Information and Privacy Commissioner,
Ontario, Canada

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

PHIPA DECISION 18

Complaint HA13-94

Sensenbrenner Hospital

December 10, 2015

Summary: The hospital received a request for records relating to the complainant's son, who was the victim of a fatal motor vehicle accident. The hospital located records responsive to the request and granted complete access to them. The complainant requested a review on the basis that additional records should exist. Accordingly, the sole issue to be decided is whether the hospital conducted a reasonable search for responsive records. In this decision, the adjudicator upholds the hospital's search and dismisses the complaint.

Statutes Considered: *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A, as amended, section 53.

OVERVIEW:

[1] The Sensenbrenner Hospital (the hospital) received a request under the *Personal Health Information Protection Act* (the *Act*) for access to all records relating to the requester's son, who was the victim of a fatal motor vehicle accident.[1]

[2] The hospital located records responsive to the request and granted complete access to them. After reviewing the records, the requester advised the hospital that she was of the view that additional records should exist. The hospital responded that all of the records responsive to her request had been disclosed.

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[1] The hospital accepted that the requester was entitled to seek access under the *Act* to her deceased son's records.

[3] The requester, now the complainant, filed a complaint in response to the hospital's decision.

[4] During mediation, the complainant confirmed her position that additional records ought to exist. Specifically, she believes that records relating to urine tests and samples should exist, including a warrant for their seizure. The hospital confirmed its position that all responsive records had been disclosed and provided the complainant with a letter describing in detail all efforts taken to locate the responsive records. The hospital subsequently located additional records and disclosed them to the complainant, advising that no additional records exist. The complainant maintains that additional records relating to urine tests or urine analyses should exist.

[5] As a mediated resolution could not be reached, the complaint was transferred to the adjudication stage of the complaint process for an adjudicator to conduct a review. I sought and received representations from the hospital and the complainant. The parties' representations were shared with each other in accordance with this office's practice.

[6] For the reasons that follow, I uphold the hospital's search for responsive records and find that its efforts to locate records containing the information sought by the complainant were reasonable. As a result, I dismiss the complaint.

DISCUSSION:

[7] The sole issue to be decided in this complaint is whether the hospital has conducted a reasonable search for records responsive to the request. The complainant takes the position that additional records relating to urine samples and analyses ought to have been located by the hospital in its search for records.

[8] In light of the complainant's position, I requested that the hospital provide me with an affidavit sworn by the individual who conducted or coordinated the searches, outlining the steps that were taken to locate the responsive records. The hospital provided an affidavit sworn by the Manager of Health Records and Privacy (the manager).

[9] The manager explains that the hospital provided the complainant with complete access to the information that she sought; first, the chart relating to her son's visit to the hospital following the accident and, subsequently, his entire chart. The manager also explains that the hospital accommodated the complainant's personal visits to the hospital in an attempt to provide her with the information she sought; specifically, the complainant's visits to the hospital's laboratory as well as its heath records, administration, and emergency departments.

[10] The manager states that the complainant repeatedly referred to a urine test that came from the hospital. She states that the complainant would often refer to this test

while talking about the report by the coroner or the autopsy conducted on her son by the hospital, or another hospital (located in Sudbury). The manager indicates that it was difficult to discern exactly why the complainant believes that records relating to a urine sample should exist. Despite repeated efforts for obtain further details regarding the specific information that the complainant sought, the manager states that the hospital could not identify why she believes that such records exist, given that the hospital had no record of a urine sample being taken from her son while he was under its care.

[11] In her affidavit, the manager describes the specific steps that the hospital took to attempt to locate information about a urine sample or urinalysis that the complainant believes should exist. First, she states that administrative and clinical staff, including the manager, the director of nursing, the manager of laboratory services, and the assistant administrator of financial services (who is also the designated Freedom of Information Coordinator under the *Freedom of Information and Protection of Privacy Act* or *FIPPA*) reviewed the chart from the complainant's son's time at the hospital following the accident. The manager states that there is no mention in the chart of urine being sampled or tested; nor is there a request on the chart for it to be sampled or tested. She states that there are input and output charts that show how much fluid was given to the complainant's son intravenously and how much was excreted through output, but reiterates that there are no results of any urine tests on the charts or any indication that a sample was taken.

[12] The manager concedes that in 2007, the year that these records were created, the hospital had a different Laboratory Information System and a different laboratory manager. However, she states that the current manager of the hospital's laboratory contacted the manager of the Regional Program to determine whether the former system was still accessible and whether a report might have been logged, but not printed. It was established that the former system was no longer accessible. The manager states that the hospital's information technology department also inquired about whether information on the former system was still accessible, and also determined that it was not.

[13] The manager submits that it is not possible that the records that the complainant seeks existed, but were destroyed by the hospital. She submits that the hospital does not destroy any records that have not been microfilmed first. She also explains that the complainant's son's age at the time of his death, plus the minimum retention period plus 5 years, would not have permitted the destruction of his records until at least 2020. She states that the *Public Hospital's Act* requires that destruction cannot occur until 10 years from death or last visit; however, it is recommended that hospitals wait for 15 years before destroying records. The manager submits that had there been a record indicating that a urine sample had been taken it would not have been destroyed.

[14] Finally, the manager submits that the hospital does not believe that any records containing the information sought by the complainant exist, but are not in the hospital's possession. She submits that the only other place that documentation regarding a

urinalysis could have been recorded is the former laboratory information system, referred to above, that is no longer accessible. However, she submits that given that there is no documented order for a urine test, it is unlikely that such information would have been found on the former system even if it had been accessible.

[15] The complainant states that she disagrees with the manager's position that the hospital granted her full access to her son's chart for the following reasons. First, she submits that a copy of an Authorization for Release of Medical Information that she signed in 2007 for the police was not disclosed to her until sometime after her request for her son's complete chart was made and that, as an aside, she states that the record contained no valid date. Second, the complainant submits that copies of both the coroner's warrant for seizure and the list of items that were seized under that warrant were missing from her son's file, and it was only through her persistence that these records were subsequently located in a file called "Articles of Interest" outside of the health records department and provided to her. While these records were originally not provided to her, they were subsequently located and she has now been granted access to them.

[16] The complainant also disagrees with the manager's position that she was unable to provide the hospital with sufficient information about the urine sample for the hospital to locate such records. She states that she shared with the hospital all of the information she had, specifically, a form entitled "Case Submission" where the Centre for Forensic Services (CFS) seal number gave the description of items that were seized. She submits that the CFS form indicates that 9 vials of blood and urine were seized from the hospital under the CFS seal number 2G03872. She submits that she explained to a number of hospital staff that these were the samples taken while her son was still under the care of the hospital's emergency department.

[17] Finally, the complainant states that in the manager's affidavit, the affiant states that the complainant's son's total urine output was 70cc and that 9:00am was the last time there was any output. The complainant submits that the urine output chart from the Sudbury Regional Hospital (where he was later transferred) shows that there was no further urine output. The complainant states that no urinalysis was done at the Sudbury Regional Hospital and the Case Submission form also supports the fact that no urine was seized from the Sudbury Regional Hospital. Additionally, the complainant points to her son's autopsy report which, under the heading "Evidence of Theory", indicates "Foley catheter with bag containing 20cc's of urine" which she submits is the remaining amount left from the 70cc's referred to in the affidavit.

[18] The complainant concludes her representations by asserting that she continues to believe that a urine sample was taken while her son was under the care of the hospital's emergency department, and that records about the sample should exist.

[19] In reply, the manager responds to the complainant's concerns. First, she confirms that the complainant is accurate in her statement that the signed release of information form was not part of the package of records that was initially provided to

her. The manager states that the original request was interpreted to be for records created on the day that the complainant's son was under the care of the hospital. She explains that as the release of information form was signed at a later date, it was not disclosed. The manager states that when the complainant subsequently requested a copy of her son's complete chart, from birth, it was disclosed to her.

[20] With respect to the consent form that the complainant signed for the police, the manager confirms that it was not properly dated and concedes that this was in error. She states that during mediation she addressed this issue with the mediator. She submits the hospital has since improved their process by asking the Ontario Provincial Police (the OPP) to change their forms that have an outdated "date" area that states 199__ and 201__ and now insist on its proper completion. She also submits that the hospital now uses a date stamp on the back of the consent forms when the officers pick up the information that records the date and time as well as the officer's badge number, name, and signature. She provided a copy of the printed stamp with her representations.

[21] The manager acknowledges that the complainant showed the hospital copies of records that she believed demonstrated that additional records should exist, but would not provide the hospital with copies of those records because she is concerned about "cover-ups."

[22] Finally, the manager states that she deals with paper records and not samples. However, she states that she has inquired with clinical staff as to what happens with a urine bag and is advised that when the deceased was transferred he would have had the bag attached to him. The manager states that she cannot determine what happened once he left the hospital's care. She also states that the laboratory technician who documented what samples were given is very thorough and, had any urine samples been available and provided to the police this would have been documented.

[23] The manager concludes her representations with the submission that despite all the searches conducted by the hospital for records responsive to the complainant's request, it did not locate a record of urine sample being taken, a record of an order for a urinalysis, or a record of a urinalysis being performed.

[24] In sur-reply, the complainant states that she remains very concerned. She submits that initially, despite several searches conducted by a number of different individuals for a search warrant, the hospital was not able to locate it. She submits that subsequently, she was advised that while a laboratory technician was cleaning out old files she came across a file called "Article of Interest" in which there were two documents, a coroner's "Warrant for Seizure" and a list of items that the Kapuskasing OPP seized. As a result of the hospital's failure to locate the records during their initial searches in what the complainant submits is a small office with limited space, she questions the thoroughness of the hospitals search for responsive records. She submits that it is very difficult to believe that the documents were not located during their initial searches. Therefore, she continues to question the reasonableness of the hospital's

search for responsive records.

Analysis and findings

[25] Where a complainant claims that additional records exist beyond those identified by a health information custodian, the issue to be decided is whether the custodian has conducted a reasonable search for records as required by sections 53 and 54 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the custodian's decision. If I am not satisfied, I may order further searches.

[26] The issue of whether a custodian conducted a reasonable search for records has not been frequently addressed in decisions issued under the *Act*. However, the issue of whether an institution under *FIPPA* and the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) has conducted a reasonable search for responsive records has been extensively canvassed. As the access provisions in all three acts are substantially similar, in my view, the principles regarding reasonable search established in orders issued under *FIPPA* and *MFIPPA* are both relevant and informative. Accordingly, in the review that follows I will refer to decisions on reasonable search that have been issued under those acts.

[27] Having carefully reviewed the evidence that is before me, I am satisfied that the search conducted by the hospital for records responsive to the complainant's request and specifically, for records containing information about a possible urine sample that was taken or a urinalysis that was done at the hospital, was reasonable and is in compliance with its obligations under the *Act*.

[28] Under *FIPPA* and *MFIPPA,* as well as under the *Act,* 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.[2] A further search will be ordered if the custodian does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.[3] The *Act* does not require the custodian to prove with absolute certainty that further records do not exist. However, the custodian must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[4] To be responsive, a record must be "reasonably related" to the request.[5]

[29] In the circumstances of this complaint, I find that the hospital has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify all responsive records within its custody and control, including any records detailing possible urine samples taken from the deceased while he was under its care. Based on

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[2] Orders M-909, PO-2469 and PO-2592. See also PHIPA Decision 17.
[3] Order MO-2185.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.

the information before me, the search for records, coordinated by the manager of the hospital's health records and privacy department, was reasonable in its scope. The manager explains that the deceased's chart was reviewed by a number of different hospital employees, including administrative and clinical staff. She inquired of those employees as to the specific details of hospital practices with respect to the taking of such samples in order to ensure that records were being sought in the appropriate places. She also attempted to conduct a search of the information contained in the hospital's former record keeping system and when that proved to be unsuccessful, she made inquiries about the likelihood that such information would be contained on that system, but not recorded elsewhere. The manager also advised that the complainant attended at various departments in the hospital, and met with employees in those departments, in an attempt to locate records regarding a urine sample or urinalysis and that hospital staff attempted numerous times to be of assistance. In light of the information provided by the manager which details the efforts taken by the hospital, I accept that the searches that were conducted were undertaken by experienced employees, knowledgeable in the subject matter. I accept that the hospital expended a reasonable effort to locate any responsive records relating to urine samples or urinalyses, but none were located.

[30] Under *FIPPA* and *MFIPPA*, although a requester will rarely be in a position to indicate precisely which records the custodian has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6] In my view, this requirement is equally applicable when determining whether a custodian conducted a reasonable search under the *Act*. In the circumstances of this complaint, I find that the complainant has not provided a reasonable basis to conclude that additional records relating to a urine sample or urinalysis exist.

[31] I have also considered that in the current complaint, the complainant refers to records that were disclosed to her, in part, as a result of a request that she submitted under *FIPPA* for information held by the Ministry of Community Safety and Correctional Services relating to the fatal accident involving her son. Of particular note is a record that originates from the Centre of Forensic Sciences (CFS) entitled "Case Submission." At the bottom of that page is a chart which lists "items submitted" to the CFS and the non-severed portions of that list include a reference to "9 vials of blood and urine from [Sensenbrenner] hospital."

[32] I accept that as a result of this reference to "9 vials of blood and urine" on a record that was provided to her as a result of a request for information submitted under *FIPPA*, it was reasonable for the complainant to conclude that urine samples were taken from her son while he was under the care of the hospital. However, as a result of that request under *FIPPA,* which was appealed to this office and disposed of by my order, Order PO-3559, I reviewed a number of records that address bodily samples that were taken from the deceased. These records have been disclosed, either in full or in part, to

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[6] Order MO-2246. See also PHIPA Decision 17.

the complainant and provide greater context with respect to samples seized from the hospital.

[33] In the records responsive to the request under *FIPPA*, there are references to samples of the deceased's bodily fluid that were seized from the hospital, as well as to samples seized from the Sudbury hospital where he was subsequently transferred, and samples seized following the post-mortem examination. In all instances (with the exception of the record that the complainant relies on), the records describing samples taken from the hospital refer to 9 vials of blood only; these records make no reference to any vials containing urine samples taken from the hospital. Specifically, this information is found in the following records:

- a supplementary occurrence report entitled "SOCO Supplementary Report – Post-Mortem Examination" which indicates that the 9 vials of samples taken from the hospital under the CFS seal number 2G03872 were samples of blood only and that a urine sample was only taken during the course of the Post-Morten Examination (pages 000026 -000028);

- the notes of one of the investigating officers with the Ontario Provincial Police (OPP) which indicate that 9 vials of the deceased's blood were seized from the hospital on January 17, 2007 (page 000303);

- an OPP Property Report which indicates that 9 vials of "biological samples" were taken from the deceased at the hospital under the CFS seal number 2G03872 ((page 000416).

[34] All of these records were disclosed, in full or in part, to the complainant as a result of her request for information filed under *FIPPA*. No severances were made to any of the portions of these records that make reference to 9 vials of blood having been seized by the hospital.

[35] Moreover, a copy of the CFS Case Submission to which the complainant refers is identified as page 000177 in the records responsive to the *FIPPA* request.[7] A close examination of the record reveals that although the typewritten part of the description of the samples submitted states "9 vials of blood and urine from [Sensenbrenner] hospital", handwritten notes below that entry clearly identify that the samples contained in the 9 vials seized from that hospital were of blood. In those handwritten notes there is no mention of any of those vials containing a bodily fluid other than blood.

[36] I acknowledge that a record that was partially disclosed to the complainant at some point during her quest for information about her son contains information that would lead the appellant to believe that a urine sample was collected at the hospital.

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[7] Page 000177 of the *FIPPA* appeal file was disclosed to the complainant by the Ministry of Community Safety and Correctional Services in response to her request for access to information submitted under *FIPPA.*

However, based on my review of the information that was severed from that record as well as the other records responsive to the complainant's related *FIPPA* appeal, I find that it is reasonable to conclude that the information that suggests that a urine sample was seized from the hospital is misleading. As a result, I do not accept that I have been provided with sufficient evidence to support a reasonable basis for concluding that hospital records relating to a urine sample or urinalysis should exist.

[37] In my view, as with *FIPPA* and *MFIPPA,* the *Act* does not require the hospital 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, that would include records relating to urine samples taken or urinalyses conducted while the deceased was under the hospital's care. I accept that it has. The evidence before me suggests that the hospital took the requisite reasonable efforts to attempt to respond to the complainant's inquiries and attempt to locate records relating to a urine sample or urinalysis and none were located.

[38] For the reasons outline above, I am satisfied that the hospital has discharged its onus and has demonstrated that it has conducted a reasonable search in compliance with its obligations under the *Act*. On that basis, I uphold the hospital's search for records responsive to the complainant's request, specifically, records relating to urine samples or urinalyses, and dismiss the complaint.

NO ORDER:

1. For the foregoing reasons, no order is issued.

Original Signed by: December 10, 2015
Catherine Corban
Adjudicator