Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3956

Appeal PA18-387

Ministry of the Solicitor General

May 17, 2019

Summary: The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* for access to a copy of the drug analysis report for the appellant's son. The ministry issued a decision advising that access to the requested records could not be granted as the information did not exist. The appellant appealed the ministry's decision claiming that the ministry's search was not reasonable. In this order, the adjudicator upholds the ministry's search as reasonable.

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

BACKGROUND:

[1] The appellant's son died in a motor vehicle accident. The appellant submitted a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to her son's drug analysis report.

[2] The ministry issued a decision advising that access to the requested records could not be granted as the information did not exist. In the decision, the ministry explained that experienced staff familiar with the record holdings of the ministry conducted a records search and have confirmed that no drug analysis was performed in this case, only alcohol analysis.

[3] The appellant appealed the ministry's decision on the basis that the ministry had not conducted a reasonable search for a drug analysis report for her son.

[4] The appellant advised the mediator that she was of the view that the ministry did not conduct an adequate search and that the records should exist.

[5] The ministry advised the mediator that it conducted an adequate search and reiterated that responsive records do not exist. The ministry advised that it would not change its decision.

[6] The appellant advised the mediator that she would like to pursue the appeal at adjudication.

[7] I conducted an oral hearing as to the reasonableness of the ministry's search for responsive records on April 4, 2019 by telephone with the appellant and with the following individuals from the ministry:

- the Acting Manager, Freedom of information Office;
- the Senior Program Analyst; and
- the Quality Assurance Manager at the Centre of Forensic Sciences

[8] In this order, I uphold the ministry's search for a responsive drug analysis report as reasonable and dismiss the appeal.

DISCUSSION:

Was the ministry's search for responsive records reasonable?

[9] In appeals where the only issue remaining involves a denial of access due to a claim that records do not exist, as is the case in this appeal, the sole issue to be decided is whether the ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If 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.

[10] Important factors in assessing the reasonableness of the search will be whether the appellant has provided sufficient identifying information to assist the institution in its search and has provided a reasonable basis for concluding that such records exist.

[11] Sections 47 and 48 of the *Act* are also relevant to the issues in this appeal. The following quotations from a previous order interpreting these sections may provide guidance as to how they will be interpreted in future:

> Sections 47 and 48 of the *Act* place the responsibility for ascertaining the nature or whereabouts of a record of personal information on both the requester and the institution.

> It is clear from sections 47 and 48 of the Act that there is some obligation placed on the requester to provide as much direction to an institution as possible to where the records he or she is requesting may be found and/or to describe the records sought.

[12] 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.[1] To be responsive, records must be "reasonably related" to the request.[2]

[13] 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.[3]

[14] 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.[4]

[15] The Notice of Inquiry asked the parties to provide, prior to the oral hearing, any documentation that they intended to rely on at the oral hearing. Both parties provided documentation before the hearing which was reviewed in detail at the hearing.

[16] The appellant's documentary information included:

- the coroner's report,
- the evidence list report,
- the autopsy report,
- the crown brief synopsis,
- witness statement,
- laboratory reports,
- forensic science report and inbound evidence list, and
- a copy of a bar code.

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

[17] The ministry provided an affidavit of the Acting Deputy Co-ordinator (the coordinator) of the ministry's Freedom of Information and Protection of Privacy Unit that had been submitted in a previous appeal. The co-ordinator indicated that the appellant's previous request had been clarified with her as seeking access to Ontario Provincial Police (OPP) reports and officers' notes, as well as the Office of the Chief Coroner (OCC) and the Centre of Forensic Sciences (CFS) records regarding the death of her son in a motor vehicle accident (MVA).

[18] The co-ordinator recounted the searches undertaken in response to this previous request to locate responsive records, including searches conducted of OPP, CFS, and OCC record holdings. This request and the resulting appeal by the appellant resulted in Order PO-3559. In that order, the adjudicator upheld the ministry's search as reasonable.

[19] As set out in the ministry's documentation, Order PO-3559 was referred to in a subsequent order, Order PO-3674, again involving the appellant and her request for information about her son's death. In that order as well, the adjudicator found that the ministry's search for responsive records was reasonable. In both these cases, as in this appeal, the appellant sought records related to the ministry's testing of her son's body after he died.

[20] I began the hearing by asking the appellant to inform me of any details she was aware of concerning records that have not been located, or any other information to indicate that the search carried out by the ministry was not reasonable.

[21] As set out in her request, at the hearing the appellant explained that she is seeking a copy of a drug analysis report for her son.

[22] In support of her position that a drug analysis report should exist for her son, the appellant directed me in particular to pages 203 to 205 of her documentation, which are laboratory reports, each referenced as request numbers 0006, 0007, or 0008.

[23] The appellant stated that she had not been provided with requests numbers 0001 to 0005.

[24] In response, the ministry denied that a drug analysis was ever done on the appellant's son. It explained all the searches that were done to locate such a report and its protocol as to when drug analyses are ordered.

[25] According to the ministry, the appellant's son was initially thought to be the driver in the MVA, but within 24 hours the OPP determined that he was the passenger. The ministry's protocol was to not test for drugs of passengers, only for drivers, in MVAs that result in fatalities. Therefore, it states that a drug analysis was never done on the appellant's son.

[26] The ministry also reviewed in detail exactly what request numbers 0001 to 0005

were. In fact, the requests numbers went up to number 010. These requests are computer entries listing the activities performed in the ministry's file related to the MVA. These requests track the activities on the file.

[27] At the hearing, the ministry explained each request number from 001 to 010 in detail. None of these requests numbers were for a drug analysis being done on the appellant's son.

[28] At the hearing, the ministry also responded to the appellant's suspicions about passages in the documents she had provided pre-hearing that appear to her to indicate that a drug analysis was performed.

[29] During the hearing, the ministry reviewed all of the appellant's documentation, as well as the sequence of events following the MVA, and maintained that no drug analysis was done for the appellant's son. It specifically explained the timing of the testing of the appellant's son's body and the type of testing done, none of which involved drug analysis.

[30] Post-hearing, the ministry provided both the appellant and myself with a computer print-out of the request numbers. This listing contained request numbers 001 to 010 except for 008. The ministry explained at the hearing that request number 008 was accidently deleted on the system and re-entered as request number 009. The appellant has a copy of the lab report generated from request number 008, which is a blood analysis for alcohol done on January 15, 2009.

[31] After the oral hearing, the appellant provided a form from the OCC dated the day after the MVA where the coroner indicated that the appellant's son "Had been drinking and [taking] drugs " This form directed that a post-mortem examination or analysis be done for alcohol. The box for "other" was checked off, but nothing was specified for this box.

[32] In response, the ministry reiterated in writing that no drug analysis was performed. It stated:

> With respect to the Warrant for Post Mortem Examination dated January 14, 2007, the ministry has reviewed this record and finds no evidence to support that a drug analysis was conducted by the Centre of Forensic Sciences.

[33] The appellant then provided me with several emails and other supporting documents. These documents included a CFS toxicology information sheet, a letter from the Regional Coroner of January 12, 2009 issued prior to the testing being performed and police officer notes from 2007.

[34] The appellant questioned the veracity of the ministry's evidence and maintained that the ministry misconstrued or deliberately altered the request numbers to conceal

the fact that a drug analysis was done on her son.

[35] I have carefully considered all of the appellant's evidence, including her post-hearing documentation. I do not accept the appellant's interpretation of the evidence before me. I find that she has not provided a reasonable basis for me to conclude that a drug analysis was done on her son after his death. I find that the evidence indicates that although a drug analysis may have been considered at the time of the accident when the appellant's son was considered the driver of the involved motor vehicle, by the next day when it was discovered that he was a passenger, such an analysis was never pursued. I find that the only toxicology analysis that was done on her son was for alcohol.

[36] I specifically do not accept the appellant's position that the ministry deliberately altered the documents to hide the fact that a drug analysis was done on the appellant's son. Nor do I accept her interpretation of both the ministry's and her documents that such an analysis was performed. I accept the ministry's interpretation of these documents that no drug analysis was done. In this context, I find that there is no reasonable basis for believing that additional records documenting a drug analysis of the appellant's son exist.

[37] Accordingly, I find that the ministry's search for responsive records was reasonable and I uphold its search.

ORDER:

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

Original Signed by | May 17, 2019

Diane Smith
Adjudicator