made a reasonable effort to identify and locate records responsive to the request. On that basis, I uphold its search and dismiss the appeal.

ORDER:

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

Original Signed By: _____
Catherine Corban
Adjudicator

December 7, 2016