



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1696**

**Appeal MA-030133-1**

**Go Transit**



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## **NATURE OF THE APPEAL:**

GO Transit received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to records relating to himself which are maintained by GO Transit. The requester indicated that his brother is an employee of GO Transit and that in the year 2000 the requester had discussions with both staff at GO Transit and its Employee Assistance Program (EAP) provider about his brother. The requester clearly indicated that he is not seeking access to information relating solely to his brother.

Go Transit advised the requester that it did not have any records which were responsive to his request. In addition, GO Transit advised the requester that he should contact the EAP provider directly with his inquiries as it did not have custody of or maintain control over any records maintained by the EAP provider.

The requester, now the appellant, appealed this decision on the basis that GO Transit ought to have responsive records relating to his contacts both with GO Transit staff and with the EAP provider. During mediation, the appellant was advised of the extent of the searches undertaken by GO Transit for responsive records. The appellant was also advised of the nature of the relationship between GO Transit and its EAP provider with respect to records generated in the course of contacts between employees and their families and the EAP provider. The appellant was not satisfied with these explanations and insisted that the matter proceed to the adjudication stage of the appeals process.

I decided to seek the representations of GO Transit initially on the issues of whether its search for responsive records was adequate and whether it has the requisite custody or control over records prepared and maintained by its EAP provider. GO Transit made submissions, which were shared with the appellant, in their entirety, along with a copy of the Notice of Inquiry. The appellant made submissions which were in turn shared with GO Transit. I then requested and received reply representations from GO Transit.

## **DISCUSSION:**

### **CUSTODY OR CONTROL OVER THE SERVICE PROVIDER'S RECORDS**

#### **The parties' submissions**

GO Transit submits that it:

. . . provides EAP counselling services to its employees. The nature of the service relies totally on the guarantee of confidentiality between the provider and those employees or their family members who utilize the program. Any files are kept with the provider who acts solely 'as an independent external provider and is not to be considered an agent or representative of the employer' (see Article 10.2 [of the service agreement between GO Transit and the provider]).

In its reply submissions, GO Transit indicates further that the EAP provider did not share information with or report in any fashion to GO Transit staff on any contact it may have had with the appellant.

The appellant indicates that he obtained a one-page record from the EAP provider as a result of an informal request. The EAP provider is not an institution under the *Act* and is not, therefore, subject to the access provisions in it. The appellant argues that because GO Transit paid for the services rendered to him by the EAP provider, “they have reasonable control over them.” He states that because he is not a GO Transit employee or an eligible family member, GO Transit must have made a special arrangement for the payment of the EAP provider’s account. As a result, the appellant is of the view that GO Transit “would have more control and care of the records in question” than would normally be the case under the agreement between it and the EAP provider.

### **Findings**

Section 4(1) of the *Act* states as follow:

Every person has a right of access to a record or a part of a record in the custody or **under the control** of an institution unless the record or the part of the record falls within one of the exemptions under sections 6 to 15. (emphasis added)

In Order 120, former Commissioner Sidney B. Linden stated that the terms “custody” and “control” should be given a broad interpretation in order to give effect to the purposes and principles of the *Act*. I agree with former Commissioner Linden’s approach and adopt it for the purposes of this appeal. In that order, he lists a number of factors pertinent to the creation, maintenance and use of records to be considered when determining the issue of “custody” and “control” of the records. The factors relating to “control” are the following:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
4. Does the institution have a right to possession of the record?
5. Does the content of the record relate to the institution’s mandate and function?
6. Does the institution have the authority to regulate the record’s use?
7. To what extent has the record been relied upon by the institution?
8. How closely is the record integrated with other records held by the institution?
9. Does the institution have the authority to dispose of the record?

This approach has been used in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case. Similarly, this appeal must be decided on the basis of its particular facts.

I have reviewed the relevant portions of the agreement between the EAP provider and GO Transit, particularly those aspects of the agreement dealing with the confidentiality of information received from employees and their families who make use of this service. I find that the very nature of the counselling services provided under the Employee Assistance Program precludes the disclosure of information by the EAP provider to the employer, in this case GO Transit, except in very limited circumstances involving a threat to an individual's safety. Those limited circumstances were not present in the relationship between the appellant and the EAP provider.

I accept the submissions made by GO Transit with respect to the sharing of information between it and the EAP provider. In my view, the relationship is such that there do not exist the required indicia of control to demonstrate that GO Transit has "control" over the records for the purposes of the *Act*. The agreement between GO Transit and the EAP provider clearly provides for the creation of a "firewall" through which confidential information supplied by individuals in the course of their counselling or seeking help is not provided to the employer. I find that the considerations identified by the appellant do not abridge the protections afforded by the confidentiality inherent in the relationship between GO Transit and the EAP provider. Accordingly, I conclude that GO Transit does not have the requisite degree of "control" over the records maintained by the EAP provider and I dismiss that part of the appeal.

## **REASONABLENESS OF SEARCH**

### **Representations of the parties**

In support of its contention that no responsive records exist, GO Transit submits that:

Human Resources clerical staff, as well as the Supervisor, Human Resources checked all active and inactive Labour Relations files as well as a file of 'miscellaneous' reports and forms with no success. As well, twenty (20) boxes scheduled for storage retention were opened and reviewed. In all, a total of approximately three full working days were spent by two employees searching for these records. Again, I would reiterate that if in fact there was some documentation created, we are unable to locate and confirm that no record of this nature exists.

The appellant takes the position that records responsive to his request ought to exist for the following reasons:

- the submissions from GO Transit do not specify whether a search of his brother's personnel file was conducted;

- he submitted a Client ID number which he was assigned by the EAP provider. He submits that searches ought to have been conducted using this ID number;
- because he is not an employee of GO Transit or an eligible family member, records ought to exist which would document the authorization given by GO Transit to the EAP provider for the provision of counselling services to him;
- the EAP provider's fees were paid by GO Transit and records relating to that payment should exist; and
- the appellant provided evidence of contacts which he had with staff at both the EAP provider and GO Transit and records relating to those contacts should exist

In its reply representations, GO Transit submits that no records exist relating to any contacts the appellant may have had with GO Transit staff. I was provided with a copy of an invoice of a payment made by GO Transit to its EAP provider relating to the ID number provided by the appellant. However, the invoice does not refer to the appellant and, because of the operation of the confidentiality provisions of its agreement with the EAP provider, GO Transit submits that it has no way of verifying whether this payment relates to the counselling services provided by the EAP provider to the appellant. With respect to the authorization from GO Transit for the provision of counselling services to the appellant, GO Transit indicates that no records exist which document this discussion. It suggests that its authorization was provided verbally, rather than in writing.

### **Findings**

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether GO Transit has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of GO Transit will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, an institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

I accept the evidence tendered by the appellant with respect to the contacts he had with staff at GO Transit between May and August of 2000. I find that it is also logical to assume that because

the appellant is not an employee or an eligible family member under the employee assistance program, some authorization from GO Transit must have been required before the EAP provider could begin its counselling. GO Transit has provided me with evidence relating to the searches which it has undertaken for the information sought by the appellant regarding these aspects of his request. Based on the submissions from GO Transit and my reading of the EAP provider's contract with it, I am satisfied that GO Transit has taken all reasonable steps to locate and identify records responsible to this part of the request.

I also accept the appellant's contention that it is reasonable to assume that records relating to the payment of the EAP provider's fees ought to exist. As noted above, GO Transit provided me with an invoice indicating that payment was made to the EAP provider referring to the Client ID number stated by the appellant. However, I accept GO Transit's argument that, because of the confidentiality provisions in its agreement with the EAP provider, it does not have access to the further particulars regarding the services provided. It cannot, therefore, confirm that the payment made to the EAP provider pursuant to this invoice relates to the counselling services rendered to the appellant.

The appellant suggests that GO Transit is "hiding" records and recommends that additional searches be undertaken in its Legal Department, his brother's personnel file, GO Transit's Chairman's record-holdings, its finance department and the files maintained by the EAP provider. In this way, he argues that any "hidden" records will be located and disclosed to him.

Based on the submissions of GO Transit, and the fact that a "firewall" was placed around information gathered by the EAP provider in the course of the provision of its services, I am satisfied that it is not necessary for GO Transit to undertake the searches suggested by the appellant. The contacts between GO Transit and the EAP provider relating to the services rendered to the appellant were conducted through the use of an anonymous Client ID number. GO Transit would not, accordingly, be able to search for records relating to the provision of counselling services to the appellant by the EAP provider using the appellant's name as it was never provided to GO Transit by the EAP provider. Any contacts between the EAP provider and GO Transit respecting payment for counselling services were conducted through the use of the anonymous Client ID number.

In addition, the appellant clearly indicated that he is not seeking access to any personal information relating to his brother. I find that it is unreasonable to assume that searches of the brother's personnel file would reveal information relating to the appellant, given that GO Transit had no way of tying information relating only to an anonymous Client ID number to the appellant's brother.

In my view, GO Transit has undertaken searches of those record-holdings where documents responsive to the appellant's request could reasonably be likely to be located. As noted above, GO Transit does not exercise the requisite degree of control over the record-holdings of the EAP provider to require that searches be undertaken in that location.

In conclusion, I find that GO Transit has undertaken a reasonable effort to locate and identify records responsive to the appellant's request.

**ORDER:**

I uphold GO Transit's decision and dismiss the appeal.

Original Signed By: \_\_\_\_\_

Donald Hale  
Adjudicator

October 6, 2003 \_\_\_\_\_