

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-3036

Appeal PA10-248

Ministry of Children and Youth Services

January 16, 2012

**Summary:** The appellant made a request to the ministry for the number of approved hours for each client receiving intensive behavioural intervention under the autism intervention program, broken down by region. The ministry did not provide a decision respecting access to this information as it takes the position that it does not have custody or control of the requested information for the purposes of section 10(1) of the *Act*. The ministry has control over the records as it does not have an arm's length relationship with the transfer payment agencies that administer and deliver the program. The ministry is ordered to provide an access decision to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1).

**Order considered:** MO-2416

**Cases Considered:** *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611; *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072.

### OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Children and Youth Services (the ministry) for access to:

The number of clients and number of hours approved for each client receiving Intensive Behavioural Intervention (IBI) service under the Directing Funding Option (DFO) by quarter by region of Ontario as of [specified date] to most recent quarter.

[2] The ministry issued a decision providing a table with the "Number of Children/Youth Receiving IBI Services through the Direct Funding Option of the Autism Intervention Program [AIP] (Q2 2008/09 to Q4 2009/10)." The ministry also stated the following:

With regard to your request about the number of hours approved for clients receiving service under the DFO, the ministry does not collect this information. Decisions related to the number of hours of Intensive Behavioural Intervention (IBI) provided through the AIP are determined through a clinical assessment and based on the individual goals for each child, as per the Autism Intervention Program Guidelines.

[3] The appellant attached a copy of a letter<sup>1</sup> he had received from the ministry with his appeal letter sent to this office. The letter stated the following:

While the ministry does not collect the raw data related to the number of hours approved for each client in the AIP, the ministry has in the past collected the average number of hours approved for DFO clients as of a given point in time. The table below shows the average number of hours approved for DFO clients, by MCYS region, as of December 31, 2009.

[table provided]

Note that this information is reflective of the average number of approved hours at that time and is subject to change. Decisions related to the number of hours of Intensive Behavioural Intervention (IBI) provided through the AIP are determined through a clinical assessment and based on the individual goals for each child, per the Autism Intervention Program Guidelines.

[4] Based on this information, the appellant took the position that additional records responsive to his request should exist. Specifically, the appellant believes that the ministry should have data showing the number of hours approved for each client receiving IBI service under the DFO. In addition, the appellant is of the view that the ministry has custody or control of the data in question and should be able to obtain it from the relevant agencies.

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<sup>1</sup> The attached letter was sent to the appellant outside of his access request.

[5] Mediation did not resolve the appeal and the file was forwarded to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During my inquiry, I sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7. In this decision, I find that the ministry has control over the information at issue and order it to provide an access decision to the appellant.

## **DISCUSSION:**

### **Does the ministry have custody or control of the information responsive to the appellant's request?**

[6] Section 10(1) reads, in part:

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 . . .

[7] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[8] A record will be subject to the act if it is in the custody or under the control of an institution; it need not be both<sup>2</sup>.

[9] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it (Order PO-2836). A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[10] The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251].

### ***Factors relevant to determining "custody or control"***

[11] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows [Orders 120, MO-1251, PO-2306 and PO-2683]. The list is not

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<sup>2</sup> Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120 and P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a “core”, “central” or “basic” function of the institution? [Order P-912]
- Does the content of the record relate to the institution’s mandate and functions? [Orders P-120 and P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120 and P-239]
- 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? [Orders P-120 and P-239]
- Does the institution have a right to possession of the record? [Orders P-120 and P-239]
- Does the institution have the authority to regulate the record’s content, use and disposal? [Orders P-120 and P-239]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record? [Orders P-120 and P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120 and P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

[12] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why? [PO-2386]
- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record? [Order M-315]
- Who paid for the creation of the record? [Order M-506]
- What are the circumstances surrounding the creation, use and retention of the record? [PO-2386]
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.); *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.)]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? [Order MO-1251]

[13] During the inquiry, the ministry was asked to consider the list of factors set out above and submit representations supporting its position that it does not have custody or control of the record. The ministry did not do so; instead, it submits that although it funds the Intensive Behavioural Intervention (IBI) treatment, it does not require access to the level of information which is the subject of the request in order to monitor funding of the program. The ministry states, by way of explanation, that:

...the ministry contracts with transfer payment agencies (TPAs) in each of the nine MCYS<sup>3</sup> regions to administer and deliver the Autism Intervention Program (AIP), which provides intensive behavioural intervention (IBI) to children and youth with autism spectrum disorders.

The service contract negotiated between the ministry and the TPAs requires agencies submit information to the ministry's regional offices for the purposes of monitoring the contract including: program expenditures; the number of clients in service; and the number of clients waiting for service.

In addition, as part of the service contract, the ministry collects the overall average number of IBI hours approved for all families receiving service through both the Direct Service Option (DSO) and the Direct Funding Option (DFO) within a region. However, I would like to stress again, the number of hours approved for individual clients resides with agencies and is not collected by the ministry, in part to limit the personal information being shared about the clients.

These agencies along with professionals in the field are responsible for determining a client's eligibility as well as the intensity, including the number of hours IBI and the setting of the therapy.

The service contract negotiated between the ministry and these agencies requires that agencies submit information to the ministry for the purposes of monitoring the contract.

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<sup>3</sup> "MCYS" is the Ministry of Children and Youth Services.

In February 2010, the ministry started collecting the overall average number of IBI hours approved for all families receiving service through both the [DSO] and the [DFO] within a region. TPAs were asked to submit this information by quarter.

While the number of hours approved for each client does exist, it resides with transfer payment agencies and is not collected by the ministry...

[14] The appellant submits that the ministry has control over the information because of the service contract it has with each of the TPAs. The appellant provided detailed representations relating to the factors listed above, which I summarize here:

- One of the core functions of the ministry is to ensure that the AIP is being administered in an effective manner. It does so using information supplied by the TPAs for its budgetary planning.
- The ministry has a right of possession to the information under its contract with the TPAs. As the ministry collects statistics based on data kept by the TPA it could also request the actual data used to compile the statistics.
- The ministry has the authority to regulate the data's content, use and disposal under its contract with the TPA requiring that the records be maintained based on standard practices and for a period of seven years after the contractual obligations have been terminated.
- The TPAs are contracted by the ministry to administer the AIP program including determining the number of hours commensurate with the needs of each child.

[15] Based on my review, the information at issue is created by the TPA, and both the ministry and appellant appear to agree that the information is in the TPAs' possession. I find that the information is not within the ministry's possession or its custody. Accordingly, I will determine whether the information is in the ministry's control. I note that the ministry does not dispute that it could request the information at issue from the TPAs. The ministry's position is that it does not request the information because it does not require it for its purposes and it has an interest in protecting the privacy of the TPA clients.

### ***Analysis of control factors***

*[16] Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess*

*or otherwise control the record? [Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.)]*

[17] As there is a contract between the ministry and the TPA's, I will first consider the relevancy of this factor to my determination of whether the ministry has control over the information at issue.

[18] If the ministry had a contractual right to possess or control the information at issue then this consideration may weigh in favour of a finding that the information at issue is under the ministry's control.

[19] The appellant provided a copy of two contracts that are between the ministry and two specific TPAs in support of his position that the ministry has control of the information at issue. The relevant provisions of the first contract between the ministry and TPA #1 are in section 9 and state the following:

## **9.0 Records, Information Provision and Inspection**

9.1 In operating the Program, the Recipient<sup>4</sup>:

- (a) shall keep and maintain all records, invoices and other documents relating to the Funding or otherwise to the Program in a manner consistent with generally accepted accounting principles or clerical practices, as the case may be, and shall maintain such records and keep them available for review by the Government *(or other such persons authorized by the Government)* for a period of seven (7) years from the date of the termination of this Agreement;
- (b) shall maintain all records relating to the Funding or otherwise to the Program that contain Personal Information, including any records it receives about the people it serves, in a confidential manner consistent with all applicable laws;
- (c) hereby authorizes the Government *(or other such persons authorized by the Government)*, upon twenty-four (24) hours notice and during normal business hours, to enter upon the Recipient's premises to review the status and manner of operation of the Program and to inspect and copy any records, invoices and other documents in the possession or under the control of the Recipient which relate to the Funding or otherwise to the Program.

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<sup>4</sup> The recipient in the TPA which has received funding from the ministry to provide the service.



- 9.2 The Government's right of inspection in this Agreement includes the right to perform an audit of any kind including a review or examination of any aspect of the Program or any records.
- 9.3 To assist the Government in the task described in this section, the Recipient shall provide any other information to the Government *(or other such persons authorized by the Government)* reasonably requested by it.
- 9.4 The purposes for which the Government may exercise its right under this section include:
- (a) determining for what items and purposes the Recipient is expending or has expended the Funds; and
  - (b) determining whether the Recipient is operating or has operated, the Program effectively and in accordance with the terms of this Agreement.
- 9.5 Despite subsection 9.1(c) and section 9.2, the Government *(or other such persons authorized by the Government)* shall not review any Personal Information contained in any records, unless permitted by law.
- 9.6 Nothing in this section or in the Agreement shall be construed so as to give the Government (or other such persons authorized by the Government) any control over the books, accounts or other records of the Recipient.

[20] The relevant portions of the second contract between the ministry and TPA#2 are in sections 6, 9 and 15 and state the following:

Service Records and Reports

- (a) The Service Provider will maintain service records respecting each site where service is being provided and prepare and submit at such intervals as indicated in the Service Data Schedule, a report respecting the services being provided pursuant to this contract, acceptable to Ministry staff which shall include service data such as statistics on target achievements and such other information as Ontario requires.

- (b) The Service Provider will also prepare and submit to Ontario, annually, or at any time upon reasonable request, a comprehensive report acceptable to Ministry staff respecting the services being provided.

#### Disposition of Records

9. (a) In the event the Service Provider ceases operation, it is agreed that the Service Provider will not dispose of any records related to the services provided for under this contract without the prior consent of Ontario, which may be given subject to such conditions as Ontario deems advisable.

#### Freedom of Information

15. Any information collected by Ontario pursuant to this contract is subject to the rights and safeguards provided for in the *Freedom of Information and Protection of Privacy Act*.

[21] Based on my review of provisions set out above, I find that the ministry has a contractual right to exercise control over the information at issue. In particular, I find the following parts of the provisions to be relevant:

- The TPA's are required to keep the records relating to the funding and the provision of the programs.
- The ministry is permitted to attend the TPA's to review the records.
- The ministry is permitted to copy any records, invoices and other documents which relate to the funding or provision of the program.
- The ministry has the right to request information from the TPA as it relates to the review of funding or the provision of the program.

[22] I note that the following factors weigh against a finding of control:

- The ministry's rights listed above only relate to: (1) determining the items and purposes the TPA is expending the funds and, (2) determining whether the TPA is effectively operating the program in accordance with the agreement.
- The TPA #1 contract specifically stipulates that the terms of the agreement do not give the ministry control over the TPA's books, accounts or other records.

[23] In considering the weight I should place on this factor, I note that the information requested by the appellant, namely the number of approved IBI hours for each client in the program, is information relating to both the provision of the AIP program and the ministry's funding of it. I find that this information, under the terms

of both contracts, is the type of information that the ministry would be entitled to review, copy, possess or request from the TPA.

[24] Before I proceed to make my finding on the issue of control, I will proceed to consider the other following factors which may indicate control.

*Does the institution have a statutory power or duty to carry out the activity that resulted in creation of the record?*

[25] In Order MO-2416, Adjudicator Colin Bhattacharjee provided the following comments respecting the operation of this factor:

A relevant factor to consider at the outset of the control analysis is whether the institution had a statutory duty that resulted in the creation of the record, either directly or indirectly. In my view, it is also important to consider whether the institution had any other legal duty that resulted in the creation of the record. If the County had such a duty, this factor would weigh in favour of finding that the model and input data are under its control. Conversely, the lack of any such duty would weigh against finding that the model and input data are under the County's control.

[26] This factor is similar to the other factor discussed above which similarly asks that I consider whether the content of the record relates to the institution's mandate and functions.

[27] The ministry did not address this factor in its representations. The ministry's mandate, taken from its website, is to:

- Make it easier for families to find the services to give kids the best start in life,
- Make it easier for families to access the services they need at all stages of a child's development,
- And help youth become productive adults.

[28] To this end, the ministry's website notes that it works with community groups, including service providers to deliver programs geared towards families, children and youth.

[29] In considering this factor, I also examined the ministry's "Applied Behaviour Analysis-based Services and Supports for Children and Youth with ASD" guidelines<sup>5</sup>. The guidelines identify the fact that the ABA services and supports include ministry funded IBI services (previously referred to as the Autism Intervention program).

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<sup>5</sup> The guidelines are dated July 2011. "ASD" stands for autism spectrum disorders.

Section V of the guidelines "Monitoring and Evaluation" sets out guidelines relating to the collection of information.

The service contract entered into with the Ministry to deliver ABA-based services and supports includes requirements for the collection of information consistent with the Ministry's approach to performance measurement to support decision-making and business planning.

As well, the collection of information by service providers will enable longer-term evaluation of the initiative according to the five key domains identified in the Ontario Public Service Evaluation Framework. These five domains are as follows:

- 1) Relevance – the extent to which the program contributes to the achievement of a government or Ministry priority, result or other public interest.
- 2) Effectiveness – the extent to which a program or initiative is producing planned outcomes and meeting intended objectives.
- 3) Efficiency and Affordability – the extent to which an initiative is producing its planned outputs in relating to the expenditure of resources.
- 4) Sustainability – the extent to which the program can be delivered over the longer term at a consistent and appropriate level of quality/customer service within the funding available.
- 5) Customer satisfaction – the degree to which the intended recipients or beneficiaries of a service indicate that the service meets their needs and expectations.

To achieve monitoring and evaluation goals, all service providers are required to collect information pertaining to:

- child and youth outcomes
- parent/caregiver outcomes;
- parent/caregiver satisfaction with service delivery; and
- system outcomes.

In order to capture the information required to evaluate and monitor these outcomes, service providers will perform activities as appropriate such as conducting interviews, facilitating focus groups, deploying surveys, collecting and cleaning data, and managing the storage of large datasets.

[30] I have reviewed the information from the ministry's website and the ABA guidelines. While I can find no statutory power or duty for the ministry to fund and provide the IBI services it is clear that the ministry's mandate includes the provision of services for special needs children and youth. To that end, the ministry has established government funded agencies to provide these services. While the ministry does not appear to have a statutory duty that resulted in the creation of the record; the ministry's mandated goals include the provision of the IBI services that resulted in the creation and compilation of the information at issue. Further, the information at issue exists because of the ministry's contractual relationship with the TPAs to provide the IBI services.

[31] In summary, I find that the information at issue was created as a result of the ministry's actions to fulfill its mandate to provide the IBI services and this factor weighs in favour of a finding of control.

*Who paid for the creation of the record?*

[32] The significance of this factor is again set out in Order MO-2416 where Adjudicator Bhattacharjee states:

If a third party holds the requested record, a relevant factor in determining whether this record is under the control of an institution is determining who paid for its creation. If Jagger Hims [the third party] used public money to create the model, either in whole or in part, this is a factor that would weigh in favour of finding that the model and input data are under the County's control. If, however, no public money was used to create the model, this factor would weigh against finding that the model and input data are under the County's control.

[33] The ministry acknowledges that it contracts with the TPAs in each of its nine regions to administer and deliver the AIP. Further, the ministry notes that a term of the service contract it has with the TPA requires that the TPA submit information to the ministry for the purposes of monitoring the contract.

[34] Having considered the fact that the ministry funds the AIP programs and contracts with the TPAs to provide the service; I find that the ministry pays for the creation of the information at issue and find that this factor weighs in favour of a finding that the information at issue is in the ministry's control for the purposes of section 10(1) of the *Act*.

*Does the TPA operate at arm's length from the ministry?*

[35] The last factor I will consider is whether the contractual arrangement between the ministry and the TPAs established that the TPAs would operate at arm's length from

the ministry. If the ministry had intended the TPAs to operate at arm's length from it then this factor would weigh against a finding of control. Similarly, if the ministry did not intend that the TPA's would operate at arm's length from it, then this factor would weigh in favour of a finding of control over the responsive information on behalf of the ministry.

[36] The criteria to be considered in determining whether the TPA's operate at arms length from the ministry are set out in the Court of Appeal's decisions in *Walmsley* and *Ontario (Criminal Code Review Board)*, key decisions in this office's determination of whether an institution has custody or control under section 10(1) of the *Act*. Adjudicator Bhattacharjee, in Order MO-2416, provided the following summaries of these two cases:

### ***Walmsley***

In this case, the key issue was whether the Ministry of the Attorney General had control over the records of the Judicial Appointments Advisory Committee, an independent body set up by the provincial government to recommend suitable candidates for judicial appointment. In Order P-704, former Assistant Commissioner Irwin Glasberg found that, for the purposes of section 10(1) of the provincial Act, the Ministry had "control" over records in the hands of the Committee's Chair and individual members that related to the selection of a specific individual for a judicial position. His decision was upheld by the Divisional Court, but the Ministry appealed.

The Court of Appeal allowed the appeal. It concluded that former Assistant Commissioner Glasberg erred in his finding and therefore quashed his order. The Court noted that the records clearly were not in the Ministry's custody, so the key question was whether documents in the possession of the Committee's individual members were under the Ministry's control. It stated that the "answer properly depends on an examination of all aspects of the relationship between Committee members and the Ministry that are relevant to control over the documents."

The Court concluded that the documents in the possession of individual Committee members were not under the Ministry's control, after considering the following factors:

- Individual Committee members were neither employees nor officers of the Ministry.

- They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry.
- The Ministry had no statutory or contractual right to dictate to the Committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess.
- The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them.
- While there may have been elements of agency in the relationship between individual Committee members and the Ministry, nothing suggests that the agency carried with it the right of the Ministry to control these documents.
- Finally, there is nothing in the record that allows the conclusion that these documents were in fact controlled by the Ministry.

### ***Ontario Criminal Code Review Board***

In this case, the key issue was whether the Ontario Criminal Code Review Board (the Board) had control over backup audio tapes prepared by a court reporter who was an independent contractor hired by the Board. In Order P-912, Inquiry Officer Donald Hale found that, for the purposes of section 10(1) of the provincial Act, the Board had "control" over the audiotapes prepared by the court reporter. His decision was upheld by the Divisional Court, but the Board appealed.

The Court of Appeal upheld the Divisional Court's decision and dismissed the Board's appeal. It distinguished the facts in the case before it from its previous decision in *Walmsley*, which involved a Judicial Appointments Advisory Committee that operated independently and at arm's length from the Ministry. It found that unlike in *Walmsley*, the court reporter does not operate "independently or at arm's length" from the Board.

The Court further found that the backup tapes were under the control of the Board for the purposes of section 10(1) of the provincial *Act* and based its conclusion on the following three factors:

- The sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate under section 672.51(1) of the *Criminal Code* to keep an accurate record.
- It was within the Board's power to limit the use to which the backup tapes may be put and reasonable to expect that the Board would ensure, by contract if necessary, that any records of proceedings, backup records included, be used solely for the purposes of the Board.
- The Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. For this purpose, the Board must have access to the backup tapes regardless of who has physical custody of them.

[37] In considering these two cases and the contractual relationship between the ministry and the TPAs, I find that the TPAs were not meant to operate independently at arm's length from the ministry. The TPA's are funded by the ministry to provide ministry services to the public. The ministry routinely undertakes reviews of both the way in which the TPA expend public funds and how the TPAs provide the service to its clients. The TPAs are expected to provide the level of service to public service standards and adhere to the guidelines set out by the ministry. I make this finding despite the fact of the following:

- The TPA staff members and employees are not employees or staff of the ministry.
- The TPA's staff recommendations about the number of hours of treatment for each client are made independently of the ministry.

[38] Despite these factors, which I find should be given some weight, I conclude that the following factors support a finding that the ministry did not intend the TPAs to operate at arm's length:

- The ministry contracts with the TPAs to administer and deliver the AIP and thus funds the provision of this service to the public.
- The ministry has the power to request to copy, review and receive the information at issue from the TPA regarding the use of public funds and the provision of the IBI services.
- The TPA #2 is described in the contract, referred to above, as the "Delivery Agent".



- The ministry has a contractual right to dictate to the TPA the records that should be created, and how they should be maintained and stored.

[39] In my view, these factors establish that the ministry's relationship with the TPAs is more similar to the relationship set out in the *Ontario Criminal Code Review Board* than that which existed between the institution and third party in *Walmsley*. As the TPA was not established to operate at arm's length from the ministry, and considering the other factors discussed above, I find the ministry exercises the requisite degree of control over the information at issue for the purposes of section 10(1) of the *Act*. My finding is consistent with the broad and liberal approach taken by this office in past decisions on the custody and control question.

[40] My finding that the ministry has control over the information at issue takes into consideration the ministry's privacy concerns over the collection of the information. As stated above, the ministry submits that it does not request information related to individual clients as collecting this information could potentially infringe on the privacy right of these individuals. A finding of control for the purposes of section 10(1) does not mean that the information will be disclosed to the appellant. Instead, my decision will require the ministry to issue an access decision to the appellant taking into consideration the *Act*.

[41] Having considered all the factors set out above, I find that the ministry does have control of the information at issue for the purposes of section 10(1) of the *Act*.

## **ORDER:**

1. I order the ministry to issue an access decision to the appellant in accordance with Part II of the *Act*, treating the date of this decision as the date of the request.
2. I remain seized of any new appeal that the appellant may file with respect to the access decision that the ministry is required to issue under Order provision 2.

Original Signed By:  
Stephanie Haly  
Adjudicator

January 16, 2012

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