Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4045

Appeal PA19-00378

Ministry of the Solicitor General

May 20, 2020

Summary: The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* for access to a report related to a screenshot of an entry in the ministry's case management system that the appellant had received through a previous access request. The ministry responded to the request by indicating that no responsive record exists. The appellant appealed the ministry's decision and claimed that the ministry had not conducted a reasonable search for responsive records.

During adjudication of the appeal, the ministry brought an application to have the appeal dismissed on the basis of issue estoppel because the issue around the search for the record had been addressed in a previous IPC order. In this order, the adjudicator grants the ministry's application and dismisses the appeal on the basis of issue estoppel.

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

Orders Considered: Orders PO-3559, PO-3946, and PO-3956.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a screenshot of a case management system (CMS) screen that she received during an oral hearing relating to reasonable search, which resulted in

Order PO-3956.

[2] The ministry issued a decision granting partial access to the responsive records with severances pursuant to the personal privacy exemptions in sections 21(1) and 49(b) of the *Act*.

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

[4] During mediation, the appellant narrowed the scope of her appeal and advised the mediator that she was requesting a copy of the record associated with request 0009. Request 0009 is a computer entry on the ministry's CMS associated with the motor vehicle accident (the MVA) file in which the appellant's son was killed. This is the record that was provided to the appellant during her previous hearing, as reference above.

[5] The ministry advised the mediator that request 0009 in the screenshot consisted of an electronic entry only with no records associated with it. The ministry explained that another computer entry associated with the MVA, request 0008, had been accidentally deleted and replaced with request 0009, however, no new records were associated with request 0009. The ministry advised that the record that had been associated with request 0008 had already been disclosed in full to the appellant.

[6] The appellant confirmed that she received the record associated with request 0008 but was of the view that a record for request 0009 should also exist. The ministry reiterated its explanation that there was no record associated with request 0009.

[7] The appellant advised the mediator that she would like to pursue the issue of whether the ministry conducted a reasonable search for records associated with request 0009 at adjudication. As a result, I sent the ministry a Notice of Inquiry, seeking its representations on the search issue.

[8] In response, the ministry asked me to dismiss the appeal based on the doctrine of issue estoppel because the IPC had already adjudicated the issue of whether the ministry conducted a reasonable search for records related to request 0009 in Order PO-3956.

[9] I sent a copy of the ministry's letter to the appellant. In her response, the appellant indicated that she believes that a record, a drug analysis report of her son's body, which is related to request 0009, should exist.

[10] In this order, I find that issue estoppel applies and I dismiss the appeal on that basis.

DISCUSSION:

Has the issue of whether the ministry conducted a reasonable search for a drug analysis report related to request 0009 already been adjudicated by the IPC? If so, should the appeal be dismissed on the basis of issue estoppel?

Representations

[11] In response to the Notice of Inquiry seeking the ministry's representations on whether the ministry has conducted a reasonable search, the ministry sent the following letter to the IPC:

> ...The appellant has ... indicated in a previous appeal where request 0009 was being sought, which resulted in the issuance of Order PO-3956, that [she] believes that a drug analysis was performed for the appellant's son. However, the ministry explained that no drug analysis was conducted, and this explanation was accepted in [Order PO-3956].
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> The ministry has now been requested again to provide written representations as to whether it conducted a reasonable search for records related to request 0009. The ministry submits it should not be required to do so again, and instead we are requesting that this appeal be dismissed based on the doctrine of issue estoppel.
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> The Supreme Court of Canada has described the doctrine of issue estoppel in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44[1] at paragraph 18 as follows:
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> > The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. ... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided
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> The test set out in *Danyluk* for establishing the operation of issue estoppel has been adopted by the IPC, most recently in Order PO-3946, [where] Adjudicator [Justine] Wai stated (at paragraph 17):

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[1] Referred to as *Danyluk* in this order.

> *Danyluk* sets out a two-step analysis for the application of issue estoppel. First, the decision maker must determine whether the moving party ... has established the three conditions to the operation of issue estoppel. These conditions are:
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> 1. that the same question has been decided,
>
> 2. that the judicial decision which is said to create the estoppel was final; and,
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> 3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Once these three conditions are met, Adjudicator Wai held (at paragraph 18) that the decision maker [the IPC] must determine "whether, as a matter of discretion, issue estoppel ought to be applied". In quoting from *Danyluk*, Adjudicator Wai stated that:

> ...the underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.

The ministry relies upon the test set out above in these representations.

In support of the application of the first condition, that" the same question has been decided", we turn first to Order PO-3956. In Order PO-3956, the same appellant was alleging that records associated with request number 0009 ought to exist. Paragraphs 27 and 30 of that Order refer to this request. Paragraph 30 of that Order states:

> Post-hearing, the ministry provided both the appellant and myself with a computer printout of the request numbers. This listing contained request numbers 001 to 010 except for 0008. The ministry explained at the hearing that request number 008 was accidentally deleted on the system and re- entered as request number 009. The appellant has a copy of the lab report generated from request number 0008, which is a blood analysis for alcohol done on January 15, 2009.

The only difference we can see between the appeal that resulted in Order PO-3956 and this appeal is that in Order PO-3956, the appellant was expressly seeking the drug analysis that the appellant alleged was conducted in response to the death of the appellant's son. In this appeal, the appellant advised that the appellant was requesting a copy of the record associated with request 0009 listed in the screenshot, without

> expressly mentioning the drug analysis. The request may have been phrased differently, but in the end, the same question is being decided: has the ministry conducted a reasonable search for records, which include records associated with request 0009?
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> In addition, the ministry further relies upon Order PO-3559. In that Order, the same appellant had made a general request for ministry records, including CFS[2] records. The appellant again alleged that additional CFS records should exist, which would include records associated with request 0009, and the appeal again related to the issue of reasonable search.
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> In support of the second condition, that the issue was final, we note that both Orders PO-3956 and PO-3559 are final orders. Both orders upheld the ministry's searches and dismissed the appeals. Finally, in support of the third condition, we note that the appellant in both orders is the same individual as the appellant in this appeal.
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> The ministry is firmly of the view that the IPC should exercise its discretion by applying issue estoppel. It is our view that there is no public policy interest in re-adjudicating the same type of request for the same records by the same appellant. To do so would result in the further squandering of scarce public resources, which could be far better used elsewhere...

[12] The appellant was provided with a copy of the ministry's letter. In response, she did not directly address the ministry's submission that the search issue for request 0009 has already been adjudicated and that issue estoppel should apply. The only reference to issue estoppel in her response is that the request in this appeal is a new and different request and, therefore, issue estoppel should not apply.

[13] Instead, the appellant reviewed the history of her various access requests and sought to reopen these previous access requests on the basis that the ministry has deliberately not disclosed all of the responsive records to her.

[14] In this appeal, however, I am only making a determination on the appellant's access request as set out above, namely whether records for request 0009 exist. Concerning this, she specifically stated:

> The CFS claim that request 0009 was created to replace request 0008 but are unable to provide the associated records. A chain of custody (COC) is required in laboratories that handle forensics to assure reliability of

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[2] Centre for Forensic Sciences (CFS). The CFS is part of the ministry.

> reported entry and results, ensures that any results CFS report relate beyond all reasonable doubt to a request and individual where the results are or might be used in civil court and or in court as evidence. All associated records for the analysis (request 0008 - 0009 - 00010) must be retained and available to demonstrate traceability. In appeal PO-3956 and PO-3559, we were unaware of the existence of request 0009 and for such we were unable to provide any observations regarding this action.

Analysis and Findings

[15] Although the appellant provided representations on requests 0002 to 0010 in the ministry's case management system, as I noted above, this appeal concerns request 0009 only.[3]

[16] In this order, I am deciding whether the ministry's search for the record related to request 0009 has already been adjudicated, and if so, whether issue estoppel should apply.

[17] Specifically, from my review of the appellant's response to the ministry's issue estoppel letter concerning request 0009, the appellant is seeking a drug analysis report for her son's body that she believes is associated with that request.

[18] In appeals where a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[4] If the adjudicator is satisfied that the search carried out was reasonable in the circumstances, the adjudicator will uphold the institution's search as reasonable. If the adjudicator is not satisfied, they may order further searches.

[19] 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.[5] To be responsive, a record must be "reasonably related" to the request.[6]

[20] 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

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[3] Requests 0002 to 0010 relate to the appellant's son. The evidence of the ministry at the oral hearing, which resulted in Order PO-3956, was that request 0001 relates to the driver of the vehicle and did not relate to the appellant's son.
[4] Orders P-85, P-221 and PO-1954-I.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.

are reasonably related to the request.[7]

[21] 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.[8]

[22] 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.[9]

[23] As set out above, the appellant advised the mediator that she was requesting a copy of the record associated with request 0009. The ministry advised the mediator that request 0009 in the screenshot was only an electronic entry with no records associated with it. The ministry explained that request 0008 had been accidentally deleted and replaced with request 0009. The ministry advised that the record associated with request 0008 had already been disclosed in full to the appellant.

[24] The appellant confirmed to the mediator that she received a record labeled request 0008, but was of the view that a record for request 0009 should also exist.

[25] In this order, I need to determine whether the issue of reasonable search regarding records associated with request 0009 has already been adjudicated and, if so, whether the appeal should be dismissed by the reason of the doctrine of issue estoppel. This doctrine was discussed in Order PO-3946, referred to by the ministry. As referred to by the ministry, in Order PO-3946, Adjudicator Wai stated:

> As stated ... in *Danyluk*, the Supreme Court confirmed the importance of finality in litigation and stated, "an issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner."[10] In considering whether issue estoppel applies, the Supreme Court directs a decision maker to "balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."[11]

[26] Adjudicator Wai reviewed the previous order, Order PO-2960-I, which concerned the same parties, and found that the doctrine of issue estoppel applied. She stated:

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[7] Orders M-909, PO-2469 and PO-2592.
[8] Order MO-2185.
[9] Order MO-2246.
[10] *Danyluk*, *supra* note 2 at para. 18.
[11] *Ibid*. at para 33.

> The first requirement for a finding of issue estoppel is that the same question has been decided. In Order PO-2960-I, the adjudicator considered whether source term information for all Ex-Plant Release Categories included in the probabilistic risk assessments for the Darlington as well as the Pickering A and B nuclear stations is exempt under sections 14(1)(i) and 16 of the *Act*. The adjudicator found that the source term information was exempt from disclosure after considering the records, circumstances and the parties' representations.
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> The request before me in this appeal is nearly identical to the one before the adjudicator in Order PO-2960-I. The only difference between the request at issue before me and the one at issue in Appeal PA08-96 is the inclusion of "most recent" in the current request to describe the probabilistic risk assessments. I find that this small difference does not alter the type of information that the appellant seeks access to. Based on my review, I find the same type of information, namely, source term information of the type set out in the request is responsive to the appellant's request. The only difference is the time period to which the information relates. In the circumstances of this appeal, I do not accept that the different time period changes the essence of the question to be decided. OPG claims the application of the exemptions in sections 14(1)(i) and 16 to the *source term information* for all Ex-Plant Release Categories included in the probabilistic risk assessments for the nuclear stations in question. Therefore, I find the question at issue before me was decided in Order PO-2960-I...
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> I find Order PO-2960-I was a final decision and the second condition for issue estoppel is satisfied...
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> Finally, I find the third requirement for the application of issue estoppel is satisfied. The parties to Order PO-2960-I are the same as those before me in this appeal...

[27] The ministry relies on Order PO-3956, as well as Order PO-3559 referred to in Order PO-3956, as demonstrating that the reasonable search issue in this appeal has already been adjudicated.

[28] In Order PO-3559, the appellant claimed that additional records relating to her deceased son existed, including toxicology results, urine samples and analyses, and records relating to the retention of the deceased's cranial matter. This would have included any drug analysis reports. In Order PO-3559, the ministry's search for responsive records was upheld as reasonable. In that order, the adjudicator found that the appellant had not provided a reasonable basis for her to conclude that any additional reports on the testing of the appellant's son's body had not been located by the ministry.

[29] In Order PO-3956, the appellant requested a copy of a drug analysis report on her son's body she believed existed. She appealed the ministry's decision that such a report did not exist on the basis that the ministry had not conducted a reasonable search for this report. In that appeal, I held an oral hearing in which both the appellant and the ministry's representatives provided testimony. In particular, besides the appellant, I heard from the following ministry staff:

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

[30] As well, the parties provided written documentation in support of their positions regarding the issue of reasonable search before, during and after the oral hearing.

[31] In that appeal, the appellant testified that she was seeking a copy of a drug analysis report for her son. The appellant was aware of the existence of request 0009 in the ministry's case management system. Specifically, during the oral hearing, I reviewed information about how request 0009 was generated and what it concerned with both the ministry and the appellant. In Order PO-3956, in considering request 0009, I stated:

> 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.
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> Post-hearing, the ministry provided both the appellant and myself with a computer printout of the request numbers. This listing contained request numbers 0001 to 0010 except for 0008. The ministry explained at the hearing that request number 0008 was accidently deleted on the system and re-entered as request number 0009. The appellant has a copy of the lab report generated from request number 0008,[12] which is a blood analysis for alcohol done on January 15, 2009...
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> 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.

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[12] In Order PO-3956, I occasionally referred to requests 0001, 0008, 0009, and 0010 mistakenly as 001 and 008, 009, and 010.

[32] In Order PO-3956, the appellant's position was that the request numbers at issue, including request 0009, were associated with a drug analysis report done by the ministry on her son's body. In finding that none of the request numbers, including request 0009, had such a report associated with it, I made the following determination:

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

[33] The appellant is now seeking access to a drug analysis report that she believes is associated with request 0009. Request 0009 is a screenshot from the ministry's case management system.

[34] The ministry has made an application for the appellant's appeal to be dismissed on the basis of issue estoppel.

[35] *Danyluk* sets out a two-step analysis for the application of issue estoppel. First, the decision maker must determine whether the moving party has established the three conditions to the operation of issue estoppel. These conditions are:

1. that the same question has been decided,
2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[36] If these three conditions are satisfied, then I must determine whether, as a matter of discretion, issue estoppel ought to be applied.

[37] I find that the three conditions have been met for the following reasons:

- Although I considered other information in Order PO-3956, in this order I have been asked to decide one of the same questions that I answered in Order PO-3956: that is, the question of whether the ministry conducted a reasonable search for records related to request 0009;
- Order PO-3956 was a final order; and,
- The parties in both this appeal and in Order PO-3956 are the same, being the appellant and the ministry.

[38] As these three conditions have been met, I must decide whether, as a matter of discretion, issue estoppel ought to be applied. I find that it should.

[39] The appellant is seeking records related to request 0009 in order to locate ministry reports that show that a drug analysis on her son's body was conducted by the ministry. In both this appeal, and in Order PO-3559, the appellant appealed the ministry's decisions related to her requests seeking ministry records about drug analysis of her son's body.

[40] The ministry's position throughout the oral hearing in Order PO-3956 was that no drug tests were ever conducted on the appellant's son's body. This was because, shortly after the motor vehicle accident that took his life, it was determined that the appellant's son was not the driver of the vehicle. The ministry explained that it was not its practice to conduct a drug analysis on passengers who had died in motor vehicle accidents.

[41] The ministry produced a copy of the screenshot for request 0009 at the oral hearing and explained in detail how request 0009 was created and why no documents were associated with this request number. Following the oral hearing, in Order PO-3956, I accepted the ministry's explanation on this point that request number 0008 was accidently deleted on the system and re-entered as request number 0009. I also accepted that request 0009 had no records associated with it.

[42] In this appeal, I find that the issue to be decided, namely, the existence of drug analysis reports on the appellant's son's body, has already been adjudicated upon in Order PO-3956 and in Order PO-3559. I have balanced the public interest in the finality of litigation in adjudicating the appellant's access request for the requested drug analysis reports with the public interest in ensuring that justice is done on the facts of this particular case.

[43] The appellant was given a full opportunity to make her case in her prior appeals,

including an oral hearing. I find that on balance, in the circumstances of this appeal, the balance lies in favour of the finality of litigation. As such, I will not re-adjudicate the issue of the existence of drug analysis reports associated with request 0009.

[44] Accordingly, following the two-step analysis for the application of issue estoppel in *Danyluk*, I find that issue estoppel applies in this appeal. Therefore, I am dismissing the appellant's appeal.

ORDER:

As issue estoppel applies, I dismiss the appeal.

Original signed by
Diane Smith
Adjudicator

May 20, 2020