

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4148

Appeal PA18-179

Ministry of the Solicitor General

May 27, 2021

**Summary:** The appellant submitted an access request to the ministry for records relating to the motor vehicle accident in which her parents died. The ministry identified responsive records and granted partial access, but withheld information under section 21(1) (unjustified invasion of personal privacy). The appellant appealed the decision to the IPC. The appellant also argued that additional responsive records should exist. On appeal, the adjudicator orders some additional disclosure of personal information, based on the application of the compassionate grounds found in section 21(4)(d) of the *Act*. The adjudicator also finds the ministry's search to be reasonable.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21(1), 21(4)(d) and 24(1).

**Orders Considered:** Orders PO-3273 and MO-4012.

### BACKGROUND:

[1] In December 2016, the appellant's parents died in a tragic motor vehicle collision. Subsequently, she made the following request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), to the Ministry of the Solicitor General<sup>1</sup> (the ministry):

As the daughter of [two named individuals], I am requesting release of all records related to this incident on compassionate grounds.

...On compassionate grounds, I am requesting release of all records pertaining to this incident including but not limited to: TTCI, Officers' notes, witness statements, Motor vehicle accident report, Investigative data file/report, Occurrence/investigative summary report, All photographs, General occurrence or sudden death report, any other records that exist.

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<sup>1</sup> Formerly the Ministry of Community Safety and Correctional Services.

[2] The ministry identified over 150 pages of responsive records relating to the request. After notifying individuals whose interests may be affected by the disclosure of the records (the affected persons), the ministry issued a decision granting partial access to the records. Access to the withheld information was denied pursuant to section 49(a) in conjunction with section 14(1)(l) (facilitate commission of an unlawful act) and the mandatory and discretionary personal privacy exemptions at sections 21(1) and 49(b). The decision also noted that:

... some information in the record, where indicated, has been removed as the information is not responsive to your request and pertains to other matters. This information has been marked "N/R" including police ten codes.

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner's office (the IPC).

[4] During mediation, the ministry advised the mediator that one of the affected persons now consented to the disclosure of her personal information in the records to the appellant. Accordingly, the ministry disclosed the information relating to this affected person.

[5] Following discussions with the mediator, the appellant requested that the mediator notify other affected parties and attempt to gain those affected parties' consent to disclose information in the records pertaining to them. The mediator was unable to obtain the consent of these two affected parties.

[6] The ministry issued a supplementary decision with respect to the "black boxes", which stated:

"... the TT ECM<sup>2</sup> unit was burned and therefore no data was retrieved. The ACM<sup>3</sup> in the Subaru was not supported by the CDR software so no data retrieved."

[7] In its letter about the Subaru's ACM unit, the ministry provided the names and contact information of the OPP Staff Sergeant and Constable for further information about the Subaru ACM. The appellant advised that the information from the tractor trailer's ECM unit and the Subaru ACM unit are no longer at issue in this appeal.

[8] Following further discussions with the mediator, the ministry issued a letter to the appellant in which it stated:

"Please note that your request was processed in accordance with section 21(4)(d) of the *Act* that permit disclosure of such personal information to the spouse/close relative of the deceased individuals where disclosure is desirable in the circumstances for compassionate reasons."

[9] The appellant continues to pursue access to the remaining information withheld pursuant to sections 21(1) and 49(b) of the *Act*, except as noted above.

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<sup>2</sup> ECM is the engine control module.

<sup>3</sup> ACM is the air bag control module.

[10] The appellant has also raised the issue of reasonable search as she believes there are additional records that exist. Accordingly, this issue has been added to the scope of the appeal.

[11] During mediation, a number of records were removed from the scope of the appeal. In some instances, the records had been disclosed (as confirmed by the mediator) and in some instances, the appellant removed records from the scope of her request. I have not set out this information in this order.

[12] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[13] During the inquiry, I sought representations from the ministry, the appellant and two affected parties. The two affected parties declined to provide representations. Pursuant to section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*, the ministry's representations and the appellant's representations (in their entirety) were shared with one another.

[14] In this order, I order some additional disclosure of personal information, based on the application of the compassionate grounds exception found in section 21(4)(d) of the *Act*. Further, I find that the ministry has conducted a reasonable search for responsive records.

## **RECORDS:**

[15] The records remaining at issue consist of police reports and police officers' handwritten notes.

[16] The ministry numbered the records consecutively, however, for the purposes of my analysis I have considered whether each type of record contained the personal information of the appellant, her deceased parents or affected persons.<sup>4</sup>

[17] The ministry also disclosed additional information on pages 45, 46, 47, and 64 of the records, and provided partial access to 18 additional pages (pages 174-192) of records that had not been previously disclosed, and a CD containing an audio recording. The appellant advised that pages 174-192 of the records, the audio recording on the CD, and the photographs at pages 137 to 161 of the records are no longer at issue in this appeal.

[18] In its representations made during the inquiry, the ministry agreed to disclose further information to the appellant, the following 21 pages of records: 58 (in part), 104, 105, 106, 108, 109, 110, 111, 112, 113, 114, 115 (in part), 116 (in part), 128, 129, 130, 131, 132, 133, 134 and 135 (in part). I will order this information disclosed to the appellant.

[19] The appellant removed certain information from the scope of her request.

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<sup>4</sup> Order M-352.

Accordingly, the withheld information on pages 4, 18, 27,<sup>5</sup> 39,<sup>6</sup> 40, 57,<sup>7</sup> 101, 102, 103, 107, 115, 116, 127 and 135 of the records are no longer at issue and will not be considered further in this appeal.

## **ISSUES:**

- A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?
- C. Did the ministry conduct a reasonable search for records?

## **DISCUSSION:**

### **A: Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?**

[20] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain “personal information” and, if so, to whom it relates.

[21] Relevant paragraphs of the definition of “personal information” in section 2(1) are the following:

“personal information” means recorded information about an identifiable individual, including,

(e) the personal opinions or views of the individual except if they relate to another individual,

(g) the views or opinions of another individual about the individual, and

(h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[22] The list in section 2(1) is not exhaustive and IPC adjudicators have held that other types of information may also qualify as personal information.<sup>8</sup>

[23] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>9</sup>

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<sup>5</sup> Top half of the page.

<sup>6</sup> Bottom half of the page.

<sup>7</sup> The first two shaded portions on this page.

<sup>8</sup> Order 11.

<sup>9</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[24] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[25] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>10</sup>

[26] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>11</sup>

[27] The ministry submits that the records contain personal information of identifiable individuals, specifically two identifiable affected persons,<sup>12</sup> besides personal information of the deceased parents. It explains that it withheld an affected person's name, their address, phone number, driver's licence number and another affected person's vehicle information. In addition, the ministry withheld the statement of one of these affected persons.

[28] With respect to the withheld information on page 58 of the record, I find that the withheld information at the bottom half of the page is not personal information as it is information about a vehicle. Accordingly, this withheld information should be disclosed to the appellant as this information cannot be exempt under section 21(1) and the ministry has not claimed any other exemptions for it.

[29] The appellant submits that the remaining information about the affected person, specifically the other driver involved in the motor vehicle collision, is not personal information. She relies on sections 2(2.1) and 2(2.2) and argues that the other driver was driving in his professional capacity when the collision occurred. The appellant relies on Order PO-3273, which she states supports a finding that the disclosure of this information would not be an unjustified invasion of personal privacy because it is "not personal information". However, I find that Order PO-3273 does not assist the appellant because the other driver was not driving in his professional capacity. The reference to professional capacity is about the information of the two police officers who investigated the collision. Their personal information was found in the police officers' curriculum vitae. As such, I distinguish Order PO-3273 on that basis.

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<sup>10</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>11</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>12</sup> One of these affected persons consented to the disclosure of her personal information to the appellant. As such, I did not ask her to provide representations during the inquiry.

[30] I accept that the other driver was driving in his professional capacity when the collision occurred. However, I find that, given the nature of that specific information, disclosure of it would reveal something of a personal nature about him. This finding is in keeping with the general rule, noted above, that information associated with an individual in a professional, official or business capacity is generally not considered to be "about" the individual unless the information reveals something of a personal nature about the individual.

[31] Finally, I find that the remaining records at pages 9,<sup>13</sup> 18, 19, 27,<sup>14</sup> 57<sup>15</sup> contain information that qualifies as the personal information of identifiable individuals, specifically the deceased parents and other affected persons, which would fall under paragraphs (e), (g), and (h) of the definition of "personal information" under section 2(1) of the *Act*. As these records do not contain the personal information of the appellant, Part II of the *Act* applies to them and I must consider whether these records are exempt pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*.

[32] In addition, I find that the record at page 9 contains the personal information of identifiable individuals, specifically the deceased parents, affected persons and the appellant, which would fall under paragraphs (a), (d), (e), (g), and (h) of the definition of "personal information" under section 2(1) of the *Act*. As this record contains the personal information of the appellant, Part III of the *Act* applies to it and I must consider whether this record is exempt pursuant to the discretionary personal privacy exemption at section 49(b) of the *Act*.

**B: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?**

[33] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[34] Under section 49(b), found in Part III, where a record contains personal information of both the appellant and other individuals, and disclosure of the information would be an "unjustified invasion" of the other individuals' personal privacy, the institution may refuse to disclose that information to the appellant.

[35] In contrast, under section 21(1), found in Part II, where a record contains personal information of another individual but *not* the appellant, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 21(1)(f)].

[36] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of

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<sup>13</sup> The withheld information at the bottom half of the page remains at issue while the withheld information at the top half of the page is no longer at issue as the affected person has consented to its disclosure.

<sup>14</sup> The information contained in the bottom half of this page.

<sup>15</sup> The last shaded portion at the bottom of the page.

personal privacy.

[37] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.<sup>16</sup>

[38] The ministry claims that the personal information at issue falls within the scope of the presumption at section 21(3)(b), or in the alternative the factor at section 21(2)(f) is applicable to the personal information at issue. In addition, I must consider the possible application of the compassionate grounds exception at section 21(4)(d).

[39] Sections 21(2)(f), 21(3)(b) and 21(4)(d) read:

21(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(d) discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

### ***Analysis and findings***

#### *21(2)(f): highly sensitive*

[40] The ministry submits that the factor in section 21(2)(f) weighs against disclosure of the personal information at issue. To be considered highly sensitive there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>17</sup>

[41] The ministry relies on Order P-1618, where the adjudicator found that the personal information of individuals who were "complainants, witnesses or suspects" as part of their contact with the OPP was "highly sensitive" pursuant to section 21(2)(f). The ministry submits that this reasoning should apply to the personal information at issue in this appeal, given that the affected person whose personal information is at issue was a

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<sup>16</sup> Order P-239.

<sup>17</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

witness to the occurrence.

[42] The ministry also relies on Order PO-3712, where the adjudicator upheld the application of section 21(2)(f) where consent had not been provided by affected parties in respect of the disclosure of their personal information combined with the sensitive nature of the personal information contained in law enforcement investigation records.

[43] With respect to PO-3712, as mentioned earlier, one affected person, a witness, has now provided her consent to the ministry. As such, her witness statement and other personal information were disclosed to the appellant during mediation. I acknowledge that the other two affected persons have not provided their consent but they were notified and given an opportunity to provide representations in this appeal. As well, the appellant is not seeking the personal information of one of the affected persons.

[44] Given the fact that the affected person (the other driver) provided his information to the police following the collision, I accept that disclosure of his personal information would likely cause him significant distress. Accordingly, I give some weight to the factor in section 21(2)(f).

*21(3)(b): investigation into violation of law*

[45] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>18</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>19</sup>

[46] The ministry submits that the presumption against disclosure in section 21(3)(b) applies to the personal information at issue because it was collected as part of a law enforcement investigation resulting from the motor vehicle collision.

[47] I accept the ministry's position. Based on the content of the records, it is clear that the personal information was compiled by the OPP and is identifiable as part of their investigation to determine the cause of the motor vehicle collision, which may have been a result of a possible violation of the law. I therefore find that the personal information in the records fits within the ambit of the presumption against disclosure in section 21(3)(b).

[48] Therefore, I find that the disclosure of the personal information is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b). Accordingly, I find that this personal information qualifies for exemption under section 21(1) of the *Act*.

[49] Section 49(b) of the *Act* applies to the personal information that is subject to analysis pursuant to Part III of the *Act*, specifically, the appellant's own personal information where it is mixed with the personal information of other identifiable individuals, including her deceased parents. In determining whether the disclosure of the personal information at issue would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in

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<sup>18</sup> Orders P-242 and MO-2235.

<sup>19</sup> Orders MO-2213 and PO-1849.



sections 21(2) and (3) and balance the interests of the parties.<sup>20</sup>

[50] I concluded above that the personal information at issue is subject to the presumption at section 21(3)(b) and the factor at section 21(2)(f). In my view, there are no other factors favouring disclosure of the personal information at issue. Considering and weighing the factors and presumption and balancing the interests of the parties, subject to my analysis on the application of section 21(4)(d) below, I find that disclosure of the personal information at issue would be an unjustified invasion of personal privacy under section 49(b).

*21(4)(d): disclosure is desirable for compassionate reasons*

[51] I will now consider the application of the exception in section 21(4)(d) to the personal information that I have found to be subject to section 21(1). The principle issue in relation to the disclosure of the personal information at issue is whether the exception to the exemption in section 21(4)(d) of the *Act* permits the disclosure of the appellant's deceased parents' personal information (some of which is co-mingled with the information of other individuals).

[52] The application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?<sup>21</sup>

*Parts 1 and 2: Do the records contain the personal information of a deceased individual and is the requester a spouse or "close relative" of the deceased individual?*

[53] The terms "close relative" and "spouse" are defined in section 2(1) of the *Act* as follows:

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; ("proche parent")

[54] I find that the records contain the personal information of two deceased individuals, specifically, the appellant's parents, and that the appellant is a "close relative" of these individuals as defined in the *Act*. Accordingly, I find that the first two requirements for the application of section 21(4)(d) have been met.

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<sup>20</sup> Order MO-2954.

<sup>21</sup> Orders MO-2237 and MO-2245.

*Part 3: Is the disclosure of the personal information of the deceased individuals desirable for compassionate reasons, in the circumstances of the request?*

[55] With respect to the application of section 21(4)(d), the ministry submits that the records must contain the personal information of a deceased individual. It points out that the personal information that it is withholding relates to two affected persons, not the deceased individuals.

[56] The ministry submits that it has disclosed information about the motor vehicle collision to the appellant. It also submits that it advised the appellant that her request had been processed in accordance with section 21(4)(d).

[57] The appellant submits that her sole reason for seeking information is to understand what happened in the last moments of her parents' lives. She submits that this information is most likely to be contained on pages 18 and 19 of the records, the witness statement of the other driver.

[58] In Order MO-2245, former Assistant Commissioner Beamish made the following comments about the purpose of the exception at section 21(4)(d):

Losing a loved one is a sad and difficult process. Section [21(4)(d)] of the *Act* was designed to **allow families to have the records they feel they require** in order to grieve in the way they choose [emphasis added].

[59] In Order MO-2237, former Assistant Commissioner Beamish provided the following guidance for how the exception should be applied to information that is clearly the personal information of the deceased individual, but, at the same time, is also the personal information of another individual or individuals:

The first question to address here is whether the reference to "personal information about a deceased individual" can include information that also qualifies as that of another individual. In my view, this question should be answered in the affirmative. The circumstances of an individual's death, particularly one that is followed by a police or coroner's investigation, are likely to involve discussions with other individuals that will entail, to a greater or lesser extent, the collection and recording of those individuals' personal information. In my view, an interpretation of this section that excludes any information of a deceased individual on the basis that it also qualifies as the personal information of another individual would be inconsistent with the definition of "personal information", set out above, since the information would clearly qualify as recorded information "about" the deceased individual. It would also frustrate the obvious legislative intent behind section 14(4)(c) [the municipal equivalent of section 21(4)(d)], of assisting relatives in coming to terms with the death of a loved one.

[60] In the circumstances of this appeal, and with regard for the principles outlined in Orders MO-2237 and MO-2245, I will be ordering the disclosure of additional information to the appellant based on the application of section 21(4)(d) of the *Act*.

[61] I will begin by addressing the ministry's submission that the access decision made

in response to this request has provided the appellant with information about the motor vehicle collision in accordance with section 21(4)(d), while the privacy rights of two affected persons have been protected. The ministry also argues that the personal information at issue relates to the two affected persons, not the deceased parents. In putting forth this argument, it appears that the ministry is relying on the fact that one of the witnesses (the other driver) did not consent to the disclosure of his statement. As stated earlier, the other witness to the motor vehicle collision consented to the disclosure of her personal information. With respect to the other affected person, as mentioned earlier, the appellant is not seeking his personal information or the name of his truck company. What the appellant is seeking is the other driver's witness statement where his personal information is intertwined with the personal information of her deceased parents. As such, this record contains the personal information of the deceased parents and the other driver, and, therefore, meets the threshold for section 21(4)(d).

[62] Based on my review of the records, I agree that the ministry has disclosed a great deal of information about the accident that took the life of the appellant's parents. I note that the affected person did not consent to the disclosure of his statement. Finally, I have also considered the appellant's stated reasons for seeking access to the records. Having done so, I conclude that the ministry's reasons for not providing greater disclosure in this case reflect its own views, rather than the appellant's, about what information may assist the appellant and her family in grieving the loss of her parents in the way they choose. In my view, this is not the correct approach to take in assessing what disclosures are compassionate in the circumstances. Assistant Commissioner Beamish had the following to say in Order MO-2245 about an institution imposing its own views on disclosure:

The task of the institution, and this office on appeal, is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons." This does not place the institution "*in loco parentis*" in the manner suggested by the Police when the disclosure is to adult relatives. Again, on the question of what is "compassionate", I accept the evidence and representations of the appellant.

[63] In the circumstances of this appeal, and weighing the interests at stake with respect to the personal information of the deceased in the records, I find that the privacy interests of the other driver must yield to the compassionate reasons for disclosure of additional information to the appellant. Given the application of the compassionate grounds exception in section 21(4)(d), I find that disclosure of the some additional personal information about the other driver (which is intertwined with the deceased parents) would not constitute an unjustified invasion of privacy.

[64] Accordingly, I will order that the additional personal information be disclosed to the appellant. For clarity, I have identified the portions of the records to be disclosed to the appellant. Only those records containing the additional disclosure under section 21(4)(d) will be provided to the ministry.

[65] For the remaining information I have found exempt under sections 49(a) or 21(1) and are not ordering disclosed under compassionate grounds, I uphold the ministry's decision to withhold this information.

[66] Based on the manner in which the ministry disclosed the information at issue, I

accept that the ministry took into consideration the nature of the information and the appellant's sympathetic need for it, the privacy rights of the affected persons and the historic practice of the institution with respect to the information. Accordingly, I find the ministry properly exercised its discretion to withhold the information under section 49(b).

### **C: Did the ministry conduct a reasonable search for records?**

[67] 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.<sup>22</sup> 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.

[68] 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.<sup>23</sup> To be responsive, a record must be "reasonably related" to the request.<sup>24</sup>

[69] 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.<sup>25</sup>

[70] 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.<sup>26</sup>

[71] 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.<sup>27</sup>

### ***Representations***

[72] In its representations, the ministry asserts that it conducted a reasonable search for responsive records. In support of its assertion, the ministry attached two sworn affidavits. The first affidavit is sworn by an administrative clerk (the first affiant), who is assigned to the Lennox and Addington County Detachment of the Ontario Provincial Police (OPP). She has been employed with the OPP since July 2010, and have served as a detachment clerk since May 2015. After September 2018, her work duties changed and she ceased to be involved in this appeal. Subsequently, the affiant in the second affidavit became the detachment clerk and became involved in this appeal (the second affiant).

[73] The first affiant states that once she received and reviewed the request, she searched on Niche RMS, the OPP records database, using the applicable occurrence number. She identified the OPP officers who investigated the occurrence, and sent a

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<sup>22</sup> Orders P-85, P-221 and PO-1954-I.

<sup>23</sup> Orders P-624 and PO-2559.

<sup>24</sup> Order PO-2554.

<sup>25</sup> Orders M-909, PO-2469 and PO-2592.

<sup>26</sup> Order MO-2185.

<sup>27</sup> Order MO-2246.

notice to those officers who had not filed their records onto Niche RMS seeking that they provide her with records they had prepared that were responsive to the occurrence, including copies of their notes and other audio-visual, written and electronic records.

[74] The first affiant states that, subsequently, she retrieved and printed all responsive records through her search of Niche RMS and from what the OPP officers provided. She also sent an email query to the OPP Photographic and Imaging Services Unit to determine if photos were on file for this occurrence. Subsequently, she was informed that the OPP Freedom of Information Liaison would be taking care to collect any photos and/or 911 audio calls in this matter.

[75] The first affiant opines that she does not believe any responsive records have been destroyed because they were created relatively recently.

[76] The second affiant states that in November 2018, he was asked to search for records contained in the data recorders that were involved in the motor vehicle collision. He contacted the OPP Constable to request that any responsive records be provided to him but was informed that these records could not be retrieved. One of the data recorders belonging to the commercial vehicle was too damaged to yield records. The other data recorders, which was in a motor vehicle, was not supported by software, and, therefore, did not produce any responsive records.

[77] The second affiant also states that his involvement in this appeal has been limited to seeking records related to the data recorders.

[78] In response, the appellant submits that the ministry did not conduct a reasonable search. She points out that in March 2019 and May 2019, she received additional records as the ministry "found" them. These additional records were not previously located. She also points out that additional photographs were later "located" after she requested for them in the original form. She finally points out that she received emails about the ACM "black box" well after January 2018 and these emails were dated in November 2018. As such, the appellant submits that she is not satisfied that there has been a complete search. She requests a full and comprehensive search completed for all documents and communications (including but not limited to police notes, emails, phone messages, official records, audio recordings and video records).

[79] In response to the appellant's argument that records were disclosed to her in 2019, or after January 2018 (the date the affidavits revealed the ministry's searches were completed), the ministry submits that the records disclosed in 2019 were disclosed as part of the mediation process and/or because the appellant had amended her request. In other words, the ministry submits that it did not disclose records due to additional searches having been conducted after 2018, which yielded newly located responsive records. Instead, these were records that the ministry had already identified as responsive through earlier searches.

[80] In response, the appellant maintains that, since undisclosed records and photographs were disclosed to her on several occasions, the ministry's original searches were incomplete. She submits that it was not due to her amending her request as alleged by the ministry.

[81] The appellant acknowledges that she does not know if she has, as of yet, all relevant records and do not have confidence in the prior searches given that the ministry only noted some omissions through the mediation process and through her pursuit of the ACM communications. She points out that the IPC mediator confirmed that the disclosures were incomplete and as a result, she was forwarded additional records and photographs in a piece-meal fashion over the past two years.

[82] In addition, the appellant submits that presumably the police contacted the coroner, who may have held some responsive records. She also submits that there must exist phone logs of her calls with the police, which she has not seen. The appellant finally submits that there may be other communications between officers or between various other professionals, which have not been included.

### ***Analysis***

[83] As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. In this appeal, if I am satisfied that the ministry's searches for responsive records were reasonable in the circumstances, the decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[84] In the circumstances, I am satisfied that the searches by the ministry for records responsive to the request were reasonable. I make this finding based on a number of reasons.

[85] 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 made a reasonable effort to identify and locate responsive records within its custody and control. The ministry conducted searches on Niche RMS (the OPP records database). It also requested OPP officers involved in the investigation to provide copies of their notes, other audio-visual, written and electronic records in their possession, besides requesting responsive records from the OPP Photographic and Imaging Services Unit. I accept that these searches were conducted by experienced employees who were knowledgeable in the subject matter and they expended a reasonable effort to locate any responsive records.

[86] 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 that such records exist. I acknowledge that the appellant believes that additional records ought to exist, in particular phone logs of her calls with the police and communications between officers or between various other professionals. She also questions whether the coroner's office may hold some responsive records.<sup>28</sup> Moreover, the appellant wants "a full and comprehensive search completed for all documents and communications (including but not limited to police notes, emails, phone

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<sup>28</sup> I note that the coroner's reports on her parents were disclosed to the appellant. They are at page 28 and 29 of the records.

messages, official records, audio records and video records).”

[87] However, also as set out above, the *Act* does not require the ministry to prove with *absolute* certainty that additional records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. In this case, I find that the ministry has made reasonable efforts to locate all responsive records. In my view, it is not reasonable that the ministry seek out further records from the coroner nor that they search for police phone logs. My understanding is that 911 phone calls are recorded but other police phone calls may not be.

[88] The appellant also concludes that additional records must exist because the ministry located additional records through the mediation process. However, I do not find that such a conclusion necessarily follows from the fact that the ministry located additional records during mediation.

[89] Accordingly, I find that the ministry’s search for responsive records was reasonable and dismiss the appeal.

## **ORDER:**

1. I order the ministry to disclose to the appellant the following information. I note that this is the information the ministry agreed to disclose in its representations. Specifically this is the records at pages 58 (in part), 104, 105, 106, 108, 109, 110, 111, 112, 113, 114, 115 (in part), 116 (in part), 128, 129, 130, 131, 132, 133, 134 and 135 (in part).
2. I also order the ministry to disclose to the appellant the information I have found not exempt under section 21(1) or 49(b) by providing her with a copy of the records by **July 5, 2021**, but not before **June 28, 2021**. I have provided a highlighted copy of these records in question with the ministry’s copy of this order. To be clear, only the highlighted information should be disclosed to the appellant.
3. I uphold the ministry’s search.
4. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant.

Original signed by: \_\_\_\_\_

Lan An  
Adjudicator

\_\_\_\_\_ May 27, 2021